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

FORM 10-K

(Mark One)

- ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2005.
- or
- TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE TRANSITION PERIOD FROM _____ TO _____.

Commission file number 1-11921

E*TRADE Financial Corporation

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction
of incorporation or organization)

94-2844166
(I.R.S. Employer
Identification Number)

135 East 57th Street, New York, New York 10022
(Address of principal executive offices and zip code)

(646) 521-4300
(Registrant's telephone number, including area code)

Securities Registered Pursuant to Section 12(b) of the Act:
Title of each class

Common Stock—\$0.01 par value
Mandatory Convertible Notes

Securities Registered Pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasonal issuer, as defined in Rule 405 of the Securities Act. Yes No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Securities Act. Yes No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act.) Yes No

At June 30, 2005, the aggregate market value of voting stock, comprised of the registrant's common stock and shares exchangeable into common stock, held by nonaffiliates of the registrant was approximately \$4.8 billion (based upon the closing price for shares of the registrant's common stock as reported by the New York Stock Exchange on that date.) Shares of common stock held by each officer, director and holder of 5% or more of the outstanding common stock have been excluded in that such persons may be deemed to be affiliates. This determination of affiliate status is not necessarily a conclusive determination for other purposes.

Number of shares outstanding of the registrant's common stock as of February 21, 2006: 417,911,092

DOCUMENTS INCORPORATED BY REFERENCE

Definitive Proxy Statement relating to the Company's Annual Meeting of Shareholders to be held May 25, 2006, to be filed hereafter (incorporated into Part III hereof.)

[Table of Contents](#)

E*TRADE FINANCIAL CORPORATION
FORM 10-K ANNUAL REPORT
For the Year ended December 31, 2005

PART I	1
Item 1. Business	1
Overview	1
Products and Services	2
Competition	4
Acquisitions and Dispositions	5
International Operations	5
Regulation	5
Item 1A. Risk Factors	7
Item 1B. Unresolved Staff Comments	14
Item 2. Properties	14
Item 3. Legal Proceedings	14
Item 4. Submission of Matters To a Vote of Security Holders	15
PART II	16
Item 5. Market for Registrant’s Common Equity, Related Shareholder Matters and Issuer Purchases of Equity Securities	16
Item 6. Selected Consolidated Financial Data	18
Item 7. Management’s Discussion and Analysis of Financial Condition and Results of Operations	20
Forward-Looking Statements	20
Overview	20
Earnings Overview	26
Segment Results Review	35
Balance Sheet Overview	37
Liquidity and Capital Resources	45
Risk Management	48
Summary of Critical Accounting Policies and Estimates	49
Required Financial Data	53
Item 7A. Quantitative and Qualitative Disclosures about Market Risk	61
Item 8. Financial Statements and Supplementary Data	64
Management Report on Internal Control Over Financial Reporting	64
Reports of Independent Registered Public Accounting Firm	65
Consolidated Balance Sheets	67
Consolidated Statements of Income	68
Consolidated Statements of Comprehensive Income	69
Consolidated Statements of Shareholders’ Equity	70
Consolidated Statements of Cash Flows	72
Notes to Consolidated Financial Statements	74
Note 1—Summary of Significant Accounting Policies	74
Note 2—Business Combinations	83
Note 3—Discontinued Operations	84
Note 4—Facility Restructuring and Other Exit Activities	86
Note 5—Brokerage Receivables, Net and Brokerage Payables	89
Note 6—Available-for-Sale Mortgage-Backed and Investment Securities	90
Note 7—Loans, Net	93
Note 8—Asset Securitization	95

Table of Contents

Note 9—Servicing Rights	99
Note 10—Property and Equipment, Net	100
Note 11—Goodwill and Other Intangibles, Net	100
Note 12—Accounting for Derivative Financial Instruments and Hedging Activities	101
Note 13—Other Assets	106
Note 14—Deposits	106
Note 15—Securities Sold Under Agreements to Repurchase and Other Borrowings by Bank Subsidiary	108
Note 16—Corporate Debt	109
Note 17—Accounts Payable, Accrued and Other Liabilities	111
Note 18—Income Taxes	112
Note 19—Shareholders’ Equity	115
Note 20—Income Per Share	116
Note 21—Employee Share-Based Payments and Other Benefits	117
Note 22—Regulatory Requirements	119
Note 23—Lease Arrangements	121
Note 24—Commitments, Contingencies and Other Regulatory Matters	121
Note 25—Segment and Geographic Information	124
Note 26—Fair Value Disclosure of Financial Instruments	128
Note 27—Related Party Transactions	129
Note 28—Condensed Financial Information (Parent Company Only)	130
Note 29—Subsequent Events	133
Note 30—Quarterly Data (Unaudited)	133
Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure	134
Item 9A. Controls and Procedures	134
Item 9B. Other Information	134
PART III	134
PART IV	134
Item 15. Exhibits and Financial Statement Schedules	134
Exhibit Index	135
Signatures	141

*Unless otherwise indicated, references to “the Company,” “We,” “Our” and “E*TRADE” mean E*TRADE Financial Corporation and/or its subsidiaries.*

E*TRADE, E*TRADE FINANCIAL, E*TRADE Bank, ClearStation, Equity Edge, Equity Resource, OptionsLink and the Converging Arrows logo are registered trademarks of E*TRADE Financial Corporation in the United States and in other countries.

FORWARD-LOOKING STATEMENTS

This report contains forward-looking statements that involve risks and uncertainties. These statements relate to our future plans, objectives, expectations and intentions. These statements may be identified by the use of words such as “expects,” “anticipates,” “intends,” “plans” and similar expressions. Our actual results could differ materially from those discussed in these statements. Factors that could contribute to these differences include those discussed under “Risk Factors,” “Management’s Discussion and Analysis of Financial Condition and Results of Operations” and elsewhere in this report. The cautionary statements made in this report should be read as being applicable to all forward-looking statements wherever they appear in this report.

PART I

ITEM 1. BUSINESS

OVERVIEW

E*TRADE Financial Corporation is a global financial services company, offering a wide range of financial solutions to retail and institutional customers under the brand “E*TRADE FINANCIAL.” We strive to create a differentiated franchise by leveraging technology to deliver a compelling combination of product, service and price to the value-driven consumer.

Our corporate offices are located at 135 East 57th Street, New York, New York 10022. We maintain significant domestic corporate and operational offices in Arlington, Virginia; Menlo Park, California; Irvine, California; Chicago, Illinois; Rancho Cordova, California; Salt Lake City, Utah; Tampa, Florida; Charlotte, North Carolina; Jersey City, New Jersey; Pittsburgh, Pennsylvania; and Alpharetta, Georgia. We also maintain international offices in London, United Kingdom; Toronto, Canada; Stockholm, Sweden; Copenhagen, Denmark; Berlin, Germany; Paris, France; Tokyo, Japan; and Hong Kong. We were incorporated in California in 1982 and reincorporated in Delaware in July 1996. We have approximately 3,400 employees. We operate directly and through numerous subsidiaries many of which are overseen by governmental and self-regulatory organizations. Our most significant subsidiaries, which together, in 2005, held 90% of consolidated assets and generated 79% of consolidated net income, are described below:

- E*TRADE Bank is a Federally chartered savings bank that provides lending products to retail customers nationwide and deposit accounts insured by the Federal Deposit Insurance Corporation (“FDIC”);
- E*TRADE Clearing LLC is the clearing firm for the brokerage subsidiaries. Its main purpose is to transfer securities from one party to another;
- E*TRADE Capital Markets-Execution Services, LLC is a registered broker-dealer, specialist, market-making firm and the parent company to E*TRADE Capital Markets, LLC;
- E*TRADE Capital Markets, LLC is a registered broker-dealer, a market-making firm and also acts as agent for our institutional customers; and
- E*TRADE Securities LLC is a registered broker-dealer and provider of brokerage services to both retail and institutional customers.

A complete list of our subsidiaries can be found in Exhibit 21.1.

Beginning in 2005, we implemented a new organizational and financial reporting structure to better address our primary customer segments and to reflect the manner in which our chief operating decision maker assesses our performance and makes resource allocation decisions. Our new segments—retail and institutional—reflect our primary customer segments. Retail customers are offered an integrated product set including investing, trading, cash management and lending products. Consistent with our philosophy of being a customer advocate, we offer retail customers an opportunity to view their complete financial picture through E*TRADE Complete. E*TRADE Complete helps customers optimize cash, investing and credit allocations by utilizing tools designed to help them determine the appropriate mix of cash, investing and credit products. In addition, we provide corporate clients with employee stock plan administration and options management tools. These corporate client accounts provide us with an opportunity to reach our clients’ employees and offer them our retail products and services.

Institutional customers are offered access to a range of execution services through traditional sales traders and direct market access to exchanges. Our institutional segment includes market-making activities, in which we match buyers and sellers of securities from both the retail segment and unrelated third parties, often trading principal positions in these securities. Our institutional segment also includes our balance sheet management functions. Balance sheet management functions include the optimization of our balance sheet through a focus on asset allocation and managing interest rate risk, credit risk and liquidity risk.

[Table of Contents](#)

We primarily provide services through our website at <http://www.etrade.com>. We offer, either alone or with our partners, branded retail websites in the U.S., Canada, Denmark, Germany, France, Hong Kong, Iceland, Sweden and the United Kingdom. We have licensed the E*TRADE name to companies that operate in Australia, Japan and Korea. We also provide services over the phone through our network of customer service representatives, relationship managers and investment advisors. In addition, we provide services in person through our E*TRADE FINANCIAL Centers. We currently have 16 centers which are available to assist retail customers with product selection.

PRODUCTS AND SERVICES

Retail

Our retail segment offers a full suite of financial solutions to retail customers including investing, trading, cash management and lending products. In addition, E*TRADE Complete offers tools to aid in the optimization of investing, cash management and lending products. E*TRADE Complete tools include the Cash Optimizer, Intelligent Investing Optimizer and the Intelligent Lending Optimizer. With the Cash Optimizer, customers can quickly transfer funds to modify deposit balances to determine the optimal distribution of cash between accounts based on their personal preferences. Each customer's product selection and mix will depend on their own price, liquidity, convenience and risk tolerance preference. The Intelligent Investing Optimizer makes it easy to develop an investment strategy for customers' uninvested cash that is engineered to match their specific goals, time horizon and risk tolerance. It suggests allocations for large cap, small cap, international investment, fixed income and cash. The Intelligent Lending Optimizer is a tool that provides customers the ability to model multiple lending scenarios to determine whether (and how) to lower their borrowing costs. Customers can use E*TRADE Complete in conjunction with our retail products described below.

Retail investing and trading products and services include:

- automated order placement and execution of market and limit equity, futures, options, exchange-traded funds and bond orders;
- two-second execution guarantee on all S&P 500 stocks and exchange-traded funds;
- fraud protection, covering losses that result from the unauthorized use of our retail products and services;
- advanced trading platforms for active traders;
- transfer functionality that facilitates the transfer of funds to/from external accounts;
- margin accounts allowing customers to borrow against their securities;
- real-time streaming quotes, commentary and news;
- some of the lowest cost stock index funds in the industry (E*TRADE S&P 500 Index Fund, E*TRADE Russell 2000 Index Fund and E*TRADE International Index Fund);
- access to over 6,000 non-proprietary mutual funds;
- three levels of advisory services; invest on your own, advice when you need it and full-service portfolio management;
- no fee and no minimum individual retirement accounts; and
- educational services through the Internet, phone or in person.

In addition to the investing and trading products and services, we offer cash management and lending products and services which include:

- interest-earning checking, money market and savings products with FDIC-insurance up to \$100,000;
- FDIC-insured (up to \$100,000) certificate of deposit ("CD") products with terms up to 5 years;

[Table of Contents](#)

- unlimited ATM transactions on some accounts;
- FDIC-insured sweep deposit account (“SDA”) that automatically transfers funds from customer brokerage accounts;
- mortgage, home equity lines of credit (“HELOC”) and second mortgage loans secured by real estate;
- credit card including the E*TRADE Mileage Maximizer and other consumer loans;
- online access to all deposit account balances and transactions;
- Quick Transfer, our self-directed fund transfers; and
- online bill payment services.

Retail customers are offered cash management and lending products and services via the Internet, automated telephone service and a limited number of physical sites. The integration of back office systems allows customers the ability to transfer funds between their investing, trading and cash management accounts, thereby giving them the opportunity to optimize the yield and liquidity of their funds.

In addition to the services above, our retail segment includes employee stock option management software and services which are provided to corporate customers. This software system facilitates the management of employee option plans, employee stock purchase plans and restricted stock plans, including necessary accounting and reporting functions. This business is a component of the retail segment since it serves as an introduction to E*TRADE for many retail customers who conduct equity option transactions as employees of our corporate customers, with our goal being that these individuals will become customers for our other products and services.

Institutional

We act as a specialist on the Chicago Stock Exchange (“CHX”) for listed securities through E*TRADE Capital Markets—Execution Services (“ETCM-ES”). A specialist is a broker-dealer authorized by an exchange to be a party through which trading on the floor of the exchange is transacted. As a specialist, we are responsible for maintaining an orderly market in the assigned securities and, frequently take or are required to take, principal positions in these securities. We have determined that services once provided through ETCM-ES as an “OTC specialist” on the floor of the CHX (i.e. a CHX specialist in over-the-counter (“OTC”) issues such as NASDAQ and bulletin board securities) could be transacted more efficiently elsewhere, and thus surrendered our OTC specialist rights in January 2006.

We act as a market maker in certain OTC issues through E*TRADE Capital Markets, LLC (“ETCM”). A market maker’s function is similar to that of a specialist except that its trading activities are OTC. The majority of our share volume for market-making activities involves bulletin board securities, which are securities that are not listed on the NASDAQ Stock Market or a national securities exchange.

As a market maker or a specialist, we take positions in securities and function as a wholesale trader by combining trading lots to match buyers and sellers of securities. Trading gains and losses result from these activities. Our revenues are influenced by overall trading volumes, the number of stocks for which we act as a market maker or a specialist and the trading volumes of those specific stocks.

We also transact large block trading activity on the New York Stock Exchange (“NYSE”). In addition, we provide institutional customers with trade execution services, including direct access to international exchanges. Our web-based platform offers real-time, online access to statements and electronic settlement capabilities.

In addition to activities with external customers, the institutional segment includes the management of our balance sheet. The institutional segment team manages interest rate risk through its analysis of the term, repricing and estimated payment characteristics of our assets and liabilities. The retail segment team originates brokerage receivables and loans and gathers deposits which are leveraged by the institutional group to enhance overall net interest income.

[Table of Contents](#)

For additional statistical information regarding products and customers, see Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") beginning on page 20. Three years of segment financial performance and data can also be found in MD&A beginning on page 35.

COMPETITION

The electronic financial services market, over the Internet and through other distribution channels, continues to evolve rapidly and is competitive. As we continue to diversify and expand our services, we expect competition to increase. Our retail segment competes with full commission brokerage firms, discount brokerage firms, online brokerage firms, Internet banks, mortgage banking companies, non-financial service companies originating loans and traditional "brick & mortar" retail banks and thrifts. These competitors also provide Internet trading and banking services, investment advisor services, touchtone telephone and voice response banking services, electronic bill payment services and a host of other financial products. Our institutional segment, in addition to the competitors above, competes with market-making firms, investment banking firms and other users of market liquidity in its quest for the least expensive source of funding.

In offering our products and services, we face competition in the following areas:

- For investing and trading products, we compete with online focused firms and large traditional financial institutions. Pricing for trading products continued to come under pressure from online focused firms during 2005.
- For cash management products, we compete with online focused banks that traditionally have compelling rates, as well as traditional financial institutions that concentrate on physical presence via branch networks to deliver products and services. Deposit pricing continued to come under competitive pressure in 2005 as banks seek to grow their deposit base by offering appealing rates to attract customers to their businesses.
- For lending products, we compete with traditional banking institutions as well as consumer finance companies and other non-bank lenders. Loan pricing and credit standards continued to come under competitive pressure in 2005 as lenders sought to grow their businesses in the face of rising interest rates.

We believe we can continue to attract customers to our products and services in these areas through our compelling combination of product, price and service. In addition, we believe our low cost infrastructure allows us to deliver products priced at competitive levels.

Our ability to leverage technology is an increasingly important competitive factor in the financial services industry. We believe our focus on being a technological leader in the financial services industry enhances our competitive position. We are not only focused on utilizing technology to deliver products and services to our customers in a secure manner, but also in building a back office that can process and deliver information timely and efficiently.

In our efforts to attract quality employees, we encounter competition in some business lines and corporate functions. Our ability to continue to compete effectively in our business will depend upon our ability to attract new employees and retain existing employees.

Many of our competitors have longer operating histories and greater resources than we do and offer a wider range of financial products and services. Many also have greater name recognition, greater market acceptance and larger customer bases. These competitors may conduct extensive promotional activities and offer better terms, lower prices and/or different products and services than we do. Moreover, some of our competitors have established relationships among themselves or with third parties to enhance their products and services. Our competitors may be able to respond more quickly to new or changing opportunities and demands and withstand changing market conditions better than we can.

[Table of Contents](#)

Management monitors actions by competitors by reviewing new product and service offerings. We review competitive pricing of both brokerage and bank products. To understand our position among our peers, we review comparative analytical data including Daily Average Revenue Trades (“DARTs”) of major online brokers. Based on this analysis, we ranked third in the number of DARTs reported for the years ended December 31, 2005 and 2004.

Overall, we believe our combination of operational efficiency and customer focus creates an entity with a value proposition unique to the financial services industry. Our operating efficiency is achieved through the use of the Internet as a low cost distribution medium and continued technology developments.

ACQUISITIONS AND DISPOSITIONS

Acquisitions

Consistent with our strategy to grow through both strategic acquisitions and organic growth, we completed four acquisitions in 2005. These acquisitions included *Harrisdirect*, LLC (“*Harrisdirect*”), J.P. Morgan Invest, LLC (known as “BrownCo”), Kobren Insight Management (“Kobren”) and Howard Capital Management (“Howard Capital”). *Harrisdirect*, a U.S.-based online discount brokerage company with approximately 425,000 customer accounts and \$0.9 billion in brokerage receivables, was acquired in October 2005. BrownCo, acquired from J.P. Morgan Chase & Co. in November 2005, is also an online brokerage company with approximately 186,000 customers and \$3.1 billion in brokerage receivables. Our 2005 strategic acquisitions also included two wealth management companies, Kobren and Howard Capital. These investment advisory businesses managed a combined total of \$1.5 billion in customer assets on the dates of purchase. Additional information about these acquisitions can be found in MD&A and Note 2 to the Consolidated Financial Statements.

Dispositions

Consistent with our strategy to continually evaluate our businesses and maintain a focus on providing services consistent with our strategy, we decided to sell or exit several product lines. In 2005, we sold our Consumer Finance business, exited our institutional proprietary trading business and made the decision to sell our professional agency business, ultimately executing a sale agreement in February 2006. The Consumer Finance business originated and serviced recreational vehicles (“RVs”) and marine loans. We retained the loan portfolio; however, we will no longer originate or service RV or marine loans. We also made the decision to surrender our rights to trade OTC stocks on the floor of the CHX in January 2006. Additional information about these dispositions and closures can be found in MD&A and Note 3 to the Consolidated Financial Statements.

INTERNATIONAL OPERATIONS

We offer services in international markets directly through its website at <http://www.etrade.com> as well as through additional branded retail brokerage websites in Canada, Denmark, France, Germany, Hong Kong, Iceland, Sweden and the United Kingdom. We also have minority equity investments in companies that license the E*TRADE brand and operate websites in Australia, Japan and Korea. Our reported performance metrics, including DARTs, do not include operating information from these licensees. Our total net U.S. revenues, which we determine based on the geographic location of the legal entity in which the revenue was earned, were \$1.50 billion in 2005, \$1.31 billion in 2004 and \$1.22 billion in 2003. Our total net non-U.S. revenues were \$0.20 billion in 2005, \$0.17 billion in 2004 and \$0.12 billion in 2003. No individual foreign country accounted for more than 10% of revenues in any of these years.

REGULATION

Our business is subject to regulation by U.S. Federal and state regulatory agencies and securities exchanges and by various non-U.S. governmental agencies or regulatory bodies, securities exchanges and central banks, each of which has been charged with the protection of the financial markets and the protection of the interests of those participating in those markets. These regulatory agencies in the United States include, among others, the

[Table of Contents](#)

Securities and Exchange Commission (“SEC”), the NASD, Inc. (“NASD”), the NYSE, the FDIC, the Federal Reserve, the Municipal Securities Rulemaking Board and the Office of Thrift Supervision (“OTS”). Additional legislation, regulations and rulemaking may directly affect our manner of operation and profitability. Our broker-dealers are registered with the SEC and are subject to regulation by the SEC and by self-regulatory organizations, such as the NYSE, NASD and the securities exchanges of which each is a member. Our banking entities are subject to regulation, supervision and examination by the OTS, the Federal Reserve and also, in the case of the Bank, the FDIC. Such regulation covers all aspects of the banking business, including lending practices, safeguarding deposits, capital structure, transactions with affiliates and conduct and qualifications of personnel.

We make our annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K, and amendments to those reports, available free of charge at our website as soon as reasonably practicable after they have been filed with the SEC. Our website address is <http://www.etrade.com>.

ITEM 1A. RISK FACTORS

Risks Relating to the Nature and Operation of Our Business

Many of our competitors have greater financial, technical, marketing and other resources

The financial services industry is highly competitive, with multiple industry participants competing for the same customers. Many of our competitors have longer operating histories and greater resources than we do and offer a wider range of financial products and services. The impact of competitors with greater name recognition, market acceptance and larger customer bases could adversely affect our revenue growth and customer retention. Our competitors may also be able to respond more quickly to new or changing opportunities and demands and withstand changing market conditions better than we can. Competitors may conduct extensive promotional activities, offering better terms, lower prices and/or different products and services that could attract current E*TRADE customers and potentially result in price wars within the industry. Some of our competitors may also benefit from established relationships among themselves or with third parties enhancing their products and services.

If we do not successfully manage consolidation opportunities, we could be at a competitive disadvantage

There has recently been significant consolidation in the financial services industry and this consolidation is likely to continue in the future. Should we be excluded from or fail to take advantage of viable consolidation opportunities, our competitors may be able to capitalize on those opportunities and create greater scale and cost efficiencies to our detriment.

We have recently acquired a number of businesses, including Harrisdirect and BrownCo. The primary assets of these businesses are their customer accounts. Our retention of these assets and the customers of businesses we acquire may be impacted by our ability to successfully integrate the acquired operations, products (including pricing) and personnel. Diversion of management attention from other business concerns could have a negative impact. In the event that we are not successful in our integration efforts, we may experience significant attrition in the acquired accounts or experience other issues that would prevent us from achieving the level of revenue enhancements and cost savings that we expect with respect to an acquisition.

We expect to pursue additional acquisitions of companies in our industry, which may require us to obtain additional financing and subject us to integration risks. There can be no assurance that we will realize a positive return on any acquisition or that future acquisitions will not be dilutive to earnings.

Downturns or disruptions in the securities markets could reduce trade volumes and margin borrowing and increase our dependence on our more active customers who receive lower pricing

Online investing services to the retail customer, including trading and margin lending, account for a significant portion of our revenues. Although we continue to diversify our revenue sources, we expect online investing services to continue to account for a significant portion of our revenues in the foreseeable future. A downturn in or disruption to the securities markets may lead to changes in volume and price levels of securities and futures transactions which may, in turn, result in lower trading volumes and margin lending. In particular, a decrease in trading activity within our lower activity accounts would significantly impact revenues and increase dependence on more active trading customers who receive more favorable pricing based on their trade volume. A decrease in trading activity or securities prices would also typically be expected to result in a decrease in margin borrowing, which would reduce the revenue that we generate from interest charged on margin borrowing. More broadly, any reduction in overall transaction volumes would likely result in lower revenues and may harm our operating results because many of our overhead costs are fixed.

We depend on payments from our subsidiaries

We depend on dividends, distributions and other payments from our subsidiaries to fund payments on our obligations, including our debt obligations. Regulatory and other legal restrictions may limit our ability to

[Table of Contents](#)

transfer funds to or from our subsidiaries. Many of our subsidiaries are subject to laws and regulations that authorize regulatory bodies to block or reduce the flow of funds to us, or that prohibit such transfers altogether in certain circumstances. These laws and regulations may hinder our ability to access funds that we may need to make payments on our obligations.

We rely heavily on technology to deliver products and services

We rely on technology, particularly the Internet, to conduct most of our activity, and our success is dependent upon our ability to process information received through the Internet. Our technology operations are vulnerable to disruptions from human error, natural disasters, power loss, computer viruses, spam attacks, unauthorized access and other similar events. Disruptions to or instability of our technology, including an actual or perceived breach of the security of our technology, could harm our business and our reputation. In addition, recent computer viruses attacking the computers of our customers could create losses for our customers even without any breach in the security of our systems, and could thereby harm our business and our reputation.

Our business and reputation may also be harmed by events that indirectly affect us. For example, changes in technology and the volume of transactions on the Internet could cause information delays resulting in slow trade execution which could in turn cause declines in customer satisfaction and loss of customers. In addition, a significant disruption to or the instability of technology systems other than ours, including an actual or perceived breach of the security of a competitor's system, could have a negative effect on our customer behavior and harm our business.

Downturns in the securities markets increase the credit risk associated with margin lending or stock loan transactions

We permit customers to purchase securities on margin. A downturn in securities markets may impact the value of collateral held in connection with margin loans and may reduce its value below the amount borrowed, potentially creating collections issues with our margin loans. In addition, we frequently borrow securities from and lend securities to other broker-dealers. Under regulatory guidelines, when we borrow or lend securities, we must generally simultaneously disburse or receive cash deposits. A sharp change in security market values may result in losses if counterparties to the borrowing and lending transactions fail to honor their commitments.

We may be unsuccessful in managing the effects of changes in interest rates and the interest-earning banking assets in our portfolio

Net interest income has become an increasingly important source of our revenue, and will continue to grow in importance as our business model develops. Our ability to manage interest rate risk could impact our financial condition. Our results of operations depend, in part, on our level of net interest income and our effective management of the impact of changing interest rates and varying asset and liability maturities. We use derivatives to help manage interest rate risk. However, the derivatives we utilize may not be completely effective at managing this risk and changes in market interest rates and the yield curve could reduce the value of our financial assets and reduce net interest income. Many factors affect interest rates, including governmental monetary policies and domestic and international economic and political conditions.

The diversification of our asset portfolio may increase the level of charge-offs

As we diversify our asset portfolio through purchases and originations of higher-yielding asset classes, such as credit card portfolios and other consumer loans, we will have to manage assets that carry a higher risk of default than our mortgage portfolio. Consequently, the level of charge-offs associated with these assets may be higher than what we have previously experienced given our asset mix. In addition, if the overall economy weakens, we could experience higher levels of charge-offs. If expectations of future charge-offs increase, a corresponding increase in the amount of our allowance for loan loss would be required. The increased level of

[Table of Contents](#)

provision for loan losses recorded to meet additional allowance for loan loss requirements could adversely affect our financial results, if those higher yields do not cover the provision for loan losses.

An increase in our delinquency rate could adversely affect our results of operations

Our underwriting criteria or collection methods may not afford adequate protection against the risks inherent in the loans comprising our consumer loan portfolio. In the event of a default, the collateral value of the financed item may not cover the outstanding loan balance and costs of recovery. In the event our portfolio of consumer finance receivables experiences higher delinquencies, foreclosures, repossessions or losses than anticipated, our results of operations or financial condition could be adversely affected.

Risks associated with principal trading transactions could result in trading losses

A majority of our specialist and market-making revenues are derived from trading as a principal. We may incur trading losses relating to the purchase, sale or short sale of securities for our own account, as well as trading losses in our specialist and market maker stocks. From time to time, we may have large positions in securities of a single issuer or issuers engaged in a specific industry. Sudden changes in the value of these positions could impact our financial results.

Reduced grants by companies of employee stock options could adversely affect our results of operations

We are a provider of stock plan administration and options management tools, and our revenue from these tools depends in part on the size and complexity of our customers' employee stock option and stock purchase plans. In December 2004, the Financial Accounting Standards Board ("FASB") issued SFAS No. 123(R) *Share-Based Payment*, which among other things requires public companies to expense employee stock options and other share-based payments at their fair value when issued. SFAS No. 123(R) may result in companies granting fewer employee options and modifying their existing employee stock purchase plans, potentially reducing the amount of products and services we provide these companies and compelling us to incur additional costs so that our tools comply with the new FASB statement. Additionally, we may see a reduction in commission revenues as fewer employee stock options would be available for exercise and sale by the employees of these companies.

Reduced spreads in securities pricing, levels of trading activity and trading through market makers and/or specialists could harm our specialist and market maker business

Computer-generated buy/sell programs and other technological advances and regulatory changes in the marketplace may continue to tighten securities spreads. Tighter spreads could reduce revenue capture per share by our specialists and market makers, thus reducing revenues for this line of business. In addition, new and enhanced alternative trading systems such as electronic communications networks, or ECNs, have emerged as an alternative for individual and institutional investors, as well as broker-dealers, to avoid directing their trades through market makers and could result in reduced revenue for our specialist and market maker business.

Advisory services subject us to additional risks

We provide advisory services to investors to aid them in their decision making and also provide full service portfolio management. Investment decisions and suggestions are based on publicly available documents and communications with investors regarding investment preferences and risk tolerances. Publicly available documents may be inaccurate and misleading resulting in recommendations or transactions that are inconsistent with the investors' intended results. In addition, advisors may not understand investor needs and risk tolerances resulting in the recommendation or purchase of a portfolio of assets that may not be well suited for the investor. Should we be found to have failed to know our customers or improperly advised them, we could be found liable for losses suffered by customers, which could harm our business.

Our international efforts subject us to additional risks and regulation, which could impair our business growth

One component of our strategy has been an effort to build an international business. We have established certain joint venture and/or licensee relationships. We have limited control over the management and direction of

[Table of Contents](#)

these venture partners and/or licensees, and their action or inaction, including their failure to follow proper practices with respect to regulatory compliance and/or corporate governance, could harm our operations and/or our reputation.

Risks Relating to the Regulation of Our Business

We are subject to extensive government regulation, including banking and securities rules and regulations, which could restrict our business practices

The securities and banking industries are subject to extensive regulation. All of our broker-dealer subsidiaries have to comply with many laws and rules, including rules relating to possession and control of customer funds and securities, margin lending and execution and settlement of transactions. We are also subject to additional laws and rules as a result of our specialist and market maker operations.

To the extent that, now or in the future, we solicit orders from our customers or make investment recommendations (or are deemed to have done so), or offer products and services, such as investing in futures, that are not suitable for all investors, we would become subject to additional rules and regulations governing, among other things, sales practices and the suitability of recommendations to customers.

As part of our institutional business we provide clients access to certain third-party research tools and other services in exchange for commissions earned. Currently, these activities are allowed by various regulatory bodies. However, changes to the regulations governing these activities have been proposed in the United Kingdom and the United States. If the regulations are changed in a way that limits or eliminates altogether the services we could provide to clients in exchange for commissions, we may realize a decrease in our institutional commission revenues.

Similarly, E*TRADE Financial Corporation, E*TRADE Re, LLC and ETB Holdings, Inc., as savings and loan holding companies, and the Bank, as a Federally chartered savings bank, are subject to extensive regulation, supervision and examination by the Office of Thrift Supervision (“OTS”) and, in the case of the Bank, also the Federal Deposit Insurance Corporation (“FDIC”). Such regulation covers all banking business, including lending practices, safeguarding deposits, capital structure, recordkeeping, transactions with affiliates and conduct and qualifications of personnel.

If we fail to comply with applicable securities, banking and insurance laws, rules and regulations, either domestically or internationally, we could be subject to disciplinary actions, damages, penalties or restrictions that could significantly harm our business

The Securities and Exchange Commission (“SEC”), the New York Stock Exchange (“NYSE”), the NASD, Inc. (“NASD”) and other self-regulatory organizations and state securities commissions can, among other things, censure, fine, issue cease-and-desist orders or suspend or expel a broker-dealer or any of its officers or employees. The OTS may take similar action with respect to our banking activities. Similarly, the attorneys general of each state could bring legal action on behalf of the citizens of the various states to ensure compliance with local laws. Regulatory agencies in countries outside of the United States have similar authority. The ability to comply with applicable laws and rules is dependent in part on the establishment and maintenance of a reasonable compliance system. The failure to establish and enforce reasonable compliance procedures, even if unintentional, could subject us to significant losses or disciplinary or other actions.

If we do not maintain the capital levels required by regulators, we may be fined or even forced out of business

The SEC, NYSE, NASD, OTS and various other regulatory agencies have stringent rules with respect to the maintenance of specific levels of net capital by securities broker-dealers and regulatory capital by banks. Net capital is the net worth of a broker or dealer (assets minus liabilities), less deductions for certain types of assets. Failure to maintain the required net capital could result in suspension or revocation of registration by the SEC

[Table of Contents](#)

and suspension or expulsion by the NYSE and/or NASD, and could ultimately lead to the firm's liquidation. In the past, our broker-dealer subsidiaries have depended largely on capital contributions by us in order to comply with net capital requirements. If such net capital rules are changed or expanded, or if there is an unusually large charge against net capital, operations that require an intensive use of capital could be limited. Such operations may include investing activities, marketing and the financing of customer account balances. Also, our ability to withdraw capital from brokerage subsidiaries could be restricted, which in turn could limit our ability to repay debt and redeem or purchase shares of our outstanding stock.

Similarly, the Bank is subject to various regulatory capital requirements administered by the OTS. Failure to meet minimum capital requirements can trigger certain mandatory, and possibly additional discretionary actions by regulators that, if undertaken, could harm a bank's operations and financial statements. A bank must meet specific capital guidelines that involve quantitative measures of a bank's assets, liabilities and certain off-balance sheet items as calculated under regulatory accounting practices. A bank's capital amounts and classification are also subject to qualitative judgments by the regulators about the strength of components of its capital, risk weightings of assets, off-balance sheet transactions and other factors.

Quantitative measures established by regulation to ensure capital adequacy require a bank to maintain minimum amounts and ratios of Total and Tier 1 Capital to Risk-weighted Assets and of Tier 1 Capital to adjusted total assets. To satisfy the capital requirements for a "well capitalized" financial institution, a bank must maintain higher Total and Tier 1 Capital to Risk-weighted Assets and Tier 1 Capital to adjusted total assets ratios.

As a non-grandfathered savings and loan holding company, we are subject to regulations that could restrict our ability to take advantage of certain business opportunities

We are required to file periodic reports with the OTS and are subject to examination by the OTS. The OTS also has certain types of enforcement powers over us, ETB Holdings, Inc. and E*TRADE Re, LLC, including the ability to issue cease-and-desist orders, force divestiture of the Bank and impose civil and monetary penalties for violations of Federal banking laws and regulations or for unsafe or unsound banking practices. In addition, under the Gramm-Leach-Bliley Act, our activities are restricted to those that are financial in nature and certain real estate-related activities. We may make merchant banking investments in companies whose activities are not financial in nature if those investments are made for the purpose of appreciation and ultimate resale of the investment and we do not manage or operate the company. Such merchant banking investments may be subject to maximum holding periods and special recordkeeping and risk management requirements.

We believe all of our existing activities and investments are permissible under the Gramm-Leach-Bliley Act, but the OTS has not yet fully interpreted these provisions. Even if our existing activities and investments are permissible, we are unable to pursue future activities that are not financial in nature. We are also limited in our ability to invest in other savings and loan holding companies.

In addition, the Bank is subject to extensive regulation of its activities and investments, capitalization, community reinvestment, risk management policies and procedures and relationships with affiliated companies. Acquisitions of and mergers with other financial institutions, purchases of deposits and loan portfolios, the establishment of new Bank subsidiaries and the commencement of new activities by Bank subsidiaries require the prior approval of the OTS, and in some cases the FDIC, which may deny approval or limit the scope of our planned activity. These regulations and conditions could place us at a competitive disadvantage in an environment in which consolidation within the financial services industry is prevalent. Also, these regulations and conditions could affect our ability to realize synergies from future acquisitions, could negatively affect us following the acquisition and could also delay or prevent the development, introduction and marketing of new products and services.

[Table of Contents](#)

Risks Relating to Owning Our Stock

We have incurred losses in the past and we cannot assure you that we will be profitable

We have incurred losses in the past and we may do so in the future. While we reported net income for the past three years, we reported a net loss of \$186.4 million in 2002. We may incur losses in the future.

We expect that expensing stock options granted to our employees will have an impact on our financial results

In December 2004, the FASB issued SFAS No. 123(R), which among other things requires public companies to expense employee stock options and other share-based payments at their fair value when issued. Although we are not currently required to record any compensation expense in connection with stock option grants to employees that have an exercise price at or above fair market value, we have voluntarily elected to adopt stock option expensing for reporting periods beginning on July 1, 2005. As a result of its impact on our financial results, we may be forced to decrease or eliminate employee stock option grants, which could, in turn, have a negative impact on our ability to attract and retain qualified employees.

We are substantially restricted by the terms of our senior notes

In June 2004, we issued an aggregate principal amount of \$400 million of senior notes due June 2011. In September and November 2005, we issued an additional aggregate principal amount of \$100 million of senior notes due June 2011, \$600 million of senior notes due September 2013 and \$300 million of senior notes due December 2015. The indentures governing these senior notes contain various covenants and restrictions that limit our ability and certain of our subsidiaries' ability to, among other things:

- incur additional indebtedness;
- create liens;
- pay dividends or make other distributions;
- repurchase or redeem capital stock;
- make investments or other restricted payments;
- enter into transactions with our stockholders or affiliates;
- sell assets or shares of capital stock of our subsidiaries;
- restrict dividend or other payments to us from our subsidiaries; and
- merge, consolidate or transfer substantially all of our assets.

As a result of the covenants and restrictions contained in the indentures, we are limited in how we conduct our business and we may be unable to raise additional debt or equity financing to compete effectively or to take advantage of new business opportunities. The terms of any future indebtedness could include more restrictive covenants.

We cannot assure you that we will be able to remain in compliance with these covenants in the future and, if we fail to do so, that we will be able to obtain waivers from the appropriate parties and/or amend the covenants.

Our corporate debt levels may limit our ability to obtain additional financing

At December 31, 2005, we had an outstanding balance of \$1,401.9 million in senior notes, \$435.6 million in mandatory convertible notes, \$185.2 million in convertible subordinated notes and \$40.5 million in term loans. Excluding the mandatory convertible notes, our ratio of debt (our senior debt, convertible subordinated debt and term loans) to equity (expressed as a percentage) was 48% at December 31, 2005.

[Table of Contents](#)

We may incur additional indebtedness in the future, including in connection with further acquisitions. Our level of indebtedness, among other things, could:

- make it more difficult or costly for us to obtain any necessary financing in the future for working capital, capital expenditures, debt service requirements or other purposes;
- make it more difficult to refinance outstanding debt;
- limit our flexibility in planning for, or reacting to, changes in our business; or
- make us more vulnerable in the event of a downturn in our business.

The market price of our common stock may continue to be volatile

From January 1, 2003 through December 31, 2005, the price per share of our common stock ranged from a low of \$3.65 to a high of \$21.71. The market price of our common stock has been, and is likely to continue to be, highly volatile and subject to wide fluctuations. In the past, volatility in the market price of a company's securities has often led to securities class action litigation. Such litigation could result in substantial costs to us and divert our attention and resources, which could harm our business. Declines in the market price of our common stock or failure of the market price to increase could also harm our ability to retain key employees, reduce our access to capital and otherwise harm our business.

We may need additional funds in the future, which may not be available and which may result in dilution of the value of our common stock

In the future, we may need to raise additional funds via debt and/or equity instruments, which may not be available on favorable terms, if at all. If adequate funds are not available on acceptable terms, we may be unable to fund our plans for the growth of our business. In addition, if funds are available, the issuance of equity securities could dilute the value of our shares of our common stock and cause the market price of our common stock to fall.

We have various mechanisms in place that may discourage takeover attempts

Certain provisions of our certificate of incorporation and bylaws may discourage, delay or prevent a third party from acquiring control of us in a merger, acquisition or similar transaction that a shareholder may consider favorable. Such provisions include:

- authorization for the issuance of "blank check" preferred stock;
- provision for a classified Board of Directors with staggered, three-year terms;
- the prohibition of cumulative voting in the election of directors;
- a super-majority voting requirement to effect business combinations or certain amendments to our certificate of incorporation and bylaws;
- limits on the persons who may call special meetings of shareholders;
- the prohibition of shareholder action by written consent; and
- advance notice requirements for nominations to the Board of Directors or for proposing matters that can be acted on by shareholders at shareholder meetings.

Attempts to acquire control of the Company may also be delayed or prevented by our stockholder rights plan, which is designed to enhance the ability of our Board of Directors to protect shareholders against unsolicited attempts to acquire control of the Company that do not offer an adequate price to all shareholders or are otherwise not in the best interests of the Company and our shareholders. In addition, certain provisions of our stock incentive plans, management retention and employment agreements (including severance payments and stock option acceleration), and Delaware law may also discourage, delay or prevent someone from acquiring or merging with us.

[Table of Contents](#)

ITEM 1B. UNRESOLVED STAFF COMMENTS

None.

ITEM 2. PROPERTIES

A summary of our significant locations at December 31, 2005 is shown in the following table. Except for our office in Alpharetta, Georgia, all facilities are leased. Square footage amounts are net of space that has been sublet or part of a facility restructuring.

<u>Location</u>	<u>Approximate Square Footage</u>
Arlington, Virginia	184,000
Rancho Cordova, California	175,000
Alpharetta, Georgia	113,000
New York, New York	76,000
Boston, Massachusetts	57,000
Irvine, California	48,000
Charlotte, North Carolina	45,000
Jersey City, New Jersey	38,000
Menlo Park, California	32,000
Tampa, Florida	30,000

All of our facilities are used by both our retail and institutional segments. In addition to the significant facilities above, we also lease all of our 16 E*TRADE Financial Centers, ranging in space from 3,000 to 7,000 square feet. All other leased facilities with space of less than 25,000 square feet are not listed by location. We believe our facilities space is adequate to meet our needs in 2006.

ITEM 3. LEGAL PROCEEDINGS

In June 2002, we acquired from MarketXT Holdings, Inc. (formerly known as Tradescape Corporation) (“MarketXT”) certain entities referred to as Tradescape Securities, LLC, Tradescape Technologies, LLC and Momentum Securities, LLC. Numerous disputes have arisen among the parties regarding the value of and responsibility for various liabilities that first became apparent following the sale. The parties have been unable to resolve these disputes and have asserted claims against each other. On April 8, 2004, MarketXT filed a complaint in the United States District Court for the Southern District of New York against the Company, certain of its officers and directors and other third parties, including Softbank Finance Corporation and Softbank Corporation, alleging that the defendants acted improperly in preventing plaintiffs from obtaining certain contingent payments and claiming damages of \$1.5 billion. On April 9, 2004, we filed a complaint in the United States District Court for the Southern District of New York against certain directors and officers of MarketXT seeking declaratory relief and monetary damages in an amount to be proven at trial for defendants’ fraud in connection with the 2002 sale transaction, including, but not limited to, having presented the Company with fraudulent financial statements of the condition of Momentum Securities during the due diligence process. We amended our complaint in October 2004 to add additional defendants. In January 2005, we filed an adversary proceeding against MarketXT and others seeking compensatory and punitive damages, and certain declaratory relief in those Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York entitled, “In re MarketXT Holdings Corp., Debtor” and a separate adversary proceeding against Omar Amanat, in the same bankruptcy court in those Chapter 7 bankruptcy proceedings entitled, “In re Amanat, Omar Shariff.” In October 2005, MarketXT answered the Company’s adversary proceeding and asserted various counterclaims, including some of the claims MarketXT had asserted in its district court action (which action MarketXT subsequently abandoned), seeking unspecified damages according to proof at trial. We have moved to dismiss certain aspects of MarketXT’s counterclaim, and discovery related to the adversary proceeding continues. The Company continues to believe that the claims brought against it by MarketXT and Omar Amanat are without merit and intends both to vigorously defend all such claims and to fully pursue its own claims as described above.

[Table of Contents](#)

In September 2001, the Company engaged in certain stock loan transactions that resulted in litigation between the Company and certain counterparties to the transactions including Nomura Securities, Inc. and certain of its affiliates (“Nomura”). In the lawsuits, Nomura sought approximately \$10.0 million in damages and asserted the right to keep an additional \$5.0 million, plus interest, unspecified punitive damages, attorney fees, and other relief from the Company for conversion and breach of contract. The Company asserted claims and defenses against Nomura relating to the same amount and alleged, *inter alia*, that Nomura, among others, participated in a stock lending fraud and violated federal and state securities laws among other allegations. The Company sought, among other things, compensatory damages for all expenses and losses that it had incurred to date. On December 5, 2005, the Company entered into an agreement with Nomura and its subsidiaries and affiliates to settle the lawsuits pending between the parties in New York and Minnesota. Pursuant to that agreement, Nomura, without admission of liability, agreed to pay, and has paid, \$35.0 million to the Company to resolve these disputes; the Company and Nomura further agreed to dismiss their claims against each other. With the resolution of these matters, this litigation will no longer be included in our disclosures.

An unfavorable outcome in any matter that is not covered by insurance could have a material adverse effect on our business, financial condition, results of operations and cash flows. In addition, even if the ultimate outcomes are resolved in our favor, the defense of such litigation could entail considerable cost and the diversion of the efforts of management, either of which could have a material adverse effect on our results of operations. In addition to the matters described above, the Company is subject to various legal proceedings and claims that arise in the normal course of business, which we believe will not have a material adverse effect on our financial position, results of operations or cash flows.

We maintain insurance coverage that we believe is reasonable and prudent. The principal insurance coverage we maintain covers commercial general liability, property damage, hardware/software damage, cyber liability, directors and officers, employment practices liability, certain criminal acts against the Company and errors and omissions. We believe that such insurance coverage is adequate for the purpose of our business. Our ability to maintain this level of insurance coverage in the future, however, is subject to the availability of affordable insurance in the marketplace.

ITEM 4. SUBMISSION OF MATTERS TO A VOTE OF SECURITY HOLDERS

None.

[Table of Contents](#)

PART II

ITEM 5. MARKET FOR REGISTRANT'S COMMON EQUITY, RELATED SHAREHOLDER MATTERS AND ISSUER PURCHASES OF EQUITY SECURITIES

Price Range of Common Stock

The following table shows the high and low sale prices of our common stock as reported by the NYSE for the periods indicated:

	<u>High</u>	<u>Low</u>
2005:		
First Quarter	\$ 14.98	\$ 11.70
Second Quarter	\$ 14.39	\$ 10.53
Third Quarter	\$ 17.60	\$ 13.85
Fourth Quarter	\$ 21.71	\$ 15.50
2004:		
First Quarter	\$ 15.40	\$ 10.82
Second Quarter	\$ 13.75	\$ 10.57
Third Quarter	\$ 12.70	\$ 9.51
Fourth Quarter	\$ 15.17	\$ 11.21

The closing sale price of our common stock as reported on the NYSE on February 21, 2006 was \$24.42 per share. At that date, there were 2,224 holders of record of our common stock.

Dividends

We have never declared or paid cash dividends on our common stock. Although we do not currently have any plans, we may pay dividends in the future.

Repurchase Plans

In 2004, our Board of Directors approved the following repurchase plans, as they determined that the use of cash to reduce outstanding debt and outstanding common stock was likely to create long-term value for our shareholders. During 2005, we repurchased a total of \$58.2 million or nearly 4.6 million shares of common stock under the repurchase plans approved in 2004. Under the December 2004 Plan which is described more fully below, we purchased a total of \$20.2 million consisting of 1.6 million shares at an average price of \$12.73 per shares. Under the April 2004 plan which is also described more fully below, we repurchased a total of \$38.0 million consisting of 3.0 million shares at an average price of \$12.84 per share. We did not repurchase any shares during the three months ended December 31, 2005.

December 2004 Plan

On December 15, 2004, we announced that our Board of Directors approved an additional \$200 million repurchase plan (the "December 2004 Plan".) The December 2004 Plan is open-ended and provides the flexibility to buy back common stock, retire debt or a combination of both. We may conduct these repurchases on the open market, in private transactions or a combination of both. In 2005, we purchased 1.6 million shares at an average price of \$12.73 per share. We did not repurchase any shares during the three months ended December 31, 2005. We did not repurchase any shares under this plan in 2004. There is \$179.8 million available under this plan for additional repurchases as of December 31, 2005.

April 2004 Plan

On April 29, 2004, we announced that our Board of Directors approved a \$200 million repurchase program (the "April 2004 Plan".) The April 2004 Plan was open-ended and provided the flexibility to buy back common

[Table of Contents](#)

stock, redeem for cash our outstanding convertible subordinated notes, retire debt in the open market or a combination of all three. We could have conducted these repurchases on the open market, in private transactions or a combination of both. We repurchased 5.8 million shares for \$75.8 million under this plan in 2004. In April 2005, we completed the April 2004 Plan. In 2005, we repurchased 3.0 million shares at an average price of \$12.84 per share. There are no amounts available under this plan for additional repurchases as of December 31, 2005.

Sale of Unregistered Shares

In January 2005, we issued 135,256 shares of common stock in connection with our acquisition of Howard Capital Management, Inc. No underwriters were involved, and there were no underwriting discounts or commissions. The securities were issued under the exemption from registration provided under Section 4(2) of the Securities Act. These shares of common stock were sold by the issuer in a transaction not involving a public offering. We filed an initial registration statement on May 6, 2005, and filed an amended registration statement on February 6, 2006, which was declared effective on February 7, 2006.

In November 2005, we issued 1,331,902 shares of common stock in connection with our acquisition of Kobren Insight Management Inc. No underwriters were involved, and there were no underwriting discounts or commissions. The securities were issued under the exemption from registration provided under Section 4(2) of the Securities Act. These shares of common stock were sold by the issuer in a transaction not involving a public offering. We filed a registration statement on December 12, 2005, which was declared immediately effective.

[Table of Contents](#)

ITEM 6. SELECTED CONSOLIDATED FINANCIAL DATA

(Dollars in millions, except per share and per trade amounts)

	Year Ended December 31,					Variance
	2005	2004	2003	2002	2001	2005 vs. 2004
Results of Operations: ⁽¹⁾						
Total net revenues	\$ 1,703.8	\$ 1,482.9	\$ 1,342.7	\$ 1,261.7	\$ 1,240.2	15 %
Facility restructuring and other exit activities ⁽⁵⁾	\$ 30.0	\$ (15.7)	\$ (134.2)	\$ (15.4)	\$ (198.6)	*
Gain (loss) on sale and impairment of investments	\$ 83.1	\$ 128.1	\$ 147.9	\$ (20.3)	\$ (49.5)	*
Income (loss) from continuing operations ⁽²⁾	\$ 446.2	\$ 381.8	\$ 200.5	\$ 119.0	\$ (238.9)	17 %
Cumulative effect of accounting changes ⁽³⁾	\$ 1.6	\$ —	\$ —	\$ (293.7)	\$ —	*
Net income (loss)	\$ 430.4	\$ 380.5	\$ 203.0	\$ (186.4)	\$ (241.5)	13 %
Income (loss) per share from continuing operations—Basic	\$ 1.20	\$ 1.04	\$ 0.56	\$ 0.33	\$ (0.72)	15 %
Income (loss) per share from continuing operations—Diluted	\$ 1.16	\$ 0.99	\$ 0.55	\$ 0.33	\$ (0.72)	17 %
Net income (loss) per share—Basic	\$ 1.16	\$ 1.04	\$ 0.57	\$ (0.52)	\$ (0.73)	12 %
Net income (loss) per share—Diluted	\$ 1.12	\$ 0.99	\$ 0.55	\$ (0.52)	\$ (0.73)	13 %
Weighted average shares—Basic (in thousands)	371,468	366,586	358,320	355,090	332,370	1 %
Weighted average shares—Diluted ⁽⁴⁾ (in thousands)	384,630	405,389	367,361	361,051	332,370	(5)%

* Percentage not meaningful.

(1) No cash dividends have been declared in any of the periods presented.

(2) In 2005, we exited the professional proprietary and agency trading businesses and completed the sale of E*TRADE Consumer Finance Corporation. In 2004, we completed the sale of substantially all of the assets and liabilities of E*TRADE Access. We have reflected the results of these operations as discontinued operations for all periods presented.

(3) In 2005, we recorded a credit of \$1.6 million, net of tax, as a cumulative effect of accounting change, to reflect the amount by which compensation expense would have been reduced in periods prior to adoption of Statement of Financial Accounting Standards ("SFAS") No. 123(R), *Share-Based Payment*, for restricted stock awards outstanding on July 1, 2005. In 2002, impairment of goodwill that was identified upon adoption of SFAS No. 142, *Goodwill and Other Intangible Assets* is reported as a cumulative effect of accounting change.

(4) For 2004, diluted earnings per share is calculated using the "if converted" method, which includes the additional dilutive impact assuming conversion of the Company's subordinated convertible debt. Under the "if converted" method, the per share numerator excludes the interest expense and related amortization of offering costs from the convertible debt, net of tax, of \$20.0 million. The denominator includes the shares issuable from the assumed conversion of the convertible debt of 25.8 million. For all other periods presented, the "if converted" method is not used as its effect would be anti-dilutive.

(5) Expenses are presented in parentheses.

[Table of Contents](#)

	At December 31,					Variance
	2005	2004	2003	2002	2001	2005 vs. 2004
Financial Condition (at year end)						
Available-for-sale mortgage-backed and investment securities	\$12,564.7	\$12,543.8	\$ 9,826.9	\$ 8,193.1	\$ 4,555.1	0%
Total loans, net	\$19,512.3	\$11,785.0	\$ 9,131.4	\$ 7,365.7	\$ 8,010.5	66%
Brokerage receivables, net	\$ 7,174.2	\$ 3,034.5	\$ 2,297.8	\$ 1,421.8	\$ 2,139.2	136%
Total assets	\$44,567.7	\$31,032.6	\$26,049.2	\$21,455.9	\$18,172.4	44%
Deposits	\$15,948.0	\$12,303.0	\$12,514.5	\$ 8,400.3	\$ 8,082.9	30%
Corporate debt ⁽¹⁾	\$ 2,022.7	\$ 585.6	\$ 695.3	\$ 695.3	\$ 760.3	245%
Capital lease liability	\$ —	\$ 0.2	\$ 0.9	\$ 4.4	\$ 18.2	
Mandatorily redeemable capital preferred securities ⁽²⁾	\$ —	\$ —	\$ —	\$ 143.4	\$ 69.5	
Shareholders' equity	\$ 3,399.6	\$ 2,228.2	\$ 1,918.3	\$ 1,505.8	\$ 1,570.9	53%

⁽¹⁾ Corporate debt represents senior notes, mandatory convertible notes and convertible subordinated notes.

⁽²⁾ Mandatorily redeemable capital preferred securities were deconsolidated beginning in 2003 in accordance with SFAS No. 150, *Accounting for Certain Financial Instruments with Characteristics of both Liabilities and Equity*. These securities are no longer classified as preferred securities; however, they are on the balance under Other Borrowings by Bank Subsidiary.

	Year Ended December 31,					Variance
	2005	2004	2003	2002	2001	2005 vs. 2004
Key Measures:						
Operating margin	38%	33%	14%	21%	(15)%	5 %
Daily Average Revenue Trades	97,740	83,643	77,052	66,588	89,018	17 %
Average commission per trade	\$ 13.82	\$ 15.63	\$ 16.41	\$ 17.01	\$ 17.21	(12)%
Bank net interest spread (basis points)	222	207	150	146	100	7 %
Average margin balances	\$ 2,767	\$ 2,048	\$ 1,219	\$ 1,243	\$ 2,092	35 %
Average interest-earning banking assets	\$ 27,948	\$ 22,332	\$ 17,165	\$ 13,704	\$ 12,337	25 %
Total employees (period end)	3,439	3,320	3,455	3,478	3,334	4 %

The selected consolidated financial data should be read in conjunction with Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations and Item 8. Financial Statements and Supplementary Data.

ITEM 7. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

The following discussion should be read in conjunction with the Consolidated Financial Statements and the related notes that appear elsewhere in this document.

FORWARD-LOOKING STATEMENTS

Statements made in this document, other than statements of historical information, are forward-looking statements that are made pursuant to the safe harbor provisions of Section 21E of the Securities Exchange Act of 1934. These forward-looking statements may sometimes be identified by words such as "expect," "may," "looking forward," "we plan," "we believe," "are planned," "could be" and "currently anticipate." Although we believe these statements, as well as other oral and written forward-looking statements made by us or on behalf of E*TRADE Financial Corporation from time to time, to be true and reasonable, we can give no assurance that these plans, intentions or expectations will be achieved. Actual results, performance or achievements could differ materially from those contemplated, expressed or implied by the forward-looking statements. Important factors that could cause actual results to differ materially from our forward-looking statements are set forth in our other filings with the Securities and Exchange Commission ("SEC") and in this document under the heading "Risk Factors." We caution that there may be risks associated with owning our securities other than those discussed in this document and in such filings. We do not undertake to update any forward-looking statements that may be made from time to time by or on behalf of E*TRADE FINANCIAL.

OVERVIEW

Key Strategy

Our strategy to enhance shareholder value centers on growing and strengthening our retail business and leveraging that growth in our institutional business. We strive to grow our retail business by acquiring, expanding and retaining our relationships with the global retail customer. We plan to grow those relationships by providing product offerings built around price, functionality and service. We also intend to grow through appropriate and targeted acquisitions which leverage our existing business platform.

As we grow our retail customer base and we hold more customers' assets, we believe that our business will benefit from the management of our balance sheet by the institutional business. As we are able to manage our balance sheet on an enterprise-wide basis, we become less dependent on our customer's trading activity, which is dependent on levels of market activity, and are better able to generate recurring income. Thus, while commissions are still reported as the lead category in our income statement because most of our customers begin their relationship with us through trading activity, net interest income has become our leading category of revenue, and we anticipate this trend will continue.

Key Factors Affecting Financial Performance

Our financial performance is affected by several external factors outside of our control, including:

- general economic conditions;
- customer demand for our products and services;
- competitor pricing on similar products and services;
- interest rates and the shape of the interest rate yield curve; and
- the performance of the equity and capital markets.

Table of Contents

In addition to the items noted above, our success in the future will depend upon, among other things:

- continuing our success in the acquisition, growth and retention of customers;
- successful integration of the *Harrisdirect* and *BrownCo* acquisitions;
- deepening customer acceptance of our investing, trading, cash management and lending products including E*TRADE Complete;
- disciplined expense control and improved operational efficiency;
- maintaining strong overall asset quality; and
- prudent risk and capital management.

Management focuses on several key metrics in evaluating the Company's performance. These metrics are shown in the table and discussed in the text below:

	As of or For the Year Ended December 31,			Variance
	2005	2004	2003	2005 vs. 2004
Customer Activity Metrics				
Retail client assets (in billions)	\$ 178.5	\$ 100.0	\$ 82.9	79 %
Daily average revenue trades	97,740	83,643	77,052	17 %
Average commission per trade ⁽¹⁾	\$ 13.82	\$ 15.63	\$ 16.41	(12)%
Customer cash and deposits (in billions)	\$ 28.8	\$ 18.7	\$ 19.0	54 %
Products per customer ⁽²⁾	2.1	1.9	1.7	11 %
Company Financial Metrics				
Operating margin ⁽³⁾	38%	33%	14%	5 %
Revenue growth	15%	10%	6%	5 %
Revenue per compensation and benefits dollar	\$ 4.47	\$ 4.23	\$ 3.68	6 %

(1) Our average commission per trade is calculated by dividing retail segment commission revenues by the number of total retail trades.

(2) We define a product as an account, an account feature that generates revenue, such as a margin-enabled account, or an account function that creates a deeper customer relationship, such as bill pay.

(3) Our operating margin is calculated by dividing our income before other income, income taxes, minority interest, discontinued operations and cumulative effect of accounting change by our total net revenues.

• Customer Activity Metrics

- Retail client assets are the market value of all client assets housed by us. Retail client assets include security holdings, cash (including money market funds), vested unexercised options and deposits. The level of client assets is an indicator of the value of our relationship with the customer. An increase in client assets indicates that existing and new customers are expanding use of our services.
- Daily Average Revenue Trades ("DARTs") are an indicator of the volume of transactions our retail customers conduct and are the predominant driver of commissions revenue.
- Average commission per trade is impacted by the mix between and within our retail domestic and international businesses. This is an indicator of changes to our customer mix and reflects the impact of changes to pricing.
- Customer cash and deposits are the balances of all customer cash, including deposits, free credits held and money market balances held in outside funds. Free credits represent credit balances in customer accounts arising from deposits of funds and sales of securities. Management considers cash and deposits to be indicative of the deepening engagement with our customers and in addition, this balance is a key driver of net interest income.

[Table of Contents](#)

- Products per customer is the average number of our products that a customer actively uses. This measure is an indicator of how well our product and service set appeals to our customer base. We believe increases to this measure are representative of our ability to cross-sell and overall customer engagement with our products and services.
- Company Financial Metrics
 - Operating margin is the percentage of every dollar of revenue that goes to net income before other income, income taxes, minority interest, discontinued operations and cumulative effect of accounting change. This percentage is indicative of our operating efficiency.
 - Revenue growth is an indicator of our overall financial well being and our ability to execute on our strategy. When coupled with the operating margin, the two provide information about the general success of current strategies. Revenue growth is the difference between the current and prior period total net revenues divided by the prior period total net revenues.
 - Revenue per compensation and benefits dollar is a broad indicator of productivity. The increase in 2005 is an indicator of our ability to drive revenue growth using the existing infrastructure. Revenue per compensation and benefits dollar is total net revenues divided by compensation and benefits expense.

Significant Events in 2005

Acquisitions

Harrisdirect

We completed our acquisition of *Harrisdirect* on October 6, 2005. At the time of the acquisition, *Harrisdirect*, an online discount brokerage company, had approximately 425,000 customers who conducted approximately 16,000 DARTs. As of October 6, 2005, *Harrisdirect* had approximately \$34.8 billion in customer assets including \$5.0 billion in customer cash. Margin debt was approximately \$0.9 billion at the time of the acquisition. *Harrisdirect* was purchased for approximately \$709 million in cash from Harris Financial Corp, a subsidiary of BMO Financial Group. As part of the financing to acquire *Harrisdirect*, we issued \$450 million in fixed-rate senior notes.

BrownCo

We completed our acquisition of JP Morgan Invest, LLC, more commonly known as *BrownCo*, on November 30, 2005. *BrownCo*, an online discount brokerage company, had approximately 186,000 customers who conducted approximately 28,000 DARTs. As of November 30, 2005, *BrownCo* had approximately \$34.2 billion in customer assets including approximately \$3.5 billion in customer cash. Brokerage receivables were approximately \$3.1 billion at the time of the acquisition. *BrownCo* was purchased for approximately \$1.6 billion in cash from JPMorgan Chase & Co. As part of the financing to acquire *BrownCo*, we issued \$550 million fixed-rate senior notes, \$650 million in common stock and \$450 million in face value of mandatory convertible notes. The common stock was sold in the market and proceeds were used for the *BrownCo* acquisition.

Wealth Management Advisors

We acquired two wealth management advisors, Kobren Insight Management and Howard Capital Management during 2005. These companies provide advisory and asset management services to retail clients. On a combined basis, these companies manage \$1.5 billion in customer assets. The acquisition of these companies are part of our ongoing strategy to enhance our product offering to customers. The growth of our wealth management business extends our ability to provide customers with the complete support they are demanding to address their varied financial needs.

Dispositions

Consistent with our strategy to continually evaluate our businesses and maintain a focus on providing services consistent with our strategy, we made the decision to sell or exit several product lines. In 2005, we sold

[Table of Contents](#)

our Consumer Finance business, exited our institutional proprietary trading business and made a decision to sell our professional agency business, ultimately executing a sale agreement in February 2006. The Consumer Finance business originated and serviced recreational vehicles (“RVs”) and marine loans. We retained the loan portfolio; however, we will no longer originate or service RV or marine loans.

In addition to the above, we made the decision to surrender our rights to trade over-the-counter (“OTC”) stocks on the floor of the Chicago Stock Exchange (“CHX”) during the first quarter of 2006. We determined that we could provide similar services without a presence on the floor of the CHX. The listed stock trading business is not impacted by the decision regarding OTC stocks. Additional information about these dispositions and closures can be found in Note 3 to the Consolidated Financial Statements.

*Introduction of E*TRADE Complete*

In 2005, we launched E*TRADE Complete, which offers consumers tools to aid in the optimization of investing, cash management and lending products. E*TRADE Complete tools currently include the Cash Optimizer, the Intelligent Investing Optimizer and the Intelligent Lending Optimizer. Customers can quickly transfer funds to modify deposit balances to determine the optimal distribution of cash between accounts based on their personal preferences. Each customer’s product selection and mix will depend on their price, liquidity, convenience and risk tolerance preference. The Intelligent Investing Optimizer makes it easy to develop an investment strategy for a customer’s uninvested cash targeted to specific goals, time horizon and risk tolerance. It also suggests allocations for large cap, small cap, international investment, fixed income and cash. The Intelligent Lending Optimizer is a tool that allows customers to model multiple lending scenarios to determine whether they can lower their borrowing costs. Customers can use E*TRADE Complete in conjunction with our other retail products.

Introduction of Token-Based Security

In 2005, we began offering a token-based security solution to our U.S.-based retail customers. Using a token-based security solution provides an added layer of security at their point of access to the Internet to safeguard their personal financial information. The tokens produce a six digit code that changes every sixty seconds making unauthorized access almost impossible. We believe comprehensive security protection is important to financial consumers and our token-based security solution gives us a competitive edge in this area.

Introduction of Complete Protection Guarantee

During 2005, we developed the E*TRADE Complete Protection Guarantee, consisting of these separate programs. This program was launched in January 2006. Our promise to customers is that we will cover any loss that results from the unauthorized use of our products and services, subject to certain limitations. Under our Complete Payment Protection Guaranty, we ensure that customer payments and transfers are processed exactly as the customer desired. In the unlikely event that any customer payment or transfer is not sent as instructed, we will work with the customer to swiftly resolve the issue and reimburse the customer in full for any late fees, penalties or related finance charges incurred. In addition under the Complete Privacy Protection Guaranty, we assure our customers that we will undertake our best efforts to maintain their privacy and we will not sell personal information to third parties or marketers for any purpose.

Enhanced Our Pricing Structure

During 2005, we changed our pricing structure to reward our customers for holding assets with us and to align our structure with the competitive marketplace. In conjunction, we changed our customer segment definitions along with our pricing structure in 2005. Our current segment definitions are as follows:

Active Trader—In October 2005, a customer with 30 or more trades per quarter qualified as an Active Trader. In February 2005, a customer that executed 15 or more trades per quarter was an Active Trader. During 2004, a customer that executed 27 trades or more per quarter was considered to be an Active Trader.

[Table of Contents](#)

Mass Affluent—In October 2005, we changed our customer segment definition to less than 30 trades per quarter and holds \$50,000 or more in assets in combined retail accounts. In February 2005, a Mass Affluent customer was a customer that executed less than 15 trades per quarter and had \$50,000 or more in assets in combined retail accounts. During 2004, a Mass Affluent customer was a customer that executed less than 27 trades per quarter and had \$50,000 or more in assets in combined retail accounts.

Main Street Investor—As established in 2005, a customer that executes less than 30 trades per quarter and less than \$50,000 in assets in combined retail accounts. In February 2005, a customer that executed less than 15 trades per quarter and had less than \$50,000 in assets in combined retail accounts. During 2004, a Main Street Investor was a customer that executed less than 15 trades per quarter and had less than \$50,000 in assets in combined retail accounts.

The table below shows our pricing as of December 31 for each period:

<u>Customer Segment</u>	<u>Base Pricing in 2005</u>	<u>Base Pricing in 2004</u>
Active Trader	\$6.99 to \$9.99 per trade	\$9.99 per trade
Mass Affluent	\$9.99 per trade	\$12.99 per trade
Main Street Investor	\$12.99 per trade	\$19.99 per trade

We changed our customer segment definitions and lowered our fees charged in February 2005 and October 2005. In addition to the fee schedule above, we have grandfathered certain trade pricing for customers acquired through our *Harrisdirect* and *BrownCo* acquisitions.

Enhanced Distribution Network

We enhanced our distribution network by opening six new centers during 2005. Our 16 centers provide face-to-face assistance for retail customers. To better serve our customers, we have also added additional relationship managers bringing the total to approximately 200. Relationship Managers (“RMs”) assist retail customers with asset allocation and investment options. In addition, RMs are cash management specialists who are able to identify the best products to meet the customers’ needs.

Change in Reporting Structure

In January 2005, we revised our financial reporting to better reflect the manner in which our chief operating decision maker assesses our performance and makes resource allocation decisions. As a result, in 2005, we began reporting our operating results in two segments, retail and institutional, rather than our former brokerage and banking segments. For our retail segment, the realignment integrated the management and operations of investing, trading, cash management and lending product and service offerings, including margin loan activities, and stock plan administration products and services for the retail customer. For our institutional segment, the realignment integrated the management and operations of balance sheet management, market-making and global execution and settlement services businesses, with a focus on creating greater integration within our institutional segment and stronger leverage of our retail segment.

Expensing of Employee Stock Options

During the second half of the year, we early adopted the accounting provisions requiring expensing of all employee stock options that continue to vest during the period and for all future grants of employee stock options. Pre-tax compensation and benefits expense increased by \$14.1 million in 2005 as a result of adopting the new accounting standard.

[Table of Contents](#)

Significant Events in 2004

Sale of Our ATM Business

In June 2004, we completed the sale of our ATM business for \$107.0 million. We sold the ATM network as we determined that, although it was an important distribution channel, its direct ownership was not essential to providing this customer benefit and that the capital could be better used elsewhere in the Company.

Continued Use of the SDA

We began sweeping brokerage customers' excess cash balances to the Bank in late 2003. In 2004, we continued sweeping funds and grew the SDA balance by \$1.9 billion to \$6.2 billion at December 31, 2004. Further, we increased the balance to \$7.7 billion at December 31, 2005.

Repurchase of Common Stock

Through Board approved plans, we repurchased \$175.8 million, or 13.7 million shares of our common stock during 2004, as the Board determined that the use of cash to reduce outstanding common stock was likely to create long-term value for our shareholders.

Summary Financial Results (dollars in millions, except per share amounts)

	As of or For the Year Ended December 31,			Variance
	2005	2004	2003	2005 vs. 2004
Total net revenues	\$ 1,703.8	\$ 1,482.9	\$ 1,342.7	15%
Net income	\$ 430.4	\$ 380.5	\$ 203.0	13%
Diluted earnings per share	\$ 1.12	\$ 0.99	\$ 0.55	13%
Operating margin (\$)	\$ 649.8	\$ 495.8	\$ 189.1	31%
Operating margin (%)	38%	33%	14%	5%

Highlights of 2005 include:

- Net interest income increased 37% compared with 2004. The continued growth in customer cash and deposits is the primary factor that led to the increase in net interest income. Generally, customer cash and deposits are our lowest cost sources of funds. This increase was also driven by higher interest-earning assets.
- Loans receivable, net increased \$7.9 billion, or 69% compared with 2004. Loans receivable, net growth was focused on two core products consisting of \$3.4 billion growth in mortgages and \$4.6 billion growth in Home Equity Lines of Credit ("HELOC"). Our consumer loan products are down \$0.1 billion as we focused our efforts on growing mortgage loan products.
- Our significant growth during 2005 has not impacted our asset quality. The ratio of nonperforming loans, net to total loans, net remained relatively flat at 0.18% at December 31, 2005 versus 0.17% at December 31, 2004. We expect this ratio to increase over time as new loans season.
- Customer cash and deposits, which include deposits, free credits held and money market balances held in outside funds, increased by \$10.1 billion over December 31, 2004. Retail deposits increased \$3.5 billion, or 29%. The increase in deposits was mainly driven by our acquisitions and organic growth in the majority of our deposit products: SDA, money market and certificates of deposit accounts. Money market balances held in outside funds increased by \$7.0 billion due to the acquisitions. We believe this growth is a result of our acquisitions and the introduction of E*TRADE Complete Cash Optimizer, as well as an overall focus on price, rate and functionality for our retail customers.
- DARTs increased 17% and 9% compared with 2004 and 2003, respectively. The increases were driven by a combination of our acquisitions during 2005 and an overall focus on price, functionality and service for our retail trading customers. In addition, market performance also played a role in our performance.

[Table of Contents](#)

Balance Sheet Highlights

Total assets were \$44.6 billion at December 31, 2005, up \$13.5 billion from December 31, 2004. This increase was primarily attributable to a 69%, or \$7.9 billion increase in loans receivable, net, and a \$4.1 billion increase in brokerage receivables, net. Interest-earning assets of \$41.1 billion increased 38% compared to December 31, 2004. Interest-earning assets include cash and equivalents, cash and investments segregated, brokerage receivables, trading and investment securities, loans receivable, net, loans held-for-sale, net and Federal Home Loan Bank ("FHLB") stock.

Loans receivable, net were \$19.4 billion at December 31, 2005 and \$11.5 billion at December 31, 2004. This increase was driven by a targeted effort to grow our residential mortgage loan portfolios including one- to four-family, HELOC and second mortgage loans. The one- to four-family loans portfolio grew \$3.4 billion and the HELOC and second mortgage loans portfolio grew \$4.6 billion during 2005. Loans receivable, net represented 44% of total assets at December 31, 2005 up from 37% at December 31, 2004. The growth in loans was primarily funded by growth in deposits and other borrowings.

Brokerage receivables, net were \$7.2 billion at December 31, 2005, up from \$3.0 billion at December 31, 2004. A portion of the increase in brokerage receivables, net resulted from our acquisitions during the year. Excluding acquired balances, brokerage receivables grew by a notable 33%. Brokerage receivables include margin loans of \$5.7 billion at December 31, 2005. Brokerage payables were \$7.3 billion at December 31, 2005, up from \$3.6 billion at December 31, 2004, predominantly the result of acquisitions during 2005.

Deposits were \$15.9 billion, up 30% or \$3.6 billion during 2005. The increase was driven by mostly organic growth in certificates of deposit and money market accounts as well as by both organic growth and conversions into the SDA. Deposits provide one of our lowest cost sources of funding and are an important contributor to our net interest income growth. We believe this overall growth is a result of our introduction of E*TRADE Complete Cash Optimizer as well as an overall focus on price, rate and functionality for our retail customers.

Borrowings at December 31, 2005 were up \$5.0 billion including securities sold under agreements to repurchase, other borrowings by Bank subsidiary and long-term notes compared to December 31, 2004. Securities sold under agreements to repurchase were up \$1.2 billion compared to December 31, 2004. Other borrowings by Bank subsidiary were up \$2.4 billion during 2005, primarily from growth in FHLB advances. The Bank's primary sources of wholesale funding are from FHLB advances and securities sold under agreements to repurchase. The increase in Bank borrowings funded the increase in loans receivable, net. Funding sources are selected based on pricing, liquidity and capacity during each period.

Long-term notes increased by \$1.4 billion. Proceeds from note issuances were used to partially fund our BrownCo and Harris*direct* acquisitions. Long-term notes issued included senior notes and mandatory convertible notes which increased \$1.0 billion and \$0.4 billion, respectively compared to December 31, 2004.

EARNINGS OVERVIEW

2005 Compared to 2004

Net income from continuing operations for 2005 was \$446.2 million, an increase of \$64.4 million or 17% compared to 2004. In 2005, we produced noteworthy asset and deposit growth. For the year, our revenue growth of 15% exceeded expense growth of 7% and resulted in an operating margin of 38%, up from 33% in 2004. Growth in revenues also was attributed to improved interest rate spread and higher net interest income from a larger balance sheet. The following sections describe in more detail the changes in key operating factors, and other changes and events that have affected our consolidated net revenues, expenses excluding interest and other income.

Table of Contents

Revenues

The components of net revenues and the resulting variances were as follows (dollars in thousands):

	Year Ended December 31,			Variance	
				2005 vs. 2004	
	2005	2004	2003	\$ Amount	%
Revenues:					
Commissions	\$ 458,834	\$ 431,638	\$ 422,709	\$ 27,196	6 %
Principal transactions	99,336	126,893	107,601	(27,557)	(22)%
Gain on sales of loans and securities, net	98,858	140,718	247,654	(41,860)	(30)%
Service charges and fees	135,314	97,575	110,058	37,739	39 %
Other revenues	94,419	89,077	86,514	5,342	6 %
Interest income	1,650,264	1,145,597	892,832	504,667	44 %
Interest expense	(779,164)	(510,455)	(486,129)	(268,709)	(53)%
Net interest income	871,100	635,142	406,703	235,958	37 %
Provision for loan losses	(54,016)	(38,121)	(38,523)	(15,895)	(42)%
Net interest income after provision for loan losses	817,084	597,021	368,180	220,063	37 %
Total net revenues	\$1,703,845	\$1,482,922	\$1,342,716	\$ 220,923	15 %

The table below presents revenues as a percentage of total revenue. The primary driver of revenue has shifted from commissions to net interest income after provision for loan losses. This shift is representative of our diversification of revenue streams. Net interest income continues to be our largest source of revenue and now represents 48% of total net revenues. Net interest income is earned primarily through lending, which includes margin, real estate and consumer loans, and by holding low cost deposits.

	Year Ended December 31,			Variance
	2005	2004	2003	2005 vs. 2004
Revenues:				
Commissions	27%	29%	32%	(2)%
Principal transactions	6	9	8	(3)
Gain on sales of loans and securities, net	6	9	18	(3)
Service charges and fees	8	7	8	1
Other revenues	5	6	7	(1)
Net interest income after provision for loan losses	48	40	27	8
Total net revenues	100%	100%	100%	— %

Commissions

Commissions revenue increased 6% to \$458.8 million in 2005 from \$431.6 million in 2004. The average commission per trade is impacted by the mix between and within our domestic and international businesses. The primary factors that affect our commissions are DARTs and average commissions per trade. Each business has a different pricing structure, unique to its customer base and local market practices, and as a result, a change in the executed trades between these businesses impacts average commission per trade. Each business also has different trade types (e.g. equities, options, fixed income and mutual funds) that can have different commission rates and as a result, changes in the mix of trade types within these businesses impact average commission per trade.

Retail commissions increased \$10.8 million compared to 2004 due to higher volumes (DARTs), offset by lower average commission per trade. Increased market pressures, strategic pricing and a change in the composition of our retail customer base have resulted in lower average commission per trade, down 12% from

[Table of Contents](#)

2004. Our retail customers are divided into three categories: Active Trader, Mass Affluent and Main Street Investor. Each segment receives product pricing based on its service usage level, with Active Traders receiving the most favorable pricing. During 2005, growth in Active Trader and Mass Affluent customer trading volumes outweighed Main Street Investor trading volumes, contributing to our lower average commission per trade.

Due to the factors described above, our growth in DARTs by 17% has equated to only a 3% increase in retail commissions revenue during 2005; however, our business model derives revenue from not only trades but the full relationship with the customer, especially customers who deposit cash with us. Our average customer purchases at least 2 products or services from our suite of retail products. So while retail commissions increased 3% during 2005, total revenue increased 15%.

Institutional commissions increased to \$119.2 million in 2005 from \$102.7 million in 2004. The increase reflects growth in wholesale trading. In early 2005, an institutional wholesale trading group was created to trade large blocks of stock for institutional customers. We provide institutional customers with global trading and settlement services, as well as worldwide access to research provided by third parties, in exchange for commissions based on negotiated rates, which differ by customer.

Principal Transactions

Principal transactions decreased 22% in 2005 compared to 2004. Principal transactions decreased due to lower market-making volumes and market volatility. Principal transactions primarily consist of revenues from market-making. As such, our principal transactions revenues are influenced by overall trading volumes, the number of stocks for which we act as a market maker, the trading volumes of those specific stocks and the trading performance of our proprietary trading activities.

Table of Contents

Gain on Sales of Loans and Securities, net

As shown in the following table, gain on sales of loans and securities, net decreased 30% to \$98.9 million in 2005, compared to 2004 (dollars in thousands):

	Year Ended December 31,			Variance	
				2005 vs. 2004	
	2005	2004	2003	\$ Amount	%
Gain (loss) on sales of originated loans:					
Mortgage loans	\$ 39,161	\$ 64,810	\$187,655	\$(25,649)	(40)%
Consumer loans ⁽¹⁾	15,686	17,906	(37,262)	(2,220)	(12)%
Gain on sales of originated loans	54,847	82,716	150,393	(27,869)	(34)%
Gain (loss) on sales of loans held-for-sale, net:					
Gain (loss) on sales of loans held-for-sale	(3,210)	4,557	33,588	(7,767)	*
Gain (loss) on hedges	2,282	(6,625)	(23,168)	8,907	*
Loss on loan prepayments	(280)	(1,379)	(10,234)	1,099	80 %
Gain (loss) on sales of loans held-for-sale, net	(1,208)	(3,447)	186	2,239	65 %
Gain on sales of loans, net	53,639	79,269	150,579	(25,630)	(32)%
Gain on sales of securities, net:					
Gain on sales of securities	84,577	75,408	97,780	9,169	12 %
Impairment	(38,343)	(13,959)	(2,611)	(24,384)	*
Gain (loss) on hedges	(1,015)	—	1,906	(1,015)	*
Gain on sales of securities, net	45,219	61,449	97,075	(16,230)	(26)%
Total gain on sales of loans and securities, net	\$ 98,858	\$140,718	\$247,654	\$(41,860)	(30)%

* Percentage not meaningful

(1) Consumer loans originated by our retail segment and sold to our institutional segment were sold at an arm's length transfer price. The gains (losses) associated with our retail segment were reclassified to discontinued operations and the amounts related to our institutional segment remained in continuing operations.

The decline in the total gain on sales of loans and securities, net was primarily due to lower gains on sales of originated mortgage loans. This was the result of an overall decline in mortgage industry volumes as interest rates continued to rise during 2005.

Impairment losses in 2005 relate primarily to interest-only securities and to a lesser extent certain investment securities. Impairments on certain interest-only securities were the result of short-term movements in interest rates. Impairments on investment securities were the result of credit losses in certain investment securities secured by manufactured housing loans. These impairments were not indicative of a specific issue with our investments, but rather an overall deterioration in the manufactured housing loan market.

Service Charges and Fees

Service charges and fees increased 39% to \$135.3 million in 2005 compared to \$97.6 million in 2004. The 2005 increase was primarily due to increases in account service fees of \$27.5 million in 2005. The increase in account service fees is due to an increase in account service fees charged from \$25 to \$40 per quarter, beginning the first quarter of 2005, for customers who did not meet certain criteria for balance and/or activity levels. Service charges and fees represent account service fees, advisory fees, servicing fee income and other customer service fees. Advisory fees increased by \$5.2 million in 2005 compared to 2004 resulting from our acquisitions of investment advisory firms. Servicing rights impairment decreased \$4.6 million due to lower impairment writedowns in 2005. This decrease resulted from the overall rise in interest rates during 2005.

[Table of Contents](#)

Other Revenues

Other revenues increased 6% to \$94.4 million in 2005 compared to 2004. The increases are due to increased options transaction fees and 12b-1 fees, offset by decreases in proprietary fund revenues relating to the closure of certain of our proprietary funds. Other revenues include foreign exchange margin revenues, stock plan administration products revenues and other revenues ancillary to our retail customer transactions.

Net Interest Income

Net interest income increased 37% to \$871.1 million in 2005 compared to 2004. The increase in net interest income is primarily due to an increase in interest-earning assets and margin loan balances. Net interest income represents interest earned on interest-earning assets (primarily loans receivable and mortgage-backed and related available-for-sale securities), margin loans, stock borrow balances, cash required to be segregated under regulatory guidelines and fees on customer assets invested in money market accounts, net of interest paid on interest-bearing banking liabilities (primarily customer deposits, repurchase agreements, other borrowings and advances from the FHLB), paid to customers on certain credit balances and to banks and other broker-dealers through our brokerage subsidiary's stock loan program. Net interest spread is the difference between the weighted-average yields earned on interest-earning banking assets and the weighted-average rates paid on interest-bearing banking liabilities.

In recent years, we have managed our interest rate risk to achieve a minimum to moderate risk profile with limited exposure to earnings volatility resulting from interest rate fluctuations. Our actions have created a balance sheet characterized by strong asset quality and flexibility to take advantage of, where appropriate, changing interest rates and to adjust to changing market conditions. We anticipate that interest rates will continue to rise in 2006 and that the overall impact of a rise in long-term interest rates will be beneficial to net interest income. We expect a negative impact on net interest spread if the interest rate yield curve remains flat or inverts. We believe growth in customer cash balances and customer margin balances will offset this risk of a decline in net interest spread.

Interest income and interest expense reflect income and expense on hedges that qualify for hedge accounting under Statement of Financial Accounting Standards ("SFAS") No. 133, *Accounting for Derivative Instruments and Hedging Activities*. The following table shows the income (expense) on hedges that are included in interest income and expense (dollars in thousands):

	Year Ended December 31,			Variance	
	2005	2004	2003	2005 vs. 2004	
				\$ Amount	%
Interest income:					
Interest income, gross	\$1,662,745	\$1,162,721	\$ 931,320	\$ 500,024	43 %
Hedge expense	(12,481)	(17,124)	(38,488)	4,643	27 %
Interest income, net	<u>1,650,264</u>	<u>1,145,597</u>	<u>892,832</u>	<u>504,667</u>	<u>44 %</u>
Interest expense:					
Interest expense, gross	(695,634)	(313,988)	(310,622)	(381,646)	(122)%
Hedge expense	(83,530)	(196,467)	(175,507)	112,937	57 %
Interest expense, net	<u>(779,164)</u>	<u>(510,455)</u>	<u>(486,129)</u>	<u>(268,709)</u>	<u>(53)%</u>
Net interest income	<u>\$ 871,100</u>	<u>\$ 635,142</u>	<u>\$ 406,703</u>	<u>\$ 235,958</u>	<u>37 %</u>

Provision for Loan Losses

Provision for loan losses increased \$15.9 million to \$54.0 million in 2005 from 2004. The increase in the provision for loan losses is primarily related to growth in the residential mortgage loan portfolio. In addition,

[Table of Contents](#)

higher consumer loan related losses resulted from higher losses on RV and higher credit card bankruptcy activity as a significant number of customers filed for personal bankruptcy before the enactment of the new bankruptcy laws in October 2005. We expect provision on our consumer loans to decrease in 2006, as the increase in 2005 was primarily due to the enactment of the bankruptcy laws. We expect this to be more than offset by increased provision in the mortgage portfolio due to planned growth in 2006 as well as seasoning of the purchases made in 2005.

During the third quarter of 2005, Hurricane Katrina inflicted significant damage to the gulf coast region. We currently do not estimate any related significant loss exposure in our loan portfolio. We have mortgage loans approximating \$582 million in the FEMA-designated impact areas. Many of the loans are to borrowers where repayment ability has not yet been determined to be diminished, or are in areas where the properties may have suffered little, to no damage or may not yet have been inspected. Of the \$582 million in loans, approximately 99% were still performing as of December 31, 2005. We currently do not estimate any significant exposure from this natural disaster and will continue to refine our estimates as more information becomes available.

See “Balance Sheet Overview” for additional information regarding factors impacting the provision for loan losses.

Expenses Excluding Interest

As shown in the following table, expenses excluding interest increased 7% to \$1.1 billion in 2005 compared to 2004 (dollars in thousands):

	Year Ended December 31,			Variance	
				2005 vs. 2004	
	2005	2004	2003	\$ Amount	%
Expenses excluding interest:					
Compensation and benefits	\$ 380,803	\$350,440	\$ 364,598	\$ 30,363	9 %
Occupancy and equipment	69,089	69,572	78,381	(483)	(1)%
Communications	82,485	69,674	73,650	12,811	18 %
Professional services	75,237	67,747	55,716	7,490	11 %
Commissions, clearance and floor brokerage	140,806	129,696	124,868	11,110	9 %
Advertising and marketing development	105,935	62,155	57,887	43,780	70 %
Servicing and other banking expenses	52,326	35,971	37,575	16,355	45 %
Fair value adjustments of financial derivatives	4,892	(2,299)	15,338	7,191	*
Depreciation and amortization	74,981	77,892	85,615	(2,911)	(4)%
Amortization of other intangibles	43,765	19,443	24,758	24,322	125 %
Facility restructuring and other exit activities	(30,017)	15,688	134,187	(45,705)	*
Other	53,751	91,144	101,042	(37,393)	(41)%
Total expenses excluding interest	\$1,054,053	\$987,123	\$1,153,615	\$ 66,930	7 %

* Percentage not meaningful

The increase in expenses was primarily driven by the following:

- Stock option expense increased by \$14.1 million compared to 2004 as a result of adopting the new accounting standard requiring the fair value of share-based compensation to be included in compensation expense. See Note 21 to the Consolidated Financial Statements for more information.
- Advertising and marketing costs increased by \$43.8 million due to the launch of E*TRADE Complete, as well as an increase in our acquisition-related marketing and customer retention marketing.
- Servicing costs increased due to growth in our loan portfolio which increased 69% compared to 2004.
- Intangible amortization increased primarily due to the impairment of our OTC specialist book.

Table of Contents

In addition, the growth in expenses was partially offset by the following:

- The sale of the Consumer Finance servicing business which resulted in a credit to facility restructuring and other exit activities of \$35.5 million. See dispositions and Notes 3 and 4 to the Consolidated Financial Statements for more information.
- The favorable settlement of the Nomura litigation reduced other expenses by \$35.0 million. See Legal Proceedings for more details regarding the settlement.

Other Income

As shown in the following table, other income decreased 62% to \$26.3 million in 2005 compared to 2004 (dollars in thousands):

	Year Ended December 31,			Variance	
	2005	2004	2003	2005 vs. 2004	
				\$ Amount	%
Other income:					
Corporate interest income	\$ 11,043	\$ 6,692	\$ 6,550	\$ 4,351	65 %
Corporate interest expense	(73,956)	(47,525)	(45,596)	(26,431)	(56)%
Gain on sale and impairment of investments	83,144	128,111	147,874	(44,967)	(35)%
Loss on early extinguishment of debt	—	(22,972)	—	22,972	*
Equity in income of investments and venture funds	6,103	4,382	9,132	1,721	39 %
Total other income	\$ 26,334	\$ 68,688	\$117,960	\$(42,354)	(62)%

* Percentage not meaningful

Other income decreased \$42.4 million in 2005 compared to 2004 primarily due to lower gain on the sale and impairment of investments of \$45.0 million and higher corporate interest expense of \$26.4 million resulting from an increase in acquisition-related senior notes in 2005, partially offset by the \$23.0 million loss on early extinguishment of debt in 2004. During 2005, we sold shares of our investments in Softbank Investment Corporation ("SBI"), Archipelago Holdings, Ameritrade Holding Corporation and International Stock Exchange resulting in gains of \$82.7 million. During 2004, gain on sale and impairment of investments was primarily related to gain on sale of our investments in SBI in the amount of \$130.6 million. The \$49.3 million decrease in other income in 2004 compared to 2003 resulted from the loss on early extinguishment of debt of \$23.0 million and lower gain on sale and impairment of investments of \$19.8 million in 2003.

Income Tax Expense

Income tax expense from continuing operations increased 26% to \$229.8 million in 2005 from 2004. The increase in income tax expense is principally related to the increase in pre-tax income over the comparable periods. Our effective tax rate for 2005 was 34.0% compared to 32.2% for 2004. The lower effective tax rate in 2004 was principally due to tax benefits recognized in 2004 in connection with the sale of partnership interests which generated an excess tax basis adjustment and the closure of several open IRS tax issues. We currently expect our 2006 effective tax rate to increase to approximately 37%. For additional information, see Note 18 to the Consolidated Financial Statements.

Discontinued Operations

The net loss from discontinued operations increased by \$16.1 million in 2005 compared to 2004. Gain on the disposal of discontinued operations, net was \$4.0 million in 2005 resulting from the sale of the Consumer Finance origination business of \$6.4 million offset by a \$2.4 million loss related to the institutional proprietary trading unit. Loss from discontinued operations, net decreased by \$11.3 million in 2005 compared to 2004, due to

[Table of Contents](#)

lower operating losses in the Consumer Finance origination business of \$7.4 million. In addition, losses from the E*TRADE Professional business were down \$2.0 million and losses in the E*TRADE Access business were down \$1.9 million compared to 2004.

2004 Compared to 2003

Overview

Net income from continuing operations grew from \$200.5 million for 2003 to \$381.8 million for 2004. This growth was achieved due to higher revenues and lower expenses excluding interest. Revenues grew due to higher net interest income, which more than offset the decline in gain on sales of loan and securities, net. Net interest income was higher due to overall growth in our balance sheet coupled with increased SDA balances, providing us lower cost funds. The decline in gain on sales of loans and securities, net, was due to a slowing mortgage market and therefore, lower gains on loan sales, as 2003 was a strong year for mortgage loan sales. Expenses excluding interest were down mainly due to lower facility restructuring and other exit activities. We established a new restructuring plan in 2003, with only minor adjustments to such plans in 2004.

Revenues

Commissions

Commissions revenue increased 2% to \$431.6 million in 2004 from \$422.7 million in 2003. Retail commissions increased 4%, or \$12.8 million compared to 2003 due to higher DARTs offset by lower average commission per trade. Increased market pressures and new retail pricing in 2004 impacted our retail average commission per trade down 5% from 2003. In early 2004, we introduced Priority E*TRADE, targeted at Mass Affluent customers and created a third tier in our retail price structure. As a result, we saw growth in DARTs of 9%, while retail commissions increased 4%. Institutional commissions decreased 4% to \$102.7 million from \$106.6 million in 2003. The slight decrease in institutional commission revenues was mainly driven by the mix of customers and related pricing.

Principal Transactions

Principal transactions increased 18% in 2004 compared to 2003, due to higher market-making revenues due to significantly increased volume from bulletin board stocks and to a lesser extent listed stocks, coupled with an increase in revenue capture on OTC-traded shares.

Gain on Sales of Loans and Securities, net

Gain on sales of loans and securities, net decreased 43% in 2004 compared to 2003, due to a decline in gain on sales of loans, net of \$71.3 million and gains on sales of securities of \$35.6 million. The decrease in sales of originated loans was due to reductions in the volume of originated loans resulting from higher interest rates in 2004 over 2003. Gains on sales of securities, net reflected a decline in the gain from sales of interest-only and mortgage-backed securities. In 2004, we also recognized other-than-temporary impairments on the value of our interest-only and asset-backed securities.

Service Charges and Fees

Service charges and fees decreased 11% to \$97.6 million in 2004 compared to \$110.1 million in 2003. The decrease was primarily due to a decline in account service fees of approximately \$14.5 million. The decrease in account service fees from 2003 to 2004 was primarily due to a decrease in the number of accounts that were charged account service fees as customers either met the specified balance and/or activity level, closed their accounts or had their account value taken to \$0 as a result of the account service fee.

Table of Contents

Other Revenues

Other revenues increased 3% to \$89.1 million in 2004 compared to \$86.5 million in 2003. The increase is primarily due to a \$6.0 million increase in payments for order flow from an overall increase in trades including option trades. Payments for order flow are payments for orders which are sent between broker-dealers.

Net Interest Income

Net interest income increased 56% to \$635.1 million in 2004 compared to 2003. The increase in net interest income is primarily due to an increase in average interest-earning banking assets, margin loan balances and growth in customer deposits. Net interest income represents interest earned on interest-earning banking assets (primarily loans receivable and mortgage-backed and related available-for-sale securities), margin loans, stock borrow balances, cash required to be segregated under regulatory guidelines and fees on customer assets invested in money market accounts, net of interest paid on interest-bearing banking liabilities (primarily customer deposits, repurchase agreements, other borrowings and advances from the FHLB), paid to customers on certain credit balances and to banks and other broker-dealers through our brokerage subsidiary's stock loan program. Net interest spread is the difference between the weighted-average yields earned on interest-earning banking assets less the weighted-average rate paid on interest-bearing banking liabilities.

Provision for Loan Losses

Provision for loan losses decreased \$0.4 million to \$38.1 million in 2004 from \$38.5 million in 2003. The \$12.4 million decrease in the provision for consumer loans was due to the continued seasoning and lower charge-offs related to our consumer loan portfolio, which consisted primarily of RVs, marine and automobiles. The \$12.0 million increase related to real estate and home equity loans was driven by the purchase of \$2.1 billion of unseasoned HELOC, which generally have higher delinquencies and charge-offs than one-to-four family loans.

Expenses Excluding Interest

In 2004, total expenses excluding interest decreased 14% to \$987.1 million from \$1,153.6 million in 2003. The primary driver of this decrease was due to significantly reduced facility restructuring and other exit activities, down \$118.5 million. In mid-2003, we initiated the 2003 Restructuring Plan, which was focused on creating additional operating leverage by exiting unprofitable product offerings and consolidating operations. The 2003 Restructuring Plan also had a positive impact on reduced costs in 2004 as compensation and benefits, occupancy and equipment and amortization of other intangibles declined in 2004 due to our efforts in 2003.

Discontinued Operations

The net loss from discontinued operations was \$1.3 million in 2004, compared to a net gain of \$2.5 million in 2003. The net loss in 2004 reflected both losses on the operations of our discontinued businesses of \$32.7 million, nearly offset by a one-time \$31.4 million gain on disposal of discontinued operations, recognized from our sale of the E*TRADE Access business. Net losses from discontinued operations were higher in 2004 due to operating losses of the Consumer Finance origination business, which was later sold in 2005.

[Table of Contents](#)

SEGMENT RESULTS REVIEW

Retail

As shown in the following table, retail segment income increased 49% to \$458.8 million in 2005 compared to 2004 (dollars in thousands, except for key metrics):

	Year Ended December 31,			Variance	
				2005 vs. 2004	
	2005	2004	2003	\$ Amount	%
Retail segment income:					
Commissions	\$ 339,654	\$328,889	\$316,092	\$ 10,765	3 %
Gain on sales of loans and securities, net	63,705	93,694	235,064	(29,989)	(32)%
Service charges and fees	116,102	84,445	104,531	31,657	37 %
Other revenues	112,836	106,457	104,157	6,379	6 %
Net interest income	445,124	322,278	133,970	122,846	38 %
Net segment revenues	1,077,421	935,763	893,814	141,658	15 %
Total segment expenses	618,664	628,146	769,318	(9,482)	(2)%
Total retail segment income	\$ 458,757	\$307,617	\$124,496	\$ 151,140	49 %
Key Metrics:					
DARTs	97,740	83,643	77,052	14,097	17 %
Average commission per trade	\$ 13.82	\$ 15.63	\$ 16.41	\$ (1.81)	(12)%
Average margin balance (in millions)	\$ 2,767	\$ 2,048	\$ 1,219	\$ 719	35 %
Retail client assets (in billions)	\$ 178.5	\$ 100.0	\$ 82.9	\$ 78.5	79 %
Products per customer	2.1	1.9	1.7	0.2	11 %

Our retail segment generates revenues and earnings through investing, trading, cash management and lending relationships with retail customers. These relationships drive essentially five sources of revenues including commissions, gain on sales of loans and securities, net, service charges and fees, other revenues and net interest income. This segment also includes results from our stock plan administration products and services, as we are ultimately servicing a retail customer through these corporate relationships. Our geographically dispersed retail accounts grew by 20% in 2005. A portion of this growth is attributable to our acquisitions of BrownCo and Harrisdirect during the fourth quarter of 2005. As of December 31, 2005, we had approximately 3.6 million active brokerage accounts and 0.7 million active banking accounts.

The increase in retail segment income in 2005 from 2004 was due to an increase in net revenue primarily driven by an increase in net interest income, offset by lower gains on sales of loans and securities, net. DARTs increased 17% in 2005 compared to 2004. While the increase in DARTs did not produce a corresponding increase in commission revenues, these customers did help drive the increase in cash deposits held in SDA accounts. Higher SDA and deposit balances translate into a lower cost of funds as deposits increase in comparison to other borrowings. Retail net interest income in 2005 increased \$122.8 million compared to 2004. The increase was driven by an increase in both average interest-earning assets and the net interest spread earned. Growth in average margin balances continues to be strong for the retail segment, with average balances increasing 35%, to \$2.8 billion in 2005 compared to \$2.0 billion in 2004 including the impact of our acquisitions. Other key drivers of the increase in retail segment income were growth in the average balance of loans and deposits which increased 54% and 11%, respectively over last year. Service charges and fees increased by 37% in 2005 compared to 2004, primarily due to an increase in account service fees. Offsetting these positive variances were lower gains on the sale of loans and securities, net of \$30.0 million due to the lower gains on the sale of mortgage loans and securities impairment.

The increase in retail segment income in 2004 from 2003 was due to an increase in net revenues and reduced expenses. Net revenue growth was largely driven by an increase in net interest income and, to a lesser

Table of Contents

extent, commissions, offset by declines in gain on sales of loans and securities, net and service charges and fees. Retail net interest income in 2004 increased \$188.3 million, or 141%. This increase was driven by increases in average margin balances up 68% to \$2.0 billion from \$1.2 billion in conjunction with the introduction of our SDA in 2003 which reduced the cost of funds, thus increasing net interest income. The reductions in gains on sales of loans and securities, net are attributed to lower loan sale volumes. In the retail expenses, facility restructuring and other exit activities declined as we incurred significant charges in 2003 related to our 2003 Restructuring Plan.

Institutional

As shown in the following table, institutional segment income increased 2% to \$191.0 million in 2005 compared to 2004. (dollars in thousands, except for key metrics):

	Year Ended December 31,			Variance	
	2005	2004	2003	2005 vs. 2004	
				\$ Amount	%
Institutional segment income:					
Commissions	\$119,180	\$102,749	\$106,617	\$ 16,431	16 %
Other revenues	163,923	203,731	150,455	(39,808)	(20)%
Net interest income after provision	372,122	274,743	234,210	97,379	35 %
Net segment revenues	655,225	581,223	491,282	74,002	13 %
Total segment expenses	464,190	393,041	426,677	71,149	18 %
Total institutional segment income	\$191,035	\$188,182	\$ 64,605	\$ 2,853	2 %
Key metrics:					
Average interest-earning banking assets (in millions)	\$ 27,948	\$ 22,332	\$ 17,165	\$ 5,616	25 %
Total non-performing loans, net, as a % of total gross loans held-for-investment	0.18%	0.17%	0.30%	—	0.01 %
Average revenue capture per 1,000 equity shares	\$ 0.458	\$ 0.341	\$ 1.180	\$ 0.117	34 %

Our institutional segment generates revenues and earnings from balance sheet management activities, market-making and global execution and settlement services.

The \$2.9 million increase in institutional segment income in 2005 was attributable to a \$74.0 million increase in revenues offset by a \$71.1 million increase in expenses. The increase in revenues resulted from higher net interest income due to higher average balances of interest-earning banking assets. The increase in net interest income was partially driven by a shift from lower yielding securities to higher yielding loans. The increase in expenses was driven by an increase in intangible amortization, compensation and benefits expense and commissions, clearance and floor brokerage due to an increase in overall trading volumes and higher servicing expenses related to an increase in loans serviced. Intangible amortization increased primarily due to the impairment of our OTC Specialist Book. Compensation and benefits expense increased due to our initial adoption of expensing options under SFAS No 123(R) and increases in volume- and performance-based compensation.

The increase in institutional segment income in 2004 from 2003 was due to an increase in net revenues and a reduction in expenses. The increase in net segment revenues was due to increases in net interest income of \$40.1 million, gain on sales of loans and securities, net of \$34.4 million and principal transactions of \$19.3 million offset by a decline in commissions of \$3.9 million. The increase in net interest income was the result of an increase in average interest-earning banking assets by 30% and yield remaining flat, with a 29% increase in average interest-bearing banking liabilities coupled with cost of funds declining 57 basis points. The decline in

[Table of Contents](#)

expenses from 2003 to 2004 was largely driven by the decline in facility restructuring and other exit activities as we recorded significant charges in 2003 related to our 2003 Restructuring Plan.

BALANCE SHEET OVERVIEW

The following table sets forth the significant components of our Consolidated Balance Sheets (dollars in thousands):

	December 31,		Variance
	2005	2004	2005 vs. 2004
Assets:			
Cash and equivalents	\$ 844,188	\$ 939,906	(10)%
Brokerage receivables, net	7,174,175	3,034,548	136 %
Trading securities	146,657	593,245	(75)%
Available-for-sale mortgage-backed and investment securities	12,564,738	12,543,818	— %
Loans receivable, net	19,424,895	11,505,755	69 %
Loans held-for-sale, net	87,371	279,280	(69)%
Other assets	4,325,662	2,136,031	103 %
Total assets	\$44,567,686	\$31,032,583	44 %
Liabilities and shareholders' equity:			
Brokerage payables	\$ 7,315,659	\$ 3,618,892	102 %
Deposits	15,948,015	12,302,974	30 %
Securities sold under agreements to repurchase	11,101,542	9,897,191	12 %
Other borrowings by Bank subsidiary	4,166,592	1,760,732	137 %
Corporate debt	2,022,701	585,617	245 %
Other liabilities	613,617	638,975	(4)%
Total liabilities	41,168,126	28,804,381	43 %
Shareholders' equity	3,399,560	2,228,202	53 %
Total liabilities and shareholders' equity	\$44,567,686	\$31,032,583	44 %

Total assets increased 44%, or \$13.5 billion during 2005. This increase was driven primarily by loans receivable, net up \$7.9 billion and brokerage receivables up \$4.1 billion. Other assets increased due to goodwill and intangibles added as a component of the *Harrisdirect* and *BrownCo* acquisitions. Excluding the initial balance of brokerage receivables at acquisition, organically generated brokerage receivables increased by 33%. Deposits increased \$3.6 billion due to higher SDA and money market deposits. Our growth in borrowings including securities sold under agreements to repurchase relates to the funding of loan growth. Corporate debt increased due to the funding of our acquisitions in 2005.

[Table of Contents](#)

Required Statistical Disclosure by Bank Holding Companies

The following table shows where you can find certain tables containing certain required Bank Holding Company disclosures, most of which are included in the Required Financial Data section, beginning on page 54.

Required Disclosure*	Page
<i>Distribution of Assets, Liabilities and Shareholder's Equity; Interest Rates and Interest Differential</i>	
Average Balance Sheets and Analysis of Net Interest Income	54
Net Interest Income—Volumes and Rates Analysis	55
<i>Investment Portfolio</i>	
Investment Portfolio—Book Value and Market Value	58
Investment Portfolio Maturity	59
<i>Loan Portfolio</i>	
Loans by Type	56
Loan Maturities	57
Loan Sensitivities	57
<i>Risk Elements</i>	
Nonaccrual, Past Due and Restructured Loans	42
Past Due Interest	42
Policy for Nonaccrual	42
<i>Potential Problem Loans</i>	43
<i>Summary of Loan Loss Experience</i>	
Analysis of Allowance for Loan Losses	40
Allocation of the Allowance for Loan Losses	41
<i>Deposits</i>	
Average Balance and Average Rates Paid	44
Time Deposit Maturities	107
Time Deposits in Excess of \$100,000	107
<i>Return of Equity and Assets</i>	54
<i>Short-Term Borrowings</i>	60

* Note that these disclosures are at the Bank Holding Company level and do not include brokerage and corporate amounts.

Table of Contents

An analysis of changes in certain balance sheet components follows:

Loans Receivable, net

Loans receivable, net are summarized as follows (dollars in thousands):

	December 31,		Variance
	2005	2004	2005 vs. 2004
Real estate loans:			
One- to four-family	\$ 7,091,664	\$ 3,669,594	93 %
HELOC, second mortgage and other	8,106,820	3,618,740	124 %
Consumer and other loans:			
RV	2,692,055	2,542,645	6 %
Marine	752,645	720,513	4 %
Automobile	235,388	583,354	(60)%
Credit card	188,600	203,169	(7)%
Other	97,436	19,493	400 %
Unamortized premiums, net	323,573	195,928	65 %
Allowance for loan losses	(63,286)	(47,681)	(33)%
Total loans receivable, net	\$19,424,895	\$11,505,755	69 %

Loans receivable, net represented 44% of total assets at December 31, 2005 and 37% of total assets at December 31, 2004. The increase of \$7.9 billion to \$19.4 billion at December 31, 2005 was due to a targeted effort to grow our one- to four-family and HELOC portfolios. These two portfolios now represent 79% of total loans receivable, net, up from 64% at December 31, 2004. We anticipate that our mortgage and HELOC portfolios will increase in the next year as we focus on these product lines; enhance our credit risk profile and focus on cross sell opportunities. We anticipate that RV and marine loan balances will decline over time due to the sale of the Consumer Finance Corporation and the continued decline in automobile loans due to the exit of the automobile origination business in 2004. Other loans include commercial loans which have increased during 2005. The increase in unamortized premiums is volume-related and represents purchase premiums, net on real estate loans.

Allowance for Loan Losses

The allowance for loan losses is management's estimate of credit losses inherent in our loan portfolio as of the balance sheet date. The estimate of the allowance for loan losses is based on a variety of factors, including the composition and quality of the portfolio, delinquency levels and trends, expected losses for the next twelve months, current and historical charge-off and loss experience, current industry charge-off and loss experience, the condition of the real estate market and geographic concentrations within the loan portfolio, the interest rate climate as it affects adjustable-rate loans and general economic conditions. Determining the adequacy of the allowance is complex and requires judgment by management about the effect of matters that are inherently uncertain. Subsequent evaluations of the loan portfolio, in light of the factors then prevailing, may result in significant changes in the allowance for loan losses in future periods. In general, the allowance for loan losses should be at least equal to twelve months of projected losses for all loan types. We believe this level is representative of probable losses inherent in the loan portfolio at the balance sheet date.

[Table of Contents](#)

The following table presents the allowance for loan losses by major loan category (dollars in thousands):

	Consumer & Other		Real Estate		Total	
	Allowance	Allowances as % of Consumer and Other Loans Receivable	Allowance	Allowances as % of Real Estate Loans Receivable	Allowance	Allowances as % of Total Loans Receivable
December 31, 2005	\$32,379	0.80%	\$30,907	0.20%	\$63,286	0.32%
December 31, 2004	\$29,686	0.72%	\$17,995	0.24%	\$47,681	0.41%

The allowance as a percentage of total loans receivable declined in 2005. The lower percentage resulted from a change in the mix of assets. Our loan portfolio shifted to a higher percentage of mortgage loans, which generally incur lower losses than consumer loans. Mortgage loans represented 79% of total loans receivable, net at the end of 2005, up from 64% at the end of 2004. The increase in the allowance allocated to the consumer loans portfolio was the result of an increase in nonperforming RV and marine loans.

The following table provides an analysis of the allowance for loan losses during the past five years (dollars in thousands):

	Year Ended December 31,				
	2005	2004	2003	2002	2001
Allowance for loan losses—beginning of year	\$ 47,681	\$ 37,847	\$ 27,666	\$ 19,874	\$12,565
Loan charge-offs:					
Real estate	(936)	(186)	(364)	(460)	(94)
HELOC, second mortgage and other	(3,929)	(1,464)	(75)	—	(79)
RV	(20,592)	(18,419)	(20,341)	(3,456)	—
Marine	(8,009)	(6,003)	(7,369)	—	—
Automobile	(5,915)	(13,796)	(22,695)	(28,046)	(5,395)
Credit card	(17,286)	(10,313)	(919)	—	—
Other	(180)	(160)	(1,971)	—	—
Total loan charge-offs	(56,847)	(50,341)	(53,734)	(31,962)	(5,568)
Loan recoveries:					
Real estate	234	—	223	30	29
HELOC, second mortgage and other	526	310	—	—	4
RV	7,848	9,088	9,738	—	—
Marine	3,960	3,225	3,806	—	—
Automobile	5,382	7,464	8,335	10,632	669
Credit card	380	141	1	—	—
Other	106	279	541	—	—
Total recoveries	18,436	20,507	22,644	10,662	702
Net charge-offs	(38,411)	(29,834)	(31,090)	(21,300)	(4,866)
Allowance acquired through acquisitions ⁽¹⁾	—	1,547	2,748	14,428	4,699
Provision for loan losses	54,016	38,121	38,523	14,664	7,476
Allowance for loan losses—end of year	\$ 63,286	\$ 47,681	\$ 37,847	\$ 27,666	\$19,874
Net charge-offs to average loans receivable, net outstanding	0.26%	0.30%	0.41%	0.28%	0.07%

(1) Acquisition of credit card portfolios in 2004 and 2003, the E*TRADE Consumer Finance portfolio in 2002 and the automobile portfolio in 2001.

Table of Contents

During 2005, the allowance for loan losses increased by \$15.6 million. Approximately \$12.9 million of this increase is due to higher real estate loans outstanding which increased by \$8.1 billion during 2005. The remaining increase in the allowance was due to slightly higher expected losses on RV and credit card loans offset by lower automobile loan related losses.

In determining the allowance for loan losses, we allocate a portion of allowance to various loan products based on an analysis of individual loans and pools of loans. However, the entire allowance is available to absorb credit losses inherent in the total loan portfolio as of the balance sheet date. The following table allocates the allowance for loan losses by loan category (dollars in thousands):

	December 31,									
	2005		2004		2003		2002		2001	
	Amount	% ⁽¹⁾	Amount	% ⁽¹⁾	Amount	% ⁽¹⁾	Amount	% ⁽¹⁾	Amount	% ⁽¹⁾
Real estate loans:										
One- to four-family	\$ 4,858	37.0%	\$ 2,812	32.3%	\$ 2,360	28.6%	\$ 3,343	29.8%	\$ 8,716	73.7%
HELOC, second mortgage and other	26,049	42.3	15,183	31.9	3,302	19.1	851	6.8	157	0.4
Total real estate loans	30,907	79.3	17,995	64.2	5,662	47.7	4,194	36.6	8,873	74.1
Consumer and other loans:										
RV	13,465	14.1	11,343	22.4	11,386	28.3	9,480	24.8	—	3.1
Marine	4,590	3.9	4,116	6.3	2,503	7.9	3,108	8.4	—	—
Automobile	1,080	1.2	4,195	5.1	11,876	14.5	8,190	27.4	11,001	22.6
Credit card	11,714	1.0	9,078	1.8	5,583	1.4	—	—	—	—
Other	1,530	0.5	954	0.2	837	0.2	2,694	2.8	—	0.2
Total consumer and other loans	32,379	20.7	29,686	35.8	32,185	52.3	23,472	63.4	11,001	25.9
Total allowance for loan losses	\$ 63,286	100.0%	\$ 47,681	100.0%	\$ 37,847	100.0%	\$ 27,666	100.0%	\$ 19,874	100.0%

(1) Represents percentage of loans receivable in category to total loans receivable, excluding premium (discount).

Actual losses are recognized when it is probable that a loss will be incurred. Our policy is to charge-off closed end consumer loans when the loan is 120 days delinquent or when we determine that collection is not probable. For first lien position mortgages, a charge-off is recognized when we foreclose on the property. For revolving loans, our policy is to charge-off loans when collection is not probable or the loan has been delinquent for 180 days.

The \$8.6 million increase in net charge-offs in 2005 was primarily due to higher net charge-offs on credit cards of \$6.7 million, marine and RV of \$4.7 million and real estate loan portfolios of \$2.8 million, offset partially by lower net charge-offs on automobile loans of \$5.8 million. Higher credit card charge-offs are the result of increased bankruptcy filings as customers declared bankruptcy ahead of the new bankruptcy laws in October 2005. We do not anticipate that the 2005 level of credit card charge-offs will continue. The increase in net charge-offs was also due to growth in loans receivable and specific events affecting customer behavior during the period and not indicative of a decline in credit quality.

Net charge-offs decreased by \$1.3 million in 2004 from the 2003 level due to lower automobile, RV and other losses of \$10.8 million, partially offset by higher credit card losses of \$9.3 million.

Table of Contents

Nonperforming Assets

We classify loans as nonperforming when full and timely collection of interest or principal becomes uncertain or when they are 90 days past due. The following table shows the comparative data for nonperforming loans and assets (dollars in thousands):

	December 31,				
	2005	2004	2003	2002	2001
Real estate loans:					
One- to four-family	\$18,067	\$11,029	\$18,094	\$22,497	\$20,595
HELOC, second mortgage and other	9,568	2,755	269	81	—
Total real estate loans	27,635	13,784	18,363	22,578	20,595
Consumer and other loans:					
Recreational vehicle	2,826	1,416	1,399	1,486	—
Marine	873	908	1,067	94	—
Automobile	448	826	1,602	2,277	91
Credit card	2,858	2,999	2,147	—	—
Other	14	22	16	53	—
Total consumer and other loans	7,019	6,171	6,231	3,910	91
Total nonperforming loans, net	34,654	19,955	24,594	26,488	20,686
REO and other repossessed assets, net	6,555	5,367	6,690	6,723	3,328
Total nonperforming assets, net	\$41,209	\$25,322	\$31,284	\$33,211	\$24,014
Total nonperforming loans, net as a percentage of total loans, net	0.18%	0.17%	0.27%	0.36%	0.26%
Total allowance for loan losses as a percentage of total nonperforming loans, net	182.62%	238.94%	153.89%	104.45%	96.07%

We expect that the amount of nonperforming loans will change due to portfolio growth, portfolio seasoning and resolution through collections, sales or charge-offs. The performance of any loan can be affected by external factors, such as economic conditions, or factors particular to a borrower.

During 2005, our nonperforming assets, net increased \$15.9 million, or 62.7%, from \$25.3 million at December 31, 2004. The increase is attributed to an increase in nonperforming real estate loans of \$13.9 million. The overall growth in the real estate loan portfolio to \$15.3 billion from \$7.5 billion at December 31, 2005 and 2004, respectively is contributing to the higher level of nonperforming assets. The increase in REO and other repossessed assets, net was due to the timing of RV and marine repossession sales and only a slight increase in real estate related foreclosures during 2005. The increase in nonperforming loans has not resulted in significantly higher charge-offs in 2005. Our portfolio quality has not shown significant signs of deterioration; however, the overall level of nonperforming assets has increased as a result of this volume.

If our nonperforming loans at December 31, 2005, had been performing in accordance with their terms, we would have recorded additional interest income of approximately \$0.8 million during 2005. During 2005, we recognized \$1.0 million in interest on loans that were in nonperforming status at December 31, 2005.

The allowance as a percentage of total nonperforming loans, net decreased in 2005 compared to 2004. The lower ratio results from a change in the mix of assets. As our loan portfolio shifts to mortgage loans with loan to value ratios that remain consistent or increase over the life of the loan, the level of the allowance to nonperforming assets may decrease. Real estate loan charge-offs to average outstanding loans were 0.03% compared to 0.34% for non-real estate loan charge-offs. Real estate loans to total loans receivable, net are 79% for 2005 compared to 64% for 2004.

Table of Contents

In addition to the nonperforming assets in the table above, we monitor loans where a borrower's past credit history casts doubt on the borrower's ability to repay a loan, whether or not the loan is delinquent ("Special Mention" loans.) Such Special Mention loans continue to accrue interest and remain as a component of the loans receivable balance. These loans represented \$127.2 million and \$71.8 million of the total loan portfolio at December 31, 2005 and 2004, respectively, and are actively monitored.

Mortgage-Backed and Investment Securities Available-for-Sale

Available-for-sale securities are summarized as follows (dollars in thousands):

	December 31,		Variance
	2005	2004	2005 vs. 2004
Mortgage-backed securities:			
Federal National Mortgage Association	\$ 7,269,348	\$ 5,062,204	44 %
Government National Mortgage Association	2,138,270	2,710,808	(21)%
Collateralized mortgage obligations and other	1,015,794	1,279,057	(21)%
Total mortgage-backed securities	10,423,412	9,052,069	15 %
Investment securities:			
Asset-backed securities	1,365,754	2,796,429	(51)%
Publicly traded equity securities	435,765	374,842	16 %
Other	339,807	320,478	6 %
Total investment securities	2,141,326	3,491,749	(39)%
Total available-for-sale securities	\$12,564,738	\$12,543,818	— %

Available-for-sale securities represented 28% of total assets at December 31, 2005 and 40% of total assets at December 31, 2004. We evaluate our portfolio of securities available-for-sale in light of changing market conditions and other factors and, where appropriate, take steps intended to improve our overall positioning. During the period, we performed a balance sheet review and decided to enhance the liquidity of our portfolio by reducing our securities portfolio of asset-backed securities and increasing our portfolio of mortgage-backed securities.

As interest rates increase, the fair value of available-for-sale securities decreases and vice versa. The fair value of the portfolio will be adversely impacted in 2006 if long-term interest rates continue to rise. Net unrealized gains and losses in available-for-sale securities are included in shareholders' equity as accumulated other comprehensive income or loss, net of tax.

Deposits

Deposits as of December 31, 2005 and 2004 are summarized as follows (dollars in thousands):

	December 31,		Variance
	2005	2004	2005 vs. 2004
Sweep deposit account	\$ 7,733,267	\$ 6,167,436	25 %
Money market and savings accounts	4,635,866	3,340,936	39 %
Certificates of deposit	2,703,605	2,069,674	31 %
Brokered certificates of deposit	484,612	294,587	65 %
Checking accounts	390,665	430,341	(9)%
Total deposits	\$15,948,015	\$12,302,974	30 %

Deposits represented 39% of total liabilities at December 31, 2005 and 43% of total liabilities at December 31, 2004. Deposits increased \$3.6 billion to \$15.9 billion at December 31, 2005, driven by a \$1.6 billion increase in the SDA, a \$1.3 billion increase in money market and savings accounts and a \$0.6 billion increase in certificates of deposit.

Table of Contents

The increase in the SDA was driven equally by organic growth of existing customer balances and conversions from money market funds. The increase in money market accounts was the result of our focused attention to sales and retention efforts for these customers, as well as the overall impact of E*TRADE Complete Cash Optimizer. E*TRADE Complete Cash Optimizer enables customers to determine the optimal use of their funds and has resulted in higher money market and certificate of deposit balances. The SDA, money market accounts and certificates of deposit generally provide us the benefit of lower interest costs, compared with wholesale funding. The increases in the balances of these accounts are the product of the core customer relationship that we maintain within our retail segment. The increase in certificates of deposit reflects the renewed customer interest in the product as a result of focused retention efforts coupled with a higher overall interest rates offered in this product.

Average deposits increased by \$1.3 billion in 2005 compared to 2004. Average rates paid increased slightly as market interest rates increased throughout 2005. The table below shows average deposit and rates paid for the three years ending (dollars in thousands):

	Year Ended December 31,								
	2005			2004			2003		
	Average Balance for the Year	Percentage of Total	Average Rate	Average Balance for the Year	Percentage of Total	Average Rate	Average Balance for the Year	Percentage of Total	Average Rate
Sweep deposit account	\$ 6,683,454	50%	0.54%	\$ 5,008,953	42%	0.26%	\$ 877,322	9%	0.15%
Money market and savings accounts	3,604,326	27	2.47%	3,792,778	31	1.25%	4,369,477	45	1.69%
Certificates of deposit	2,276,709	17	3.90%	2,564,914	21	4.31%	3,749,320	39	3.52%
Brokered certificates of deposit	450,441	3	3.48%	358,665	3	2.56%	365,162	4	2.78%
Checking accounts	387,146	3	0.69%	353,688	3	0.68%	267,763	3	0.93%
Total average deposits	\$13,402,076	100%	1.73%	\$12,078,998	100%	1.51%	\$ 9,629,044	100%	2.84%

Securities Sold Under Agreements to Repurchase and Other Borrowings by Bank Subsidiary

Securities sold under agreements to repurchase and other borrowings by Bank subsidiary are summarized as follows (in thousands):

	As of December 31,		Variance
	2005	2004	2005 vs. 2004
Securities sold under agreements to repurchase	\$11,101,542	\$9,897,191	12 %
FHLB advances	\$ 3,856,106	\$1,487,841	159 %
Subordinated debentures	305,046	255,300	19 %
Other	5,440	17,591	(69)%
Total other borrowings by Bank subsidiary	\$ 4,166,592	\$1,760,732	137 %

Securities sold under agreements to repurchase increased by 12% compared to December 31, 2004. These borrowings coupled with FHLB advances are the primary wholesale funding sources of the Bank. During 2005, the Bank used these wholesale sources along with deposit growth to fund the increase in loans receivable. Other borrowings by Bank subsidiary represented 10% of total liabilities at December 31, 2005 and 6% of total liabilities at December 31, 2004. The increase of \$2.4 billion during 2005 was primarily due to an increase in FHLB advances. We actively manage our funding sources and determine the optimal mix based on pricing, liquidity and capacity during each period.

Corporate Debt

Corporate debt increased \$1.4 billion during 2005. This increase was due to the issuance of additional senior notes and mandatory convertible notes during the period, the proceeds of which were used to fund the acquisitions of HarrisDirect and BrownCo. See "Liquidity and Capital Resources" below for additional information about securities issued.

[Table of Contents](#)

LIQUIDITY AND CAPITAL RESOURCES

Our liquidity and capital resources enable us to fund our operating activities, and finance acquisitions and asset growth. Cash flows are derived from capital markets activities and core operations in the retail and institutional segments. The segment cash flows provide capital to fund growth in our regulated subsidiaries. A summary of the capital markets activity of the Company and a high level summary of our sources and uses of cash and equivalents at the parent company level during the year is discussed below.

Changes in Cash and Equivalents

In 2005, cash and equivalents at E*TRADE Financial Corporation, on a standalone holding company basis, increased \$25 million to \$94 million primarily due to an increase in operating cash flows of \$340 million and the following significant activities and events impacting cash:

- The acquisitions of *Harrisdirect* and *BrownCo* for \$2.3 billion; and
- Issuances of long-term debt and equity of \$2.2 billion.

Our capital markets activity during 2005 included the issuance of common stock and debt securities. The following table shows our 2005 equity and debt issues:

<u>Month Issued</u>	<u>Principal Amount (in millions)</u>	<u>Fixed Coupon Rate</u>	<u>Maturity</u>
September	\$ 100.0	8.00% ⁽¹⁾	June 2011
September	350.0	7 ³ / ₈ %	September 2013
October	250.0	7 ³ / ₈ %	September 2013
November	300.0	7 ⁷ / ₈ %	December 2015
November	450.0	6 ¹ / ₈ % ⁽²⁾	November 2018
Total debt	1,450.0		
Equity ⁽³⁾	718.4		
Total	\$ 2,168.4		

(1) This debt was issued at a premium with an effective yield of 7¹/₄ %.

(2) Mandatory convertible notes issued.

(3) Includes \$691.8 million issued in connection with funding our acquisition of *BrownCo*, *Howard Capital*, *Kobren* and other acquisitions.

In November 2005, we issued 18.0 million units of mandatory convertible notes ("Units") with a face value of \$450 million. Each Unit consists of a purchase contract and a 6¹/₈% senior note. We recorded the purchase contracts and senior notes at fair value with \$15 million recorded in equity and \$435 million in debt, respectively. Each purchase contract obligates the holder to purchase, and the Company to sell, at a purchase price of \$25.00 in cash, a variable number of shares of the Company's common stock. The stock conversion ratio varies depending on the average closing price of our common stock over a 20-day trading period ending on the third trading day immediately preceding November 18, 2008 ("Reference Price"). If the Reference Price is equal to or greater than \$21.816 per share, the settlement rate will be 1.1459 shares of common stock. If the Reference Price is less than \$21.816 per share but greater than \$18.00 per share, the settlement rate is equal to \$25.00 divided by the Reference Price. If the Reference Price is less than or equal to \$18.00 per share, the settlement rate will be 1.3889 shares of common stock. The Company is obligated under the purchase contract to sell shares of its common stock under the agreement in November 2008. In November 2008, the aggregate principal amount of the senior notes will be remarketed, which may result in a change in the interest rate and maturity date of the senior notes.

Additionally, in 2005, we entered into a \$250 million, three-year senior secured revolving credit facility, secured by certain of our assets. The facility will be used for general corporate purposes, including regulatory capital needs arising from acquisitions. This facility was unused in 2005 and requires us to maintain certain

Table of Contents

minimum financial covenants, which we met during 2005. We believe that these restrictions will not have a material effect on our ability to meet foreseeable funding requirements.

We had outstanding debt of \$2.0 billion as of December 31, 2005 as follows:

Type	Balance (in millions)	Fixed Coupon Rate	Year of Maturity
Convertible subordinated notes	\$ 185.2	6.00%	2007
Senior notes	504.4	8.00%	2011
Senior notes	597.5	7 ³ / ₈ %	2013
Senior notes	300.0	7 ⁷ / ₈ %	2015
Mandatory convertible notes	435.6	6 ¹ / ₈ %	2018
Total	\$ 2,022.7		

For information regarding the terms of outstanding borrowings including senior debt, mandatory convertible notes and convertible subordinated notes, see Note 16 to the Consolidated Financial Statements.

Our current senior debt ratings are B1 (positive outlook) by Moody's, B+ (positive) by Standard and Poor's and BB (low) by Dominion Bond Rating Service ("DBRS"). The Bank's long-term deposit ratings are BA2 by Moody's, BB+ (stable) by Standard and Poor's and BB by DBRS. A significant downgrade in these ratings may impact our ability to borrow at current market spreads, at rates considered acceptable or at all.

Liquidity Available from Subsidiaries

Liquidity available to the parent company from its subsidiaries, other than Converging Arrows, is limited by regulatory requirements of its subsidiaries. Converging Arrows, an investment company, is a subsidiary of the parent company. The \$176.6 million of cash and investment securities owned by Converging Arrows is available as a source of liquidity for the parent company. Converging Arrows is not restricted in its dealings with the parent company and may transfer funds to the parent company without regulatory approval. In addition to the investment company, brokerage and banking subsidiaries may provide liquidity to the parent; however, they are restricted by regulatory guidelines.

The Bank is prohibited by regulations from lending to the parent company. At December 31, 2005, the Bank has approximately \$192.5 million of capital available for dividend declaration without regulatory approval while still maintaining "well capitalized" status. The Bank's required and actual capital amounts and ratios are presented in the table below (dollars in thousands):

	Actual		Required for Capital Adequacy Purposes		Required to be Well Capitalized Under Prompt Corrective Action Provisions	
	Amount	Ratio	Amount	Ratio	Amount	Ratio
At December 31, 2005:						
Total Capital to Risk-weighted assets	\$2,021,091	10.94%	>\$1,478,238	>8.0%	>\$1,847,797	>10.0%
Tier I Capital to Risk-weighted assets	\$1,957,805	10.60%	>\$ 739,119	>4.0%	>\$1,108,678	> 6.0%
Tier I Capital to Adjusted total assets	\$1,957,805	5.92%	>\$1,322,343	>4.0%	>\$1,652,929	> 5.0%
At December 31, 2004:						
Total Capital to Risk-weighted assets	\$1,533,934	11.09%	>\$1,106,778	>8.0%	>\$1,383,472	>10.0%
Tier I Capital to Risk-weighted assets	\$1,486,422	10.74%	>\$ 553,389	>4.0%	>\$ 830,083	> 6.0%
Tier I Capital to Adjusted total assets	\$1,486,422	5.83%	>\$1,019,659	>4.0%	>\$1,274,574	> 5.0%

The Bank is also required by OTS regulations to maintain tangible capital of at least 1.50% of tangible assets. The Bank satisfied this requirement at both December 31, 2005 and 2004.

Table of Contents

Brokerage subsidiaries are prohibited from paying cash dividends, or making unsecured advances or loans to its parent or employees if such payment would result in net capital of less than 5% of aggregate debit balances or less than 120% of its minimum dollar requirement of \$250,000. At December 31, 2005, all of our brokerage subsidiaries met their minimum required net capital requirements.

Share Repurchases and Debt Retirements

The Company's Board of Directors (the "Board") authorizes share repurchase and debt retirement plans, as they determine that they are likely to create long-term value for our shareholders. In 2004, the Board authorized the April 2004 Plan and the December 2004 Plan. Under these plans, we may repurchase common stock or retire convertible subordinated notes. In 2005, we repurchased an aggregate of \$58.2 million in common shares. More information about the April 2004 and the December 2004 repurchase plans can be found in Item 5 on page 16.

Off-Balance-Sheet Arrangements

We enter into various off-balance-sheet arrangements in the ordinary course of business, primarily to meet the needs of our clients and to reduce our own exposure to interest rate risk. These arrangements include firm commitments to extend credit and letters of credit. Additionally, we enter into guarantees and other similar arrangements as part of transactions in the ordinary course of business. For additional information on each of these arrangements, see "Item 8—Financial Statements and Supplementary Data".

Contractual Obligations

The following summarizes our contractual obligations at December 31, 2005 and the effect such obligations are expected to have on our liquidity and cash flow in future periods (in thousands):

	Due in						Total
	2006	2007	2008	2009	2010	Thereafter	
Security commitments to:							
Purchase securities	\$ 882,135	\$ —	\$ —	\$ —	\$ —	\$ —	\$ 882,135
Sell securities	(950,762)	—	—	—	—	—	(950,762)
Loan commitments to:							
Originate loans ⁽¹⁾	362,203	—	—	—	—	—	362,203
Purchase loans	112,452	—	—	—	—	—	112,452
Sell mortgages	(35,087)	—	—	—	—	—	(35,087)
Equity funding commitments ⁽²⁾	18,297	18,707	8,332	—	—	—	45,336
Acquisition-related commitments	3,400	—	—	—	—	—	3,400
Certificates of deposit ⁽³⁾⁽⁴⁾	2,423,817	426,882	177,405	76,380	89,550	126,797	3,320,831
Other borrowings by Bank subsidiary ⁽⁵⁾	11,931,620	872,852	142,648	287,601	185,705	2,814,914	16,235,340
Mandatorily redeemable preferred securities ⁽⁵⁾	24,042	24,042	24,042	24,042	24,042	851,068	971,278
Convertible and senior notes ⁽⁵⁾	151,013	330,647	139,722	139,204	139,155	2,371,968	3,271,709
Facilities offered for sublease, less estimated future sublease income ⁽⁶⁾	8,366	6,476	4,860	4,075	2,255	140	26,172
Operating lease payments	27,503	26,872	25,374	22,397	19,753	27,596	149,495
Total contractual obligations⁽⁷⁾	\$ 14,958,999	\$ 1,706,478	\$ 522,383	\$ 553,699	\$ 460,460	\$ 6,192,483	\$ 24,394,502

(1) Contains optional commitments to originate.

(2) Estimated based on investment plans of the venture capital funds, low income housing credit partnerships and joint ventures.

(3) Does not include demand deposit, money market, passbook savings accounts or SDA, as there are no maturities and/or scheduled contractual payments

(4) Includes annual interest based on the contractual features of each transaction, using market rates at December 31, 2005. Interest rates are assumed to remain at current levels over the life of all adjustable rate instruments.

(5) Includes annual interest or dividend payments; does not assume early redemption under current call provisions.

(6) Included in the facilities restructuring accrual.

(7) The table does not include \$4.4 billion of unused lines of credit available to customers under HELOCs and \$1.8 billion of unused credit card and commercial lines as of December 31, 2005.

RISK MANAGEMENT

As a financial services company, we are exposed to risks in every component of our business. Transactions including the opening of an account, processing of a trade, acceptance of a deposit, hiring a new employee and acquiring a company, all involve a certain amount of risk. The identification and management of risks are the keys to effective risk management. Our risk management practices support decision-making, improve the success rate for new initiatives and strengthen the organization. Our goal is to balance risks and rewards through effective risk management. We do not believe that risks can be completely eliminated; however, we do believe risks can be identified and managed to within the Company's risk tolerance.

We manage risk through a governance structure involving the Board, senior management and several risk committees. We use management level risk committees to help ensure that business decisions are executed with our desired risk profile.

The Corporate Risk Committee, consisting of senior management executives, monitors risks throughout the Company. In addition to this committee, various departments throughout the Company aid in the identification and management of risks. These departments include internal audit, compliance, finance, legal, treasury, credit and risk management.

Credit Risk Management

Credit risk is the risk of loss resulting from an adverse change in a borrower's ability to repay their loan. Loan and margin advances are underwritten based on the creditworthiness of the borrower and the fair market value of the underlying collateral, taking into consideration any events that may affect the value of that collateral. The level of credit risk in an individual loan will vary depending on the credit characteristics of the borrower, the magnitude of the transaction and the quality of the collateral, in addition to the terms of the transaction. These risks are monitored at the Bank level by the Credit Risk Management Committee.

The Credit Risk Management Committee is responsible for the overall credit risk management of the Bank. This committee reports to the Asset Liability Management Committee. The credit risk management process encompasses the entire underwriting and review process from comprehensive credit policies to loan review and regulatory exams. The Credit Risk Management Committee reviews detail risk measurement and modeling results, and monitors the loan audit review process. We conduct independent reviews of the underwriting process for originated and purchased loans. The Credit Risk Management Committee regularly reviews the results of those reviews. In addition, regulatory examiners review and perform detailed tests of our credit underwriting, loan administration and allowance process.

The Credit Risk Management Committee's duties include monitoring asset quality trends, evaluating market conditions including residential real estate markets, determining the adequacy of the allowance, establishing underwriting standards, approving large credit exposures, approving large portfolio purchases and delegating credit approval authority. The Credit Risk Management Committee uses detailed tracking and analysis to measure credit performance and routinely reviews and modifies credit policies as appropriate. The section below includes some of the information reviewed by the committee in determining asset quality and the level of adequacy of the allowance.

In addition to the Bank's Credit Risk Management Committee, brokerage margin receivables are monitored by brokerage management. These receivables are evaluated to determine if the margin loans have sufficient collateral, that is the value of the securities held as collateral are sufficient to cover the margin receivable balance. In addition, brokerage management monitors situations where trades have occurred and payment was not received due to fraud or returned checks and other electronic transaction rejects. These situations are rare but do occasionally occur.

[Table of Contents](#)

Interest Rate Risk Management

Interest rate risk is the risk of loss from adverse changes in interest rates. Interest rate risks are monitored and managed by the Bank Asset Liability Management Committee (“ALCO”). The Asset Liability Management Committee reviews balance sheet trends, market interest rate and sensitivity analyses. The analysis of interest sensitivity to changes in market interest rates under various scenarios is reviewed by ALCO. The scenarios assume both parallel and non-parallel shifts in the yield curve. See Item 7A. Quantitative and Qualitative Disclosures about Market Risk for additional information about our interest rate risks.

Operational Risk Management

Operational risk is the risk of loss resulting from fraud, inadequate controls or the failure of the internal control process, third party vendor issues, processing issues and external events. Operational risks exist in most areas of the Company from advertising to customer service. While we make every effort to protect against failures in the internal controls system, no system is completely fail proof.

The failure of a third party vendor to adequately meet its responsibilities could result in financial losses and reputation risks. The Vendor Risk Management group monitors our vendor relationships. Third party vendor arrangements are screened by the Legal department and are overseen by the Vendor Risk Management group. The vendor risk identification process includes evaluating contracts, renewal options and vendor performance. To ensure the financial soundness of providers, we conducted financial reviews of our large providers. In addition, onsite operational audits are conducted annually for significant providers.

Fraud losses result from unauthorized use of customer and corporate funds and resources. We have a sophisticated system that monitors customer transaction and identifies the most fraudulent transactions before they occur. However, the world is a changing place and new techniques are constantly being developed by both the perpetrators to commit fraud and our efforts to stop fraud.

We are one of the few in the industry that offers customers digital security tokens. Digital security tokens work in conjunction with a password. The tokens display a number that changes every 60 seconds. The number on the display and a password must be used together to access the customers account. This system makes fraudulent entry into a customer’s account virtually impossible. This security system is part of our efforts to mitigate fraudulent transactions and entry into customer accounts.

Processing issues and external events may result in opportunity loss or actual losses depending on the situation. These types of losses include issues resulting from inadequate staffing, equipment failures, significant weather events or other related types of events. External events resulting in opportunity or actual losses could include the failure of a competitor to meet its customers’ needs, Internet performance issues, legal, reputation, public policy and strategic risks.

SUMMARY OF CRITICAL ACCOUNTING POLICIES AND ESTIMATES

Our discussion and analysis of our financial condition and results of operations are based on our consolidated financial statements, which have been prepared in conformity with accounting principles generally accepted in the United States of America. Note 1 to the Consolidated Financial Statements contains a summary of our significant accounting policies, many of which require the use of estimates and assumptions. We believe that of our significant accounting policies, the following are noteworthy because they are based on estimates and assumptions that require complex, subjective judgments by management, which can materially impact reported results. Changes in these estimates or assumptions could materially impact our financial condition and results of operation.

[Table of Contents](#)

Allowances for Loan Losses and Uncollectible Margin Loans

Description

The allowance for loan losses is management's estimate of credit losses inherent in our loan portfolio as of the balance sheet date. At December 31, 2005, our allowance for loan losses was \$63.3 million on \$19.5 billion of loans designated as held-for-investment. In addition to our banking loans, we extend credit to brokerage customers in the form of margin loans. At December 31, 2005, margin accounts had approximately \$5.7 billion in outstanding margin loans for which we provided an allowance for uncollectible margin loans of \$8.8 million.

Judgments

The estimate of the allowance is based on a variety of factors, including the composition and quality of the portfolio, delinquency levels and trends, expected losses for the next twelve months, current and historical charge-off and loss experience, current industry charge-off and loss experience, the condition of the real estate market and geographic concentrations within the loan portfolio, the interest rate climate as it affects adjustable-rate loans and general economic conditions. Determining the adequacy of the allowance is complex and requires judgment by management about the effect of matters that are inherently uncertain. Subsequent evaluations of the loan portfolio, in light of the factors then prevailing, may result in significant changes in the allowance for loan losses in future periods.

Effects if Actual Results Differ

Although we have considerable experience in performing these reviews, if management's underlying assumptions prove to be inaccurate or significant unanticipated changes to the national or regional economies occur, the allowance for loan losses could be insufficient to cover actual losses. If our estimates understate probable losses inherent in the portfolio, this would result in additional expense. A 10% increase or decrease in the allowances would result in a \$7.2 million charge or credit to income, respectively.

Classification and Valuation of Certain Investments

Description

We generally classify our investments in debt instruments (including corporate, government and municipal bonds), mortgage-backed securities, asset-backed securities and marketable equity securities as either available-for-sale or trading. We have not classified any investments as held-to-maturity. The classification of an investment determines its accounting treatment. Both unrealized and realized gains and losses on trading securities held by our banking subsidiaries are recognized in gain on sales of loans and securities, net. Securities held by our brokerage subsidiaries are for market-making purposes and gains and losses are recorded as principal transactions revenue. Unrealized gains and losses on available-for-sale securities are included in accumulated other comprehensive income. Declines in fair value that we believe to be other-than-temporary are included in gain on sales of loans and securities, net for our banking investments and gain on sale and impairment of investments for our brokerage (other than those held for market-making purposes) and corporate investments. We have investments in certain publicly-traded and privately-held companies, which we evaluate for other-than-temporary declines in market value. During 2005, 2004 and 2003, we recognized \$40.3 million, \$18.4 million and \$10.2 million, respectively, of losses from other-than-temporary declines in market value related to our investments.

Judgments

When possible, the fair value of securities is determined by obtaining quoted market prices. For illiquid securities, fair value is estimated by obtaining market price quotes on similar liquid securities and adjusting the price to reflect differences. For securities where market quotes and similar securities are not available, we use discounted cash flows. We also make estimates about the fair value of investments and the timing for recognizing

[Table of Contents](#)

losses based on market conditions and other factors. Other-than-temporary impairment is recorded based on management judgment. Management evaluates securities based on market conditions and all available information about the issuer or underlying collateral. This information is used to determine if impairment is other-than-temporary. The determination that impairment is other-than-temporary is judgmental. Based on the facts and circumstances, companies could have different conclusions regarding when securities are other-than-temporarily impaired. Impairment of mortgage-backed or asset-backed securities is recognized when management estimates the fair value of a security is less than its amortized cost and if the current present value of estimated cash flows has decreased since the last periodic estimate. If the security meets both criterion, we write the security down to fair value in the current period. We assess securities for impairment at each reported balance sheet date.

Effects if Actual Results Differ

Earnings could be influenced by the timing of management's decisions to recognize a security as other-than-temporarily impaired. Our estimates are based on the best available information. Over time additional information may become available and may influence future write-downs. If all securities with fair values lower than amortized book were written-down, a \$302.4 million charge would occur. Management believes that its estimates of other-than-temporary impairment are supportable and reasonable. See Note 6 to the Consolidated Financial Statements for additional information regarding securities.

Valuation and Accounting for Financial Derivatives

Description

The Bank's principal assets are residential mortgages and mortgage-backed securities, which typically pay a fixed interest rate over an extended period of time. However, the principal sources of funds for the Bank are customer deposits and other short-term borrowings with interest rates that are fixed for a shorter period of time, if at all. The Bank purchases interest rate derivatives, including interest rate swaps, caps and floors, to manage this difference between long-term and short-term interest rates and to convert fixed-rate assets or liabilities to variable rates.

Accounting for derivatives differs significantly depending on whether a derivative is designated as a "hedge," which is a transaction intended to reduce a risk associated with a specific balance sheet item or future expected cash flow. In order to qualify for hedge accounting treatment, documentation must indicate the intention to designate the derivative as a hedge of a specific asset or liability or a future cash flow. Effectiveness of the hedge must be monitored over the life of the derivative. Substantially all derivatives held on December 31, 2005 were designated as hedges. As of December 31, 2005, we had derivative assets of \$152.5 million and derivative liabilities of \$38.1 million. As of December 31, 2004, we had derivative assets of \$115.9 million and derivative liabilities of \$52.2 million.

Judgments

Hedge accounting is very complex and involves the interpretation of a vast amount of accounting literature. From time to time, new interpretations are issued, which result in new accounting methods applied to existing and new transactions. The implementation of SFAS No. 133 involves numerous judgments and Company-level interpretations. We must make assumptions and judgments about the continued effectiveness of our hedging strategies and the nature and timing of forecasted transactions. Judgment is necessary to determine the accounting for our hedging strategies.

Effects if Actual Results Differ

If our hedging strategies were to become significantly ineffective or our assumptions about the nature and timing of forecasted transactions were to be inaccurate, we could no longer apply hedge accounting and our

[Table of Contents](#)

reported results would be significantly affected. Revised accounting interpretations of existing literature could materially impact our financial results. If 10% of the fair value of derivatives classified in liabilities were determined to relate to derivatives that do not qualify for hedge accounting treatment, the adjustment would reduce income by \$3.8 million before taxes. Similarly, if 10% of the fair value of derivatives included in assets were determined to not qualify for hedge accounting treatment, the result would be \$15.2 million in additional pre-tax income. The most significant effect of not qualifying for hedge accounting treatment is the earnings volatility that would be created by marking the derivatives to market as interest rates change.

Estimates of Effective Tax Rates, Deferred Taxes and Valuation Allowances

Description

In preparing our consolidated financial statements, we calculate our income tax expense based on the tax laws in the various jurisdictions where we conduct business. This requires us to estimate our current tax obligations and required reserves for potential tax deficiencies and to assess temporary differences between the financial statement carrying amounts and the tax bases of assets and liabilities. These differences result in deferred tax assets and liabilities, the net amount of which we show as other assets on our consolidated balance sheets. We must also assess the likelihood that each of our deferred tax assets will be realized. To the extent we believe that realization is not *more likely than not*, we establish a valuation allowance. When we establish a valuation allowance or increase this allowance in a reporting period, we generally record a corresponding tax expense in our consolidated statements of income. Conversely, to the extent circumstances indicate that a valuation allowance is no longer necessary, that portion of the valuation allowance is reversed, which generally reduces our overall income tax expense. Our net deferred tax asset as of December 31, 2005 and 2004 was \$3.9 million and \$41.1 million, respectively, net of a valuation allowance of \$39.4 million and \$52.7 million, respectively.

Judgments

Management must make significant judgments to determine our provision for income taxes, our deferred tax assets and liabilities and any valuation allowance to be recorded against our net deferred tax asset. Changes in our estimate of these taxes occur periodically due to changes in the tax rates, changes in our business operations, implementation of tax planning strategies, resolution with taxing authorities of issues with previously taken tax positions and newly enacted statutory, judicial and regulatory guidance. These changes in judgment as well as differences between our estimates and actual amount of taxes ultimately due, when they occur, affect accrued taxes and can be material to our operating results for any particular reporting period.

Effects if Actual Results Differ

These changes, when they occur, affect accrued taxes and can be material to our operating results for any particular reporting period.

Valuation of Goodwill and Other Intangibles

Description

We review goodwill and purchased intangible assets with indefinite lives for impairment annually and whenever events or changes indicate the carrying value of an asset may not be recoverable in accordance with SFAS No. 142. Our recorded goodwill at December 31, 2005 was \$2.0 billion, and we will continue to evaluate it for impairment at least annually. Our recorded intangible assets at December 31, 2005 were \$532.1 million, which have useful lives between three and thirty years.

Judgments

In 2005, we performed our annual impairment test of goodwill with the assistance of a third party. This evaluation indicated that no impairment charges were necessary. We also evaluate the remaining useful lives on

[Table of Contents](#)

intangible assets each reporting period to determine whether events and circumstances warrant a revision to the remaining period of amortization in accordance with SFAS No. 142. Our estimates of fair value of goodwill and other intangible assets depend on a number of factors, including estimates of future market growth and trends, forecasted revenue and costs, expected useful lives of the assets, appropriate discount rates and other variables.

Effects if Actual Results Differ

If our estimates of goodwill fair value change due to changes in our businesses or other factors, we may determine that an impairment charge is necessary. Estimates of fair value are determined based on a complex model using cash flows and company comparisons. If management's estimates of future cash flows are inaccurate, the fair value determined could be inaccurate and impairment not recognized in a timely manner. Intangible assets are amortized over their estimated useful lives. If changes in the estimated underlying revenues occurs, impairment or a change in the remaining life may need to be recognized.

Valuation and Expensing of Share-Based Payments

Description

We value and expense employee share-based payments, which is primarily stock options, in accordance with SFAS No. 123(R.) We value each granted option using an option pricing model using assumptions that match the characteristics of the granted options. We then assume a forfeiture rate that is used to calculate each period's compensation expense attributed to these options.

Judgments

We estimate the value of employee stock options using the Black-Scholes-Merton option pricing model. Assumptions necessary for the calculation of fair value include expected term and expected volatility. These assumptions are management's best estimate of the characteristics of the options. Additionally, forfeiture rates are estimated based on prior option vesting experience.

Effects if Actual Results Differ

If our estimates of employees' forfeiture rates are not correct at the end of the term of the option, we will record either additional expense or a reduction in expense in the period it completely vests. This adjustment may be material to the period in which it is recorded. In addition, option fair value is based on estimates of volatility determined by us. Many methods are available to determine volatility, so the determination is subjective. Applying a different method to determine volatility could impact earnings. A 10 basis point change in volatility would increase or decrease stock option fair value by 7%. A change in fair value would affect all amortization periods.

REQUIRED FINANCIAL DATA

This section presents information required by the SEC's Industry Guide 3, "Statistical Disclosure by Bank Holding Companies" that has not been incorporated into Management's Discussion and Analysis. The tables in this section include Bank subsidiary information only.

[Table of Contents](#)

Distribution of Assets, Liabilities and Shareholder's Equity; Interest Rates and Interest Differential

The following table presents average balance data and income and expense data for our banking operations, as well as the related interest yields and rates and interest spread (dollars in thousands):

	Year Ended December 31,								
	2005			2004			2003		
	Average Balance	Interest Inc./Exp.	Average Yield/Cost	Average Balance	Interest Inc./Exp.	Average Yield/Cost	Average Balance	Interest Inc./Exp.	Average Yield/Cost
Interest-earning banking assets:									
Loans, net ⁽¹⁾	\$15,488,527	\$ 828,717	5.35%	\$10,065,174	\$ 490,550	4.87%	\$ 7,659,793	\$ 384,005	5.01%
Mortgage-backed and related available-for-sale securities	9,421,988	401,782	4.26%	8,300,536	331,460	3.99%	6,707,070	255,802	3.81%
Available-for-sale investment securities	2,544,481	132,984	5.23%	3,056,440	124,038	4.06%	2,026,646	87,340	4.31%
Trading securities	268,092	12,342	4.60%	712,819	22,692	3.18%	488,372	16,159	3.31%
Other	224,756	8,623	3.84%	196,697	6,677	3.39%	282,998	7,607	2.69%
Total interest-earning banking assets⁽²⁾	27,947,844	\$1,384,448	4.95%	22,331,666	\$ 975,417	4.37%	17,164,879	\$ 750,913	4.37%
Non-interest-earning banking assets	451,161			489,282			833,296		
Total banking assets	\$28,399,005			\$22,820,948			\$17,998,175		
Interest-bearing banking liabilities:									
Retail deposits	\$12,951,635	\$ 216,632	1.67%	\$11,720,333	\$ 173,508	1.48%	\$ 9,263,881	\$ 263,017	2.84%
Brokered certificates of deposit	450,441	15,680	3.48%	358,665	9,172	2.56%	365,162	10,147	2.78%
Repurchase agreements and other borrowings	10,115,764	374,337	3.70%	8,139,736	259,196	3.18%	5,976,730	160,081	2.68%
FHLB advances	3,260,556	126,495	3.88%	1,168,519	50,055	4.28%	935,043	42,579	4.55%
Total interest-bearing banking liabilities	26,778,396	\$ 733,144	2.73%	21,387,253	\$ 491,931	2.30%	16,540,816	\$ 475,824	2.87%
Non-interest-bearing banking liabilities	308,719			345,553			562,357		
Total banking liabilities	27,087,115			21,732,806			17,103,173		
Total banking shareholder's equity	1,311,890			1,088,142			895,002		
Total banking liabilities and shareholder's equity	\$28,399,005			\$22,820,948			\$17,998,175		
Excess of interest-earning banking assets over interest-bearing banking liabilities/net interest income	\$ 1,169,448	\$ 651,304		\$ 944,413	\$ 483,486		\$ 624,063	\$ 275,089	
Bank net interest:									
Spread			2.22%			2.07%			1.50%
Margin (net yield on interest-earning banking assets)			2.33%			2.17%			1.60%
Ratio of interest-earning banking assets to interest-bearing banking liabilities			104.37%			104.42%			103.77%
Return on average:⁽³⁾⁽⁴⁾									
Total banking assets			1.04%			0.90%			0.69%
Total banking shareholder's equity			22.41%			19.08%			13.83%
Average equity to average total banking assets			4.62%			4.77%			4.97%

(1) Nonaccrual loans are included in the respective average loan balances. Income on such nonaccrual loans is recognized on a cash basis.

(2) Amount includes a taxable equivalent increase in interest income of \$10.5 million, \$7.0 million and \$2.4 million for 2005, 2004 and 2003, respectively.

(3) Ratio calculations exclude discontinued operations.

(4) Ratio calculations are based on standalone Bank results and not segment results.

Table of Contents

Increases and decreases in interest income and interest expense result from changes in average balances (volume) of interest-earning banking assets and liabilities, as well as changes in average interest rates (rate.) The following table shows the effect that these factors had on the interest earned on our interest-earning banking assets and the interest incurred on our interest-bearing banking liabilities. The effect of changes in volume is determined by multiplying the change in volume by the previous year's average yield/cost. Similarly, the effect of rate changes is calculated by multiplying the change in average yield/cost by the previous year's volume. Changes applicable to both volume and rate have been allocated proportionately (in thousands):

	2005 Compared to 2004 Increase (Decrease) Due To			2004 Compared to 2003 Increase (Decrease) Due To		
	Volume	Rate	Total	Volume	Rate	Total
Interest-earning banking assets:						
Loans, net	\$ 286,205	\$ 51,962	\$ 338,167	\$ 117,505	\$ (10,960)	\$ 106,545
Mortgage-backed and related available-for-sale securities	46,805	23,517	70,322	63,159	12,499	75,658
Available-for-sale investment securities	(22,977)	31,923	8,946	42,058	(5,360)	36,698
Trading securities	(17,841)	7,491	(10,350)	7,167	(634)	6,533
Other	1,018	928	1,946	(2,256)	1,326	(930)
Total interest-earning banking assets⁽¹⁾	293,210	115,821	409,031	227,633	(3,129)	224,504
Interest-bearing banking liabilities:						
Retail deposits	19,287	23,837	43,124	(16,844)	(72,665)	(89,509)
Brokered certificates of deposit	2,699	3,809	6,508	(177)	(798)	(975)
Repurchase agreements and other borrowings	69,040	46,101	115,141	65,125	33,990	99,115
FHLB advances	81,585	(5,145)	76,440	10,122	(2,646)	7,476
Total interest-bearing banking liabilities	172,611	68,602	241,213	58,226	(42,119)	16,107
Change in net interest income	\$ 120,599	\$ 47,219	\$ 167,818	\$ 169,407	\$ 38,990	\$ 208,397

(1) Amount includes a taxable equivalent increase in interest income of \$10.5 million, \$7.0 million and \$2.4 million in 2005, 2004 and 2003, respectively.

[Table of Contents](#)

Lending Activities

The following table presents the balance and associated percentage of each major loan category in our portfolio (dollars in thousands):

	December 31,									
	2005		2004		2003		2002		2001	
	Balance	% of Total	Balance	% of Total	Balance	% of Total	Balance	% of Total	Balance	% of Total
Real estate loans:										
One- to four-family:										
Fixed-rate	\$ 2,603,268	13.5%	\$ 525,420	4.5%	\$ 1,345,369	14.9%	\$ 1,877,265	26.0%	\$ 3,672,512	46.0%
Adjustable-rate	4,574,629	23.8	3,388,767	29.1	1,910,161	21.3	1,502,224	20.9	2,645,952	33.1
HELOC, second mortgage and other	8,106,894	42.1	3,621,835	31.1	1,524,215	17.0	368,392	5.1	25,858	0.3
Total real estate loans⁽¹⁾⁽²⁾	15,285,791	79.4	7,536,022	64.7	4,779,745	53.2	3,747,881	52.0	6,344,322	79.4
Consumer and other loans:										
RV	2,692,055	14.0	2,567,891	22.1	2,285,451	25.4	1,366,876	19.0	198,643	2.5
Marine	752,645	3.9	724,125	6.2	627,975	7.0	453,783	6.3	—	—
Automobile	235,388	1.2	583,389	5.0	1,162,339	12.9	1,481,695	20.6	1,436,407	18.0
Credit card	188,600	1.0	203,169	1.8	113,434	1.3	—	—	—	—
Other	97,436	0.5	19,493	0.2	16,218	0.2	152,645	2.1	12,237	0.1
Total consumer and other loans	3,966,124	20.6	4,098,067	35.3	4,205,417	46.8	3,454,999	48.0	1,647,287	20.6
Total loans⁽¹⁾	19,251,915	100.0%	11,634,089	100.0%	8,985,162	100.0%	7,202,880	100.0%	7,991,609	100.0%
Adjustments:										
Premiums (discounts) and deferred fees on loans	323,637		198,627		184,078		190,506		38,722	
Allowance for loan losses	(63,286)		(47,681)		(37,847)		(27,666)		(19,874)	
Total adjustments	260,351		150,946		146,231		162,840		18,848	
Loans, net⁽¹⁾⁽²⁾	\$ 19,512,266		\$ 11,785,035		\$ 9,131,393		\$ 7,365,720		\$ 8,010,457	

(1) Includes loans held-for-sale, principally one- to four-family real estate loans. These loans were \$0.1 billion, \$0.3 billion, \$1.0 billion, \$1.8 billion and \$1.6 billion at December 31, 2005, 2004, 2003, 2002 and 2001, respectively.

(2) The geographic concentrations of mortgage loans are described in Note 7 to the Consolidated Financial Statements.

We primarily purchase performing pools of loans on the secondary market using our correspondent network. Pools of loans are collections of similar loans packaged together and purchased/sold together as a group. The following table shows the number of pools and the associated number of loans that we purchased:

	Year Ended December 31,		
	2005	2004	2003
Number of pools	2,587	3,568	5,686
Number of loans	16,374	14,164	18,767

Table of Contents

The following table shows the contractual maturities of our loan portfolio at December 31, 2005, including scheduled principal repayments. This table does not, however, include any estimate of prepayments. These prepayments could significantly shorten the average loan lives and cause the actual timing of the loan repayments to differ from those shown in the following table (in thousands):

	Due in ⁽¹⁾			Total
	< 1 Year	1- 5 Years	> 5 Years	
Real estate loans:				
One- to four-family:				
Fixed rate	\$ 36,698	\$ 170,739	\$ 2,395,831	\$ 2,603,268
Adjustable rate	65,765	304,014	4,205,850	4,575,629
HELOC, second mortgage and other	303,714	1,435,383	6,367,797	8,106,894
Total real estate loans	406,177	1,910,136	12,969,478	15,285,791
Consumer and other loans:				
RV	122,577	571,894	1,997,584	2,692,055
Marine	32,314	150,685	569,646	752,645
Automobile	107,211	128,177	—	235,388
Credit card	19,344	77,374	91,882	188,600
Other	27,817	69,619	—	97,436
Total consumer and other loans	309,263	997,749	2,659,112	3,966,124
Total loans	\$ 715,440	\$ 2,907,885	\$ 15,628,590	\$ 19,251,915

(1) Estimated scheduled principal repayments are calculated using weighted-average interest rate and weighted-average remaining maturity of each loan portfolio.

The following table shows the distribution of those loans that mature in more than one year between fixed and adjustable interest rate loans at December 31, 2005 (in thousands):

	Interest Rate Type		Total
	Fixed	Adjustable	
Real estate loans:			
One- to four-family	\$ 2,566,570	\$ 4,509,864	\$ 7,076,434
HELOC, second mortgage and other	1,625,673	6,177,507	7,803,180
Total real estate loans	4,192,243	10,687,371	14,879,614
Consumer and other loans:			
RV	2,569,478	—	2,569,478
Marine	720,331	—	720,331
Automobile	128,177	—	128,177
Credit card	—	169,256	169,256
Other	5,654	63,965	69,619
Total consumer and other loans	3,423,640	233,221	3,656,861
Total loans	\$ 7,615,883	\$ 10,920,592	\$ 18,536,475

Available-for-Sale and Trading Securities

Our portfolios of mortgage-backed securities and investments are classified into three categories in accordance with SFAS No. 115, *Accounting for Certain Investments in Debt and Equity Securities*: trading, available-for-sale or held-to-maturity. None of our mortgage-backed securities or other investments was classified as held-to-maturity during 2005, 2004 and 2003.

Table of Contents

Our mortgage-backed securities portfolio is composed primarily of:

- privately insured mortgage pass-through securities;
- Government National Mortgage Association (“Ginnie Mae”) participation certificates, guaranteed by the full faith and credit of the United States;
- Federal National Mortgage Association (“Fannie Mae”) participation certificates, guaranteed by Fannie Mae;
- Federal Home Loan Mortgage Corporation (“Freddie Mac”) participation certificates, guaranteed by Freddie Mac; and
- securities issued by other non-agency organizations.

We buy and hold mortgage-backed trading securities principally for the purpose of selling them in the near term. These securities are carried at market value and any realized or unrealized gains and losses are reflected in our consolidated statements of income as gain on sales of loans and securities, net. The following table shows the Bank’s trading securities and the related the realized and unrealized gains (losses) (in thousands):

<u>As of December 31,</u>	<u>Balance</u>	<u>Realized Gains (Losses)</u>	<u>Unrealized Gains</u>
2005	\$125,262	\$ 18,572	\$ 560
2004	\$566,935	\$ (729)	\$ 2,509
2003	\$821,162	\$ (21,517)	\$ 4,835

Trading securities decreased in 2005 from 2004 due to market fluctuations which presented an opportunity to sell certain positions at a gain.

Our investments classified as available-for-sale are carried at estimated fair value with the unrealized gains and losses reflected as a component of accumulated other comprehensive income.

The following table shows the cost basis and fair value of our mortgage-backed securities and investment portfolio that the Bank held and classified as available-for-sale (in thousands):

	<u>December 31,</u>					
	<u>2005</u>		<u>2004</u>		<u>2003</u>	
	<u>Cost Basis</u>	<u>Fair Value</u>	<u>Cost Basis</u>	<u>Fair Value</u>	<u>Cost Basis</u>	<u>Fair Value</u>
Mortgage-backed securities	\$ 10,702,248	\$ 10,423,412	\$ 9,204,871	\$ 9,052,069	\$ 7,313,908	\$ 7,157,389
Investment securities:						
Asset-backed securities	1,376,315	1,365,754	2,789,471	2,796,429	2,000,239	2,010,729
FHLB stock	198,700	198,700	92,005	92,005	79,236	79,236
Municipal bonds	167,848	168,850	136,362	136,671	44,906	45,646
Corporate bonds	74,931	72,760	87,959	84,515	122,583	116,030
Other debt securities	78,989	73,485	79,467	74,700	86,217	79,637
Publicly traded equity securities	290,240	288,365	274,294	274,736	161,000	160,892
Total investment securities	2,187,023	2,167,914	3,459,558	3,459,056	2,494,181	2,492,170
Total available-for-sale securities	\$ 12,889,271	\$ 12,591,326	\$ 12,664,429	\$ 12,511,125	\$ 9,808,089	\$ 9,649,559

Table of Contents

The following table shows the scheduled maturities, carrying values and current yields for the Bank's available-for-sale and trading investment portfolio at December 31, 2005 (dollars in thousands):

	After One But Within Five Years		After Five But Within Ten Years		After Ten Years		Total	
	Balance Due	Weighted-Average Yield	Balance Due	Weighted-Average Yield	Balance Due	Weighted-Average Yield	Balance Due	Weighted-Average Yield
Mortgage-backed securities:								
Federal National Mortgage Association	\$ 582,879	5.04%	\$ 914,382	5.04%	\$ 5,843,035	5.04%	\$ 7,340,296	5.04%
Federal Home Loan Mortgage Corporation	5,803	4.50%	8,886	4.50%	5,065	4.50%	19,754	4.50%
Government National Mortgage Association	156,182	5.11%	245,830	5.11%	1,761,682	5.11%	2,163,694	5.11%
Collateralized mortgage obligations and other	83,465	4.93%	130,242	4.93%	782,451	4.93%	996,158	4.93%
Total mortgage-backed securities	828,329		1,299,340		8,392,233		10,519,902	
Investment securities:								
Asset-backed securities	96,744	5.38%	154,116	5.38%	1,104,343	5.38%	1,355,203	5.38%
Municipal bonds ⁽¹⁾	32,204	4.47%	49,243	4.47%	79,209	4.47%	160,656	4.47%
Corporate debt	8,672	5.24%	13,729	5.24%	50,631	5.24%	73,032	5.24%
Other debt securities	42,857	4.38%	26,537	4.38%	—	N/A	69,394	4.38%
Publicly traded equity securities ⁽²⁾	—	N/A	—	N/A	290,240	5.20%	290,240	5.20%
Total investment securities	180,477		243,625		1,524,423		1,948,525	
Trading securities	5,469	8.50%	10,035	8.50%	108,266	8.50%	123,770	8.50%
Total available-for-sale and trading securities	\$1,014,275		\$1,553,000		\$10,024,922		\$12,592,197	

(1) Yields on tax-exempt obligations are computed on a tax-equivalent basis.

(2) Preferred stock in Freddie Mac and Fannie Mae, no stated maturity date

Deposits and Other Sources of Funds

In 2003, we introduced the SDA. The SDA is a sweep product that transfers brokerage customer balances, previously held in money market funds not on our balance sheet, to the Bank. The Bank carries these balances as customer deposits in FDIC-insured money market accounts.

The Balance Sheet Overview begins on page 37 and Note 14 to the Consolidated Financial Statements provide additional information about the Bank's deposits, including the range of interest rates paid on deposits and scheduled maturities of certificates of deposits, including certificates of deposits of \$100,000 or more.

Borrowings

Deposits represent a significant component of our current funds. In addition, we borrow from the FHLB and sell securities under repurchase agreements.

We are a member of, and own capital stock in, the FHLB system. In part, the FHLB provides us with reserve credit capacity and authorizes us to apply for advances on the security of FHLB stock and various home mortgages and other assets—principally securities that are obligations of, or guaranteed by, the United States government—provided we meet certain creditworthiness standards. At December 31, 2005, our outstanding advances from the FHLB totaled \$3.9 billion at interest rates ranging from 2.53% to 6.96% and at a weighted-average rate of 4.09%.

We also raise funds by selling securities to nationally recognized investment banking firms under agreements to repurchase the same securities. The investment banking firms hold the securities in custody. We treat repurchase agreements as borrowings and secure them with designated fixed- and variable-rate securities. We also participate in

[Table of Contents](#)

the Federal Reserve Bank's special direct investment and treasury, tax and loan borrowing programs. We use the proceeds from these transactions to meet our cash flow or asset/liability matching needs.

The following table sets forth information regarding the weighted-average interest rates and the highest and average month-end balances of our borrowings (dollars in thousands):

	Ending Balance	Weighted- Average Rate ⁽¹⁾	Maximum Amount At Month-End	Yearly Weighted-Average	
				Balance	Rate
At or for the year ended December 31, 2005:					
Advances from the FHLB	\$ 3,856,106	4.09%	\$ 4,316,683	\$ 3,260,556	3.88%
Securities sold under agreement to repurchase and other borrowings	\$11,412,028	4.15%	\$ 11,412,028	\$10,115,764	3.70%
At or for the year ended December 31, 2004:					
Advances from the FHLB	\$ 1,487,841	2.71%	\$ 1,777,110	\$ 1,168,519	4.28%
Securities sold under agreement to repurchase and other borrowings	\$10,170,082	2.15%	\$ 10,285,738	\$ 8,139,736	3.18%
At or for the year ended December 31, 2003:					
Advances from the FHLB	\$ 920,000	1.85%	\$ 1,058,300	\$ 935,043	4.55%
Securities sold under agreement to repurchase and other borrowings	\$ 5,567,163	1.46%	\$ 6,888,441	\$ 5,976,730	2.68%

(1) Excludes hedging costs.

ITEM 7A. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

For quantitative and qualitative disclosures about market risk, we currently evaluate such risks for our brokerage and banking operations separately. The following discussion about our market risk disclosure includes forward-looking statements. Actual results could differ materially from those projected in the forward-looking statements as a result of certain factors, including, but not limited to, those set forth in the section entitled “Risk Factors.” Market risk is our exposure to changes in interest rates, foreign exchange rates and equity and commodity prices. Our exposure to interest rate risk is primarily related to interest-earning assets and sources of funds.

Interest Rate Risk

The management of interest rate risk is essential to profitability. Interest rate risk is our exposure to changes in interest rates. In general, we manage our interest rate risk by balancing variable and fixed assets, liabilities and derivatives in a way that reduces the overall exposure to changes in interest rates. This analysis is based on complex assumptions regarding maturities, market interest rates and customer behavior. Changes in interest rates including the following could impact interest income and expense:

- Interest-bearing assets and liabilities may re-price at different times or by different amounts creating a mismatch.
- The yield curve may flatten or change shape affecting the spread between short and long term rates. Widening or narrowing spreads could impact net interest income.
- Market interest rates may influence prepayments resulting in maturity mismatches. In addition, prepayments could impact yields as premium and discounts amortize.

Exposure to market risk is dependent upon the distribution of interest-bearing assets, liabilities and derivatives. The differing risk characteristics of each product are managed to mitigate our exposure to interest rate fluctuations. At December 31, 2005, 92% of our total assets were interest-earning. Approximately 80% of interest-earning assets are variable meaning that they re-price periodically based on market interest rates.

At December 31, 2005, approximately 58% of our total assets were residential mortgages and mortgage-backed securities. The values of these assets are sensitive to changes in interest rates, as well as expected prepayment levels. As interest rates increase, residential mortgages and mortgage-backed securities tend to exhibit lower prepayments. The inverse is true in a falling rate environment.

Our liability structure consists of brokerage payables, transactional deposit relationships, such as money market accounts, certificates of deposit, wholesale collateralized borrowings from the FHLB and other entities, securities sold under agreements to repurchase and long term notes. Our transactional deposit accounts tend to be less rate-sensitive than other deposit account types. Brokerage payables, agreements to repurchase securities and money market accounts re-price as interest rates change. Certificates of deposit re-price over time depending on maturities. FHLB advances and long term notes generally have fixed rates.

Derivative Financial Instruments

We use derivative financial instruments to help manage our interest rate risk. Interest rate swaps involve the exchange of fixed-rate and variable-rate interest payments between two parties based on a contractual underlying notional amount, but do not involve the exchange of the underlying notional amounts. Option products are utilized primarily to decrease the market value changes resulting from the prepayment dynamics of the mortgage portfolios, as well as to protect against increases in funding costs. The types of options employed include Cap Options (“Caps”) and Floor Options (“Floors”), “Payor Swaptions” and “Receiver Swaptions.” Caps mitigate the market risk associated with increases in interest rates, while Floors mitigate the risk associated with decreases in market interest rates. Similarly, Payor and Receiver Swaptions mitigate the market risk associated with the respective increases and decreases in interest rates.

[Table of Contents](#)

Scenario Analysis

Scenario analysis is an advanced approach to estimating interest rate risk exposure. Under the Net Present Value of Equity (“NPVE”) approach, the present value of all existing assets, liabilities, derivatives and forward commitments are estimated and then combined to produce a NPVE figure. The sensitivity of this value to changes in interest rates is then determined by applying alternative interest rate scenarios, which include, but are not limited to, instantaneous parallel shifts up 100, 200 and 300 basis points and down 100 and 200 basis points. The NPVE method is used at the Bank level and not for the consolidated Company. The Bank has 79% and 84% of our interest-earning assets and holds 77% and 85% of our interest-bearing liabilities at December 31, 2005 and 2004, respectively. Interest-earning assets not included in the NPVE approach are floating rate brokerage receivables and a small portfolio of trading securities. Interest-bearing liabilities not currently included in the analysis consist of brokerage payables and corporate level long-term debt.

The sensitivity of NPVE at December 31, 2005 and 2004 and the limits established by the Bank’s Board of Directors are listed below (dollars in thousands):

Parallel Change in Interest Rates (bps)	Change in NPVE				
	At December 31,				Board Limit
	2005		2004		
+300	\$(490,045)	(22)%	\$(158,207)	(9)%	(55)%
+200	\$(298,476)	(13)%	\$(69,671)	(4)%	(30)%
+100	\$(115,244)	(5)%	\$(2,321)	— %	(20)%
-100	\$(49,256)	(2)%	\$(149,651)	(9)%	(20)%
-200	\$(382,924)	(17)%	*	*	(30)%

* The Interest Rate Risk for down 200 is not presented as of December 31, 2004 because the OTS did not require the Bank to monitor this information as of that date.

Under criteria published by the OTS, the Bank’s overall interest rate risk exposure at December 31, 2005 was characterized as “moderate.” We actively manage our interest rate risk positions. As interest rates change, we will readjust our strategy and mix of assets, liabilities and derivatives to optimize its position. For example, a 100 basis points increase in rates may not result in a change in value as indicated above. The Bank’s Asset Liability Committee monitors the Bank’s position.

Mortgage Production Activities

Our current strategy is to hold loan production on the balance sheet, thus the current period impact resulting from exposure to mortgage production activity risks have declined. However, holding mortgage assets on the balance sheet involves similar risks. We are exposed to changing interest rates between the commitment and funding dates. The most significant mortgage loan risk is prepayment risk. The cost to originate a mortgage loan can be significant. When mortgage loans prepay, these costs are written off. Depending on the timing of the prepayment, these write-offs may result in a lower than anticipated yields. The Asset Liability Committee reviews estimates of the impact of changing market rates on loan production volumes and prepayments. This information is incorporated into our interest rate risk management strategy.

For mortgage loans intended to be sold, Interest Rate Lock Commitments (“IRLC”) are considered derivatives with changes in fair value recorded in earnings. IRLC are commitments issued to borrowers that lock in an interest rate now for a loan closing in one to three months. These locks initially recorded with a fair value of zero will fluctuate in value of the lock period as market interest rates change. There were \$0.1 billion at December 31, 2005 and \$0.2 billion at December 31, 2004 in mortgage loan commitments awaiting funding. At December 31, 2005 and 2004, IRLC were valued at \$1.6 million and \$1.5 million, respectively.

Equity Security Risk

Equity securities risk is the risk of potential loss from investing in public and private equity securities. We hold equity securities for investment purposes and in trading securities for market-making purposes. For investment purposes, we currently hold publicly traded equity securities, in which we had unrealized gains of \$94.7 million as of December 31, 2005. As each security's market price fluctuates, we are exposed to risk of a loss with respect to these unrealized gains. Our investments in Softbank Investment Corporation ("SBI") and Investmart also expose us to foreign currency exchange risk. These investments are less than 1% of total assets as of December 31, 2005.

Trading Securities

We hold \$146.7 million and \$593.2 million in trading securities as of December 31, 2005 and 2004. Trading securities unlike most of our assets are marked-to-market through earnings. For liquidity purposes at the Bank level, we maintain a trading portfolio of investment-grade securities. At December 31, 2005 and December 31, 2004, the non-equity trading portfolio has fair values of \$125 million and \$567 million, respectively.

In addition, we make a market in certain equity securities. We held as trading for market-making purposes, a fair value of \$20.2 million and \$8.3 million as of December 31, 2005 and 2004, respectively. Our market-making activities are primarily in certain exchange-traded and over-the-counter securities on the CHX. The market risk from this business is monitored by the Asset Liability Committee who has established specific guidelines for an acceptable level of risk.

ITEM 8. FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

MANAGEMENT REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING

The management of E*TRADE Financial Corporation is responsible for establishing and maintaining adequate internal control over financial reporting. E*TRADE Financial Corporation's internal control system was designed to provide reasonable assurance to the company's management and board of directors regarding the preparation and fair presentation of published financial statements. Internal control over financial reporting is defined in Rule 13a-15(f) or 15d-15(f) promulgated under the Securities Exchange Act of 1934 as a process designed by, or under the supervision of, the company's principal executive and principal financial officers and effected by the company's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the company;
- provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and
- provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

E*TRADE Financial Corporation's management assessed the effectiveness of its internal control over financial reporting as of December 31, 2005. In making this assessment, it used the criteria set forth by the Committee of Sponsoring Organizations of the Treadway Commission in "Internal Control—Integrated Framework". Based on our assessment we believe that, as of December 31, 2005, E*TRADE Financial Corporation's internal control over financial reporting is effective based on those criteria.

E*TRADE Financial Corporation's audited consolidated financial statements include the results of the following entities, but management's assessment does not include an assessment of the internal control over financial reporting of these entities because they were acquired during the fourth quarter of 2005. This approach is consistent with published SEC guidance on the permissible scope of management's internal control report.

- The U.S.-based online discount brokerage business of *Harrisdirect*, LLC, which was acquired on October 6, 2005; and
- The online discount brokerage business of J.P. Morgan Invest, LLC ("BrownCo"), which was acquired on November 30, 2005.

These entities represented 13% of total assets at December 31, 2005 and 3% of revenues for year ended December 31, 2005.

E*TRADE Financial Corporation's Independent Registered Public Accounting Firm, Deloitte & Touche LLP, has issued an audit report on our assessment of the E*TRADE Financial Corporation's internal control over financial reporting. The report of Deloitte & Touche LLP appears on the next page.

[Table of Contents](#)

REPORTS OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

To the Board of Directors and Stockholders of
E*TRADE Financial Corporation
Arlington, Virginia

We have audited management's assessment, included in the accompanying "Management Report on Internal Control Over Financial Reporting," that E*TRADE Financial Corporation and subsidiaries (the "Company") maintained effective internal control over financial reporting as of December 31, 2005, based on criteria established in "Internal Control—Integrated Framework" issued by the Committee of Sponsoring Organizations of the Treadway Commission. As described in the report on Internal Control Over Financial Reporting, management excluded from their assessment the internal control over financial reporting at *Harrisdirect*, LLC and *BrownCo*, which were acquired on October 6, 2005 and November 30, 2005, respectively, and whose financial statements represented 13% of total assets at December 31, 2005 and 3% of revenues for 2005. Accordingly, our audit did not include the internal control over financial reporting at *Harrisdirect*, LLC and *BrownCo*. The Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management's assessment and an opinion on the effectiveness of the Company's internal control over financial reporting based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States.) Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinions.

A company's internal control over financial reporting is a process designed by, or under the supervision of, the company's principal executive and principal financial officers, or persons performing similar functions, and effected by the company's board of directors, management, and other personnel to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of the inherent limitations of internal control over financial reporting, including the possibility of collusion or improper management override of controls, material misstatements due to error or fraud may not be prevented or detected on a timely basis. Also, projections of any evaluation of the effectiveness of the internal control over financial reporting to future periods are subject to the risk that the controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the consolidated financial statements as of and for the year ended December 31, 2005 of the Company and our report dated March 1, 2006 expressed an unqualified opinion on those financial statements.

/s/ Deloitte & Touche LLP

McLean, Virginia
March 1, 2006

[Table of Contents](#)

To the Board of Directors and Stockholders of
E*TRADE Financial Corporation
Arlington, Virginia

We have audited the accompanying consolidated balance sheets of E*TRADE Financial Corporation and subsidiaries (the “Company”) as of December 31, 2005 and 2004, and the related consolidated statements of income, comprehensive income, shareholders’ equity, and cash flows for each of the three years in the period ended December 31, 2005. These consolidated financial statements are the responsibility of the Company’s management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States.) Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, such consolidated financial statements present fairly, in all material respects, the financial position of E*TRADE Financial Corporation and subsidiaries as of December 31, 2005 and 2004, and the results of their operations and their cash flows for each of the three years in the period ended December 31, 2005, in conformity with accounting principles generally accepted in the United States of America.

We have also audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the effectiveness of the Company’s internal control over financial reporting as of December 31, 2005, based on the criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission and our report dated March 1, 2006 expressed an unqualified opinion on management’s assessment of the effectiveness of the Company’s internal control over financial reporting and an unqualified opinion on the effectiveness of the Company’s internal control over financial reporting.

/s/ Deloitte & Touche LLP

McLean, Virginia
March 1, 2006

[Table of Contents](#)

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEETS
(in thousands, except share amounts)

	December 31,	
	2005	2004
<u>ASSETS</u>		
Cash and equivalents	\$ 844,188	\$ 939,906
Cash and investments required to be segregated under Federal or other regulations	610,174	724,026
Brokerage receivables, net	7,174,175	3,034,548
Trading securities	146,657	593,245
Available-for-sale mortgage-backed and investment securities (includes securities pledged to creditors with the right to sell or repledge of \$11,792,684 at December 31, 2005 and \$10,113,049 at December 31, 2004)	12,564,738	12,543,818
Loans receivable (net of allowance for loan losses of \$63,286 at December 31, 2005 and \$47,681 at December 31, 2004)	19,424,895	11,505,755
Loans held-for-sale, net	87,371	279,280
Property and equipment, net	299,256	302,291
Derivative assets	152,477	115,867
Accrued interest receivable	183,814	117,131
Investment in Federal Home Loan Bank stock	198,700	92,005
Goodwill	2,003,456	395,043
Other intangibles, net	532,108	134,121
Other assets	345,677	255,547
Total assets	\$ 44,567,686	\$ 31,032,583
<u>LIABILITIES AND SHAREHOLDERS' EQUITY</u>		
Brokerage payables	\$ 7,315,659	\$ 3,618,892
Deposits	15,948,015	12,302,974
Securities sold under agreements to repurchase	11,101,542	9,897,191
Other borrowings by Bank subsidiary	4,166,592	1,760,732
Derivative liabilities	38,072	52,208
Senior notes	1,401,947	400,452
Mandatory convertible notes	435,589	—
Convertible subordinated notes	185,165	185,165
Accounts payable, accrued and other liabilities	575,545	586,767
Total liabilities	41,168,126	28,804,381
Shareholders' equity:		
Preferred stock, shares authorized: 1,000,000; issued and outstanding: none at December 31, 2005 and 2004	—	—
Shares exchangeable into common stock, \$0.01 par value, shares authorized: 10,644,223; issued and outstanding: None at December 31, 2005 and 1,302,801 at December 31, 2004	—	13
Common stock, \$0.01 par value, shares authorized: 600,000,000; issued and outstanding: 416,582,164 at December 31, 2005 and 369,623,604 at December 31, 2004	4,166	3,696
Additional paid-in capital	2,990,676	2,234,093
Deferred stock compensation	—	(18,419)
Retained earnings	580,430	150,018
Accumulated other comprehensive loss	(175,712)	(141,199)
Total shareholders' equity	3,399,560	2,228,202
Total liabilities and shareholders' equity	\$ 44,567,686	\$ 31,032,583

See accompanying notes to consolidated financial statements

[Table of Contents](#)

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF INCOME
(in thousands, except per share amounts)

	Year Ended December 31,		
	2005	2004	2003
Revenues:			
Commissions	\$ 458,834	\$ 431,638	\$ 422,709
Principal transactions	99,336	126,893	107,601
Gain on sales of loans and securities, net	98,858	140,718	247,654
Service charges and fees	135,314	97,575	110,058
Other revenues	94,419	89,077	86,514
Interest income	1,650,264	1,145,597	892,832
Interest expense	(779,164)	(510,455)	(486,129)
Net interest income	871,100	635,142	406,703
Provision for loan losses	(54,016)	(38,121)	(38,523)
Net interest income after provision for loan losses	817,084	597,021	368,180
Total net revenues	1,703,845	1,482,922	1,342,716
Expenses excluding interest:			
Compensation and benefits	380,803	350,440	364,598
Occupancy and equipment	69,089	69,572	78,381
Communications	82,485	69,674	73,650
Professional services	75,237	67,747	55,716
Commissions, clearance and floor brokerage	140,806	129,696	124,868
Advertising and market development	105,935	62,155	57,887
Servicing and other banking expenses	52,326	35,971	37,575
Fair value adjustments of financial derivatives	4,892	(2,299)	15,338
Depreciation and amortization	74,981	77,892	85,615
Amortization of other intangibles	43,765	19,443	24,758
Facility restructuring and other exit activities	(30,017)	15,688	134,187
Other	53,751	91,144	101,042
Total expenses excluding interest	1,054,053	987,123	1,153,615
Income before other income, income taxes, minority interest, discontinued operations and cumulative effect of accounting change	649,792	495,799	189,101
Other income:			
Corporate interest income	11,043	6,692	6,550
Corporate interest expense	(73,956)	(47,525)	(45,596)
Gain on sale and impairment of investments	83,144	128,111	147,874
Loss on early extinguishment of debt	—	(22,972)	—
Equity in income of investments and venture funds	6,103	4,382	9,132
Total other income	26,334	68,688	117,960
Income before income taxes, minority interest and discontinued operations	676,126	564,487	307,061
Income tax expense	229,823	181,764	111,601
Minority interest in subsidiaries	65	893	(5,061)
Net income from continuing operations	446,238	381,830	200,521
Discontinued operations, net of tax:			
Gain (loss) from discontinued operations, net	(21,495)	(32,755)	2,506
Gain on disposal of discontinued operations, net	4,023	31,408	—
Net income (loss) from discontinued operations	(17,472)	(1,347)	2,506
Cumulative effect of accounting change, net of tax	1,646	—	—
Net income	\$ 430,412	\$ 380,483	\$ 203,027
Basic income per share			
Basic income per share from continuing operations	\$ 1.20	\$ 1.04	\$ 0.56
Basic income (loss) per share from discontinued operations	(0.04)	(0.00)	0.01
Basic income per share from cumulative effect of accounting change	0.00	—	—
Basic net income per share	\$ 1.16	\$ 1.04	\$ 0.57
Diluted income per share			
Diluted income per share from continuing operations	\$ 1.16	\$ 0.99	\$ 0.55
Diluted income (loss) per share from discontinued operations	(0.04)	(0.00)	0.00

Diluted income per share from cumulative effect of accounting change	0.00	—	—
Diluted net income per share	<u>\$ 1.12</u>	<u>\$ 0.99</u>	<u>\$ 0.55</u>
Shares used in computation of per share data:			
Basic	371,468	366,586	358,320
Diluted	<u>384,630</u>	<u>405,389</u>	<u>367,361</u>

See accompanying notes to consolidated financial statements

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF COMPREHENSIVE INCOME
(in thousands)

	Year Ended December 31,		
	2005	2004	2003
Net income	\$430,412	\$ 380,483	\$ 203,027
Other comprehensive income (loss):			
Available-for-sale securities:			
Unrealized gains, net	12,946	71,488	187,012
Less impact of realized gains (transferred out of AOCI) and included in net income, net	(77,858)	(127,236)	(142,016)
Net change from available-for-sale securities	(64,912)	(55,748)	44,996
Cash flow hedging instruments:			
Unrealized gains (losses), net	7,032	(51,137)	(21,173)
Amortization of losses into interest expense related to de-designated cash flow hedges deferred in AOCI, net	40,155	56,873	85,699
Net change from cash flow hedging instruments	47,187	5,736	64,526
Foreign currency translation gains (losses)	(16,788)	(1,210)	31,958
Other comprehensive income (loss)	(34,513)	(51,222)	141,480
Comprehensive income	\$395,899	\$ 329,261	\$ 344,507

See accompanying notes to consolidated financial statements.

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF SHAREHOLDERS' EQUITY
(in thousands)

	Shares Exchangeable into Common Stock		Common Stock		Additional Paid- in Capital	Deferred Stock Compensation	Retained Earnings (Deficit)	Accumulated Other Comprehensive Loss	Total Shareholders' Equity
	Shares	Amount	Shares	Amount					
Balance, December 31, 2002	1,627	\$ 16	358,044	\$ 3,580	\$2,190,200	\$ (23,058)	\$(433,492)	\$ (231,457)	\$ 1,505,789
Net income							203,027		203,027
Other comprehensive income								141,480	141,480
Exercise of stock options and warrants, including tax benefit			8,543	85	58,917				59,002
Employee stock purchase plan			1,572	16	5,908				5,924
Adjustment related to change in original option grants					954				954
Cancellation of unvested restricted stock			(3,447)	(34)	(21,271)	21,305			—
Issuance of restricted stock			1,733	17	13,491	(13,408)			100
Amortization of deferred stock compensation, net of cancellations and retirements			(50)		(269)	2,287			2,018
Conversion of Exchangeable Shares to common stock	(241)	(2)	241	2					—
Balance, December 31, 2003	1,386	\$ 14	366,636	\$ 3,666	\$2,247,930	\$ (12,874)	\$(230,465)	\$ (89,977)	\$ 1,918,294
Net income							380,483		380,483
Other comprehensive loss								(51,222)	(51,222)
Exercise of stock options and purchase plans, including tax benefit			6,757	68	57,686				57,754
Employee stock purchase plan			1,443	14	8,640				8,654
Adjustment related to change in original option grants					224				224
Repurchases of common stock			(13,664)	(137)	(175,639)				(175,776)
Cancellation of restricted stock			(113)	(1)	(858)	859			—
Issuance of restricted stock			908	9	11,149	(11,058)			100
Shares issued upon debt conversion			7,438	74	79,889				79,963
Amortization of deferred stock compensation, net of cancellations and retirements			(25)		(325)	4,654			4,329
Conversion of Exchangeable Shares to common stock	(83)	(1)	83	1					—
Other			161	2	5,397				5,399
Balance, December 31, 2004	1,303	\$ 13	369,624	\$ 3,696	\$2,234,093	\$ (18,419)	\$ 150,018	\$ (141,199)	\$ 2,228,202

See accompanying notes to consolidated financial statements

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF SHAREHOLDERS' EQUITY—(Continued)
(in thousands)

	Shares Exchangeable into Common Stock		Common Stock		Additional Paid- in Capital	Deferred Stock Compensation	Retained Earnings (Deficit)	Accumulated Other Comprehensive Loss	Total Shareholders' Equity
	Shares	Amount	Shares	Amount					
Balance, December 31, 2004	1,303	\$ 13	369,624	\$ 3,696	\$2,234,093	\$ (18,419)	\$ 150,018	\$ (141,199)	\$ 2,228,202
Net income							430,412		430,412
Cumulative effect of accounting change						(2,777)			(2,777)
Other comprehensive loss								(34,513)	(34,513)
Issuance of common stock on exercise of forward contract					14,479				14,479
Exercise of stock options and purchase plans, including tax benefit			7,779	78	77,657				77,735
Employee stock purchase plan			902	9	8,377				8,386
Repurchases of common stock			(4,548)	(45)	(58,170)				(58,215)
Issuance of common stock upon acquisition			1,632	17	26,634				26,651
Issuance of common stock upon BrownCo Financing			39,722	397	691,385				691,782
Cancellation of restricted stock			(516)	(5)	(2,952)	2,957			—
Issuance of restricted stock			830	8	9,892	(9,900)			—
Amortization of deferred stock compensation prior to adoption of SFAS No. 123(R), net of cancellations and retirements			(46)	(1)	(709)	1,974			1,264
Reclassification of deferred stock compensation to APIC under SFAS No. 123(R)					(26,165)	26,165			—
Share-based compensation expense under SFAS No. 123(R)					16,276				16,276
Conversion of Exchangeable Shares to common stock	(1,303)	(13)	1,303	13					—
Other			(100)	(1)	(121)				(122)
Balance, December 31, 2005	—	\$ —	416,582	\$ 4,166	\$2,990,676	\$ —	\$ 580,430	\$ (175,712)	\$ 3,399,560

See accompanying notes to consolidated financial statements

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS
(in thousands)

	Year Ended December 31,		
	2005	2004	2003
CASH FLOWS FROM OPERATING ACTIVITIES:			
Net income	\$ 430,412	\$ 380,483	\$ 203,027
Adjustments to reconcile net income to net cash provided by operating activities:			
Cumulative effect of accounting change, net of tax	(1,646)	—	—
Provision for loan losses	54,016	38,121	38,523
Depreciation, amortization and discount accretion	362,965	398,297	443,746
Realized gain and impairment of investments	(174,798)	(257,465)	(435,146)
Loss (gain) on disposition of assets	1,342	(57,451)	—
Gain on sale of Consumer Finance Corporation	(46,099)	—	—
Minority interest and equity in income of subsidiaries and investments	(6,517)	(9,882)	(14,834)
Unrealized loss on venture funds	228	5,413	5,640
Noncash restructuring costs and other exit activities	6,528	15,029	70,811
Stock-based compensation	18,253	4,654	2,287
Deferred income taxes	49,018	66,920	7,015
Other	(8,474)	11,503	16,033
Net effect of changes in assets and liabilities:			
Decrease (increase) in cash and investments required to be segregated under Federal or other regulations	518,021	936,492	(171,287)
Increase in brokerage receivables	(953,391)	(713,656)	(856,359)
Increase (decrease) in brokerage payables	339,132	(117,567)	924,051
Proceeds from sales, repayments and maturities of loans held-for-sale	7,182,775	6,857,431	13,662,209
Purchases of loans held-for-sale	(3,717,745)	(6,063,974)	(12,951,831)
Proceeds from sales, repayments and maturities of trading securities	3,779,503	9,354,027	14,749,315
Purchases of trading securities	(6,751,698)	(9,122,071)	(15,204,220)
Other assets	28,047	(69,810)	75,329
Accrued interest receivable and payable, net	(38,315)	(13,207)	12,814
Accounts payable, accrued and other liabilities	(209,768)	(36,757)	127,666
Restructuring liabilities	(5,053)	(11,564)	(30,626)
Net cash provided by operating activities	856,736	1,594,966	674,163
CASH FLOWS FROM INVESTING ACTIVITIES:			
Purchases of mortgage-backed and investment securities, available-for-sale	(13,761,461)	(20,701,412)	(21,516,669)
Proceeds from sales, maturities of and principal payments on mortgage-backed and investment securities, available-for-sale	13,606,932	17,995,471	20,271,822
Net increase in loans receivable	(7,887,040)	(3,487,941)	(2,426,789)
Purchase of Federal Home Loans Bank stock	(106,695)	(12,769)	—
Purchases of property and equipment	(79,014)	(108,887)	(60,121)
Proceeds from sale of property and equipment	—	5,957	3,846
Cash used in business acquisitions, net	(2,218,932)	(19,025)	(3,466)
Cash flow from derivative hedging assets, net	(34,696)	(33,354)	(59,607)
Proceeds from sales of discontinued businesses	56,902	106,868	—
Other	19,376	1,613	(1,908)
Net cash used in investing activities	\$ (10,404,628)	\$ (6,253,479)	\$ (3,792,892)

See accompanying notes to consolidated financial statements

[Table of Contents](#)

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS—(Continued)
(in thousands)

	Year Ended December 31,		
	2005	2004	2003
CASH FLOWS FROM FINANCING ACTIVITIES:			
Net increase (decrease) in deposits	\$ 3,668,914	\$ (202,544)	\$ 4,113,280
Advances from the Federal Home Loan Bank	19,638,000	7,041,000	1,634,700
Payments on advances from the Federal Home Loan Bank	(17,267,000)	(6,472,000)	(2,025,000)
Net increase (decrease) in securities sold under agreements to repurchase	1,181,832	4,603,641	(343,324)
Net decrease in other borrowed funds	(12,151)	(64,215)	(208,479)
Proceeds from bank loans and lines of credit, net of transaction costs	—	23,500	—
Payments on bank loans and lines of credit	—	(753)	(5,090)
Net proceeds from senior notes	992,064	394,000	—
Payments on call of convertible subordinated notes	—	(428,902)	—
Proceeds from issuance of common stock	691,783	—	—
Proceeds from issuance of Units	436,500	—	—
Proceeds from issuance of common stock from employee stock transactions	61,351	43,974	51,740
Tax benefit from tax deductions in excess of compensation expense recognition	24,530	22,441	13,186
Repayment of capital lease obligations	(157)	(734)	(6,031)
Repurchases of common stock	(58,215)	(175,776)	—
Proceeds from issuance of subordinated debentures and trust preferred securities	50,000	75,630	58,210
Payments on trust preferred securities	—	(23,375)	—
Net cash flow from derivative hedging liabilities	45,056	(159,591)	(30,916)
Other	(333)	759	14,212
	<u>9,452,174</u>	<u>4,677,055</u>	<u>3,266,488</u>
Net cash provided by financing activities			
INCREASE (DECREASE) IN CASH AND EQUIVALENTS	(95,718)	18,542	147,759
CASH AND EQUIVALENTS, Beginning of year	939,906	921,364	773,605
	<u>\$ 844,188</u>	<u>\$ 939,906</u>	<u>\$ 921,364</u>
CASH AND EQUIVALENTS, End of year			
SUPPLEMENTAL DISCLOSURES:			
Cash paid for interest	\$ 723,718	\$ 437,714	\$ 430,855
Cash paid for income taxes	\$ 206,494	\$ 101,309	\$ 42,555
Non-cash investing and financing activities:			
Transfers from loans to other real estate owned and repossessed assets	\$ 50,191	\$ 47,080	\$ 48,947
Reclassification of loans held-for-sale to loans held-for-investment	\$ 178,347	\$ —	\$ 289,592
Deconsolidation of trust preferreds to other borrowings	\$ —	\$ —	\$ 201,665
Issuance of common stock to retire debentures	\$ —	\$ 79,963	\$ —

See accompanying notes to consolidated financial statements

E*TRADE FINANCIAL CORPORATION AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

NOTE 1—SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Organization—E*TRADE Financial Corporation (together with its subsidiaries, “E*TRADE” or the “Company”) is a global company offering a wide range of financial services to the consumer under the brand “E*TRADE FINANCIAL.” The Company offers investing, trading, cash management and lending products and services to its retail and institutional customers.

Basis of Presentation—The consolidated financial statements include the accounts of the Company and its majority-owned subsidiaries. Entities in which the Company holds at least a 20% ownership or in which there are other indicators of significant influence are generally accounted for by the equity method. Entities in which the Company holds less than 20% ownership and does not have the ability to exercise significant influence are generally carried at cost. Intercompany accounts and transactions are eliminated in consolidation. The Company evaluates investments including joint ventures, low income housing tax credit partnerships and other limited partnerships to determine if the Company is required to consolidate the entities under the guidance of FASB Interpretation No. 46, *Consolidation of Variable Interest Entities—an interpretation of ARB No. 51 (“FIN 46R”).*

Certain prior period items in these consolidated financial statements have been reclassified to conform to the current period presentation. As discussed in Note 3, the operations of certain businesses have been accounted for as discontinued operations in accordance with Statement of Financial Accounting Standards (“SFAS”) No. 144, *Accounting for the Impairment or Disposal of Long-Lived Assets*. Accordingly, results of operations from prior periods have been reclassified to discontinued operations. Unless noted, discussions herein pertain to the Company’s continuing operations.

Use of Estimates—The consolidated financial statements were prepared in accordance with accounting principles generally accepted in the United States of America, which require management to make estimates and assumptions that affect the amounts reported in the consolidated financial statements and related notes for the periods presented. Actual results could differ from management’s estimates. Material estimates in which management believes near-term changes could reasonably occur include: allowances for loan losses and uncollectible margin loans; classification and valuation of certain investments; valuation and accounting for financial derivatives; estimates of effective tax rates, deferred taxes and valuation allowances; valuation of goodwill and other intangibles and valuation and expensing of share-based payments.

Financial Statement Descriptions and Related Accounting Policies—Below are descriptions and accounting policies for the Company’s financial statement categories.

Cash and Equivalents—For the purpose of reporting cash flows, the Company considers all highly liquid investments with original or remaining maturities of three months or less at the time of purchase that are not required to be segregated under Federal or other regulations to be cash equivalents. Cash and equivalents are composed of interest-bearing and non-interest-bearing deposits, certificates of deposit, commercial paper, funds due from banks and Federal funds. Cash and equivalents included \$7.1 million and \$23.7 million at December 31, 2005 and 2004, respectively, of overnight cash deposits that the Company is required to maintain with the Federal Reserve Bank.

Cash and Investments Required to be Segregated Under Federal or Other Regulations—Cash and investments required to be segregated under Federal or other regulations consist primarily of interest-bearing cash accounts. Certain cash balances, related to collateralized financing transactions by our brokerage subsidiaries, are required to be segregated for the exclusive benefit of our brokerage customers.

Brokerage Receivables, net and Payables—Brokerage receivables represent credit extended to customers to finance their purchases of securities by borrowing against securities they currently own, as well as commission

[Table of Contents](#)

receivables from customers upon settlement of their trades. Receivable from non-customers represent credit extended to principal officers and directors of the Company to finance their purchase of securities by borrowing against securities owned by them. Brokerage receivables are recorded net of allowance for doubtful accounts. Securities owned by customers and non-customers are held as collateral for amounts due on brokerage receivables, the value of which is not reflected in the consolidated balance sheets. In many cases, the Company is permitted to sell or repledge these securities held as collateral and use the securities to enter into securities lending transactions, to collateralize borrowings or for delivery to counterparties to cover customer short positions. Receivables from brokers, dealers and clearing organizations result from the Company's stock borrowing activities.

Brokerage payables include payables from customers, non-customers, brokers, dealers and clearing organizations. Brokerage payables to customers and non-customers represent credit balances in customer accounts arising from deposits of funds and sales of securities, also referred to as free credit balances, and other funds pending completion of securities transactions. The Company pays interest on certain free credit balances. Payables from brokers, dealers and clearing organizations also result from the Company's stock lending activities.

Deposits paid for securities borrowed and deposits received for securities loaned are recorded at the amount of cash collateral advanced or received, which are included in brokerage receivables, net and brokerage payables, respectively, on the consolidated balance sheets. Deposits paid for securities borrowed transactions require the Company to deposit cash with the counterparty. This cash is included in cash and investments required to be segregated under federal or other regulations. With respect to deposits received for securities loaned, the Company receives collateral in the form of cash in an amount generally in excess of the market value of the securities loaned. Interest income and interest expense are recorded on an accrual basis. The Company monitors the market value of the securities borrowed and loaned on a daily basis, with additional collateral obtained or refunded, as necessary.

Trading Securities—Certain trading securities and financial derivative instruments, that are not designated for hedge accounting, are bought and held principally for the purpose of selling them in the near term and are carried at estimated fair value based on quoted market prices. Realized and unrealized gains and losses on securities classified as trading held by the Bank are included in gain on sales of loans and securities, net and are derived using the specific identification cost method. Realized and unrealized gains and losses on trading securities held by broker-dealers are recorded in principal transactions and are also derived by the specific identification method.

Available-for-Sale Mortgage-Backed and Investment Securities—The Company classified its debt, mortgage-backed securities and marketable equity securities as either trading or available-for-sale. None of the Company's mortgage-backed or investment securities were classified as held-to-maturity at December 31, 2005 or 2004.

Available-for-sale securities consist of mortgage-backed securities, asset-backed securities, corporate bonds, municipal bonds, publicly traded equity securities, retained interests from securitizations and other debt securities. Securities classified as available-for-sale are carried at fair value, with the unrealized gains and losses reflected as a component of accumulated other comprehensive income ("AOCI"), net of tax. Fair value is based on quoted market prices, when available. For illiquid securities, fair value is estimated by obtaining market price quotes on similar liquid securities and adjusting the price to reflect differences between the two securities, such as credit risk, liquidity, term, coupon, payment characteristics and other information. Realized and unrealized gains or losses on available-for-sale securities, except for publicly traded equity securities, are computed using the specific identification cost method. Amortization or accretion of premiums and discounts are recognized in interest income using the interest method over the expected life of the security. Realized and unrealized gains or losses on publicly traded equity securities are computed using the average cost method. Realized gains and losses and declines in fair value judged to be other-than-temporary are included in gain on sales of loans and securities,

[Table of Contents](#)

net for the Company's banking operations; other amounts relating to corporate investments are included in gain on sale and impairment of investments. Interest earned is included in interest income for banking operations or corporate interest income for corporate investments.

The Company regularly analyzes certain available-for-sale investments for other-than-temporary impairment when the fair value of the investment is lower than its book value. The Company's methodology for determining impairment involves projecting cash flows relating to each investment and using assumptions as to future prepayment speeds, losses and loss severities over the life of the underlying collateral pool. Assumptions about future performance are derived from the actual performance to date and the Company's view on how the collateral will perform in the future. In projecting future performance, the Company incorporates the views of industry analysts, rating agencies and the management of the issuer, along with its own independent analysis of the issuer of the securities, the servicer, the economy and the relevant sector as a whole. If the Company determines impairment is other-than-temporary, it reduces the recorded book value of the investment by the amount of the impairment and recognizes a realized loss on the investment. The Company does not, however, adjust the recorded book value for declines in fair value that it believes are temporary. Management continues to monitor and evaluate these securities closely for impairment that is other-than-temporary.

Mortgage- and asset-backed securities that both have an unrealized loss and are rated below "AA" by at least half of the agencies that rate the securities, as well as interest-only securities that have unrealized losses, are evaluated for impairment in accordance with Emerging Issues Task Force 99-20 ("EITF 99-20"), *Recognition of Interest Income and Impairment on Purchased and Retained Beneficial Interests in Securitized Financial Assets*. Accordingly, when the present value of a security's anticipated cash flows declines below the last periodic estimate, the Company recognizes an impairment charge in gain on sales of loans and securities, net in the consolidated statements of income.

Asset Securitization and Retained Interests—An asset securitization involves the transfer of financial assets to another entity in exchange for cash and/or beneficial interests in the assets transferred. Asset transfers in which the Company surrenders control over the financial assets are accounted for as sales to the extent that consideration, other than beneficial interests in the transferred assets, is received in the exchange in accordance with SFAS No. 140 *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities*. The carrying amount of the assets transferred is allocated between the assets sold in these transactions and the retained beneficial interests, based on their relative fair values at the date of the transfer. The Company records gains or losses for the difference between the allocated carrying amount of the assets sold and the net cash proceeds received. These gains or losses are recorded in gain on sales of loans and securities, net. Fair value is determined based on quoted market prices, if available. Generally, quoted market prices are not available for beneficial interests; therefore, the Company estimates the fair value based on the present value of the associated expected future cash flows. In determining the present value of the associated expected future cash flows, management is required to make estimates and assumptions. Key estimates and assumptions include future default rates, credit losses, discount rates, prepayment speeds and collateral repayment rates. Retained beneficial interests are accounted for in accordance with SFAS No. 115, *Accounting for Certain Investments in Debt and Equity Securities* and EITF 99-20 and are included in available-for-sale investment securities in the consolidated balance sheets.

Loans Receivable, net—Loans receivable, net consists of real estate and consumer loans that management has the intent and ability to hold for the foreseeable future or until maturity. These loans are carried at amortized cost adjusted for charge-offs, net allowance for loan losses, deferred fees or costs on originated loans and unamortized premiums or discounts on purchased loans. Loan fees and certain direct loan origination costs are deferred and the net fee or cost is recognized in interest income using the interest method over the contractual life of the loans. Premiums and discounts on purchased loans are amortized or accreted into income using the interest method over the remaining period to contractual maturity and adjusted for anticipated prepayments. The Company classifies loans as nonperforming when full and timely collection of interest or principal becomes uncertain or when they are 90 days past due. Interest previously accrued, but not collected, is reversed against

[Table of Contents](#)

current income when a loan is placed on nonaccrual status and is considered nonperforming. Accretion of deferred fees is discontinued for nonperforming loans. Payments received on nonperforming loans are recognized as interest income when the loan is considered collectible and applied to principal when it is doubtful that full payment will be collected. Real estate loans are generally charged off to the extent that the carrying value of the loan exceeds the estimated net realizable value of the underlying collateral at the time of repossession. HELOCs are charged-off when the loan becomes 180 days past due. Consumer loans are charged off to the extent that the carrying value of the loan exceeds the estimated net realizable value of the underlying collateral when the loan becomes 120 days past due.

Allowance for Loan Losses—The allowance for loan losses is management’s estimate of credit losses inherent in the Company’s loan portfolio as of the balance sheet date. The estimate of the allowance is based on a variety of factors, including the composition and quality of the portfolio, delinquency levels and trends, expected losses for the next twelve months, current and historical charge-off and loss experience, current industry charge-off and loss experience, the condition of the real estate market and geographic concentrations within the loan portfolio, the interest rate climate as it affects adjustable-rate loans and general economic conditions. Determining the adequacy of the allowance is complex and requires judgment by management about the effect of matters that are inherently uncertain. Subsequent evaluations of the loan portfolio, in light of the factors then prevailing, may result in significant changes in the allowance for loan losses in future periods. In general, the allowance for loan losses should be at least equal to twelve months of projected losses for all loan types. Management believes this level is representative of probable losses inherent in the loan portfolio at the balance sheet date. Loan losses are charged and recoveries are credited to the allowance for loan losses.

Loans Held-for-Sale, net—Loans held-for-sale, net consists of mortgages acquired and loans originated by the Company that are intended for sale in the secondary market. These loans are carried at the lower of cost or estimated fair value, as determined on an aggregate basis, based on quoted market price for loans with similar characteristics. Net unrealized losses are recognized in a valuation allowance by charges to income. Premiums and discounts on loans held-for-sale are deferred and recognized as part of gain (loss) on sales of loans held-for-sale, net and are not accreted or amortized.

Property and Equipment, net—Property and equipment are carried at cost and depreciated on a straight-line basis over their estimated useful lives, generally three to ten years. Leasehold improvements are amortized over the lesser of their estimated useful lives or lease terms. Buildings are depreciated over forty years. Land is carried at cost. Technology development costs are charged to operations as incurred. Technology development costs include costs incurred in the development and enhancement of software used in connection with services provided by the Company that do not otherwise qualify for capitalization treatment as internally developed software costs in accordance with Statement of Position (“SOP”) 98-1, *Accounting for the Costs of Computer Software Developed or Obtained for Internal Use*.

In accordance with SOP 98-1, the cost of internally developed software is capitalized and included in property and equipment at the point at which the conceptual formulation, design and testing of possible software project alternatives are complete and management authorizes and commits to funding the project. The Company does not capitalize pilot projects and projects where it believes that future economic benefits are less than probable. Internally developed software costs include the cost of software tools and licenses used in the development of the Company’s systems, as well as payroll and consulting costs.

Investment in Federal Home Loan Bank (“FHLB”) Stock—Investment in FHLB stock is carried at its amortized cost, which approximates fair value.

Goodwill and Other Intangibles, net—Goodwill and other intangibles, net represents the excess of the purchase price over the fair value of net tangible assets acquired through the Company’s business combinations. The Company tests goodwill and intangible assets with indefinite lives for impairment on at least an annual basis or when certain events occur. The Company evaluates the remaining useful lives of other intangible assets each

[Table of Contents](#)

reporting period to determine whether events and circumstances warrant a revision to the remaining period of amortization.

Servicing Rights—Servicing assets are recognized when the Company sells a loan and retains the related servicing rights. The servicing rights are initially recorded at their allocated cost basis based on the relative fair value of the loan sold and the servicing rights are retained at the date of the sale in accordance with SFAS No. 140. The fair value of the servicing retained is estimated based on market quotes for similar servicing assets. Servicing assets are amortized in proportion to and over the period of estimated net servicing income. The Company measures impairment by stratifying the servicing assets, based on the characteristics of the underlying loans and by interest rates. Impairment is recognized through a valuation allowance for each stratum. The valuation allowance is adjusted to reflect the excess of the servicing assets' cost basis for a given stratum over its fair value. Any fair value in excess of the cost basis of servicing assets for a given stratum is not recognized. The Company estimates the fair value of each stratum based on an industry standard present value of cash flows model. The Company recognizes both amortization of servicing rights and impairment charges in service charges and fees in the consolidated statements of income. Servicing assets are included in other assets in the consolidated balance sheets.

Real Estate Owned and Repossessed Assets—Included in other assets in the consolidated balance sheets is real estate acquired through foreclosure and repossessed consumer assets. Real estate properties acquired through foreclosures, commonly referred to as real estate owned ("REO") and repossessed assets, are recorded at fair value, less estimated selling costs at acquisition.

Income Taxes—The Company accounts for income taxes in accordance with SFAS No. 109, *Accounting for Income Taxes*, which prescribes the use of the asset and liability method whereby deferred tax asset or liability account balances are calculated at the balance sheet date using current tax laws and rates in effect. Valuation allowances are established, when necessary, to reduce deferred tax assets when it is *more likely than not* that a portion or all of a given deferred tax assets will not be realized. In accordance with SFAS No. 109, income tax expense includes (i) deferred tax expense, which generally represents the net change in the deferred tax asset or liability balance during the year plus any change in valuation allowances and (ii) current tax expense, which represents the amount of tax currently payable to or receivable from a taxing authority plus amounts accrued for expected tax deficiencies (including both tax and interest.) Accruals for expected tax deficiencies are recorded in accordance with SFAS No. 5, *Accounting for Contingencies*, when management determines that a tax deficiency is both probable and reasonably estimable.

Securities Sold Under Agreements to Repurchase—Securities under agreements to repurchase similar securities ("Repurchase Agreements") are collateralized by fixed- and variable-rate mortgage-backed securities or investment grade securities. Repurchase Agreements are treated as financings for financial statement purposes and the obligations to repurchase securities sold are reflected as borrowings in the consolidated balance sheets.

Mandatory Convertible Debt—The Company accounts for its mandatory convertible debt by allocating the proceeds using the relative fair value of the stock purchase contracts and the debt securities on the date of issuance. The issue costs are deferred and allocated to the debt securities and the stock purchase contracts based on their relative fair values at issuance date. The portion of issuance costs allocated to the debt is amortized over the life of the debt using the interest method.

The value of the stock purchase contracts is included in equity based on the requirements of SFAS No. 150, *Accounting for Certain Financial Instruments with Characteristics of both Liabilities and Equity*, and EITF Issue No. 00-19, *Accounting for Derivative Financial Instruments Indexed to, and Potentially Settled in, a Company's Own Stock*. The Company evaluated the mandatory convertible debt under SFAS No. 150 and EITF No. 00-19. In order for the stock purchase contracts to be included in equity, the following statements must be met.

- The obligation settlement amount is not based on a fixed monetary amount known at inception,

Table of Contents

- The stock purchase commitment is based on the fair value of the issuer's equity shares,
- The Company could not be required to net cash settle the stock purchase contract,
- The Company has sufficient authorized and unissued shares available to settle the stock purchase contract, and
- There is an explicit limit on the number of shares of common stock required to be delivered under the stock purchase contract.

Based on our review of the above criterion and other relevant technical requirements, the stock purchase contracts are included in equity.

Foreign Currency Translation—Assets and liabilities of consolidated subsidiaries outside of the United States are translated into U.S. dollars using the exchange rate in effect at each period end. Revenues and expenses are translated at the average exchange rate during the period. The effects of foreign currency translation adjustments arising from differences in exchange rates from period to period are deferred and included in AOCI as the functional currency of our subsidiaries is their local currency. Currency transaction gains or losses, derived on monetary assets and liabilities stated in a currency other than the functional currency, are recognized in current operations and have not been significant to the Company's operating results in any period.

Advertising and Market Development—Advertising production costs are expensed when the initial advertisement is run. Costs of print advertising are expensed as the services are received.

Share-Based Payments—Effective July 1, 2005, the Company early adopted SFAS No. 123(R), *Share-Based Payment* and Staff Accounting Bulletin No. 107, *Share-Based Payment*, using the modified prospective application method to account for its share-based compensation plans. Upon adoption, the Company began expensing options as compensation and benefits with a one-time pre-tax credit of \$2.8 million in cumulative effect of accounting change related to estimated forfeiture on restricted stock for its adoption in 2005 related to restricted stock awards. Results for prior periods have not been restated. Prior to July 1, 2005, the Company accounted for its employee stock option and awards under Accounting Principles Board ("APB") Opinion No. 25, *Accounting for Stock Issued to Employees*, and related interpretations, and accordingly, did not record compensation costs for option grants to employees if the exercise price equaled the fair market value on the grant date. Additionally, for restricted stock awards, compensation was recorded on a straight-line basis over the vesting period of the awards with forfeitures recorded as they occurred.

Under this transition method, compensation cost in 2005 includes the portion of options and awards vesting in the period for (1) all share-based payments granted prior to, but not vested as of July 1, 2005, based on the grant date fair value estimated in accordance with the original provisions of SFAS No. 123, *Accounting for Stock-Based Compensation* and (2) all share-based payments granted subsequent to July 1, 2005, based on the grant date fair value estimated in accordance with the provisions of SFAS No. 123(R.) Compensation cost for options granted prior to July 1, 2005 is recognized on an accelerated amortization method over the vesting period of the options using an estimated forfeiture rate. Compensation cost for options granted on or after July 1, 2005 is recognized on a straight-line basis over the vesting period using an estimated forfeiture rate. Also under SFAS No. 123(R), the Company has reflected the tax benefit from tax deduction in excess of compensation recognized as a financing activity in the consolidated statements of cash flows.

Table of Contents

The following table illustrates the effect on the Company's reported net income and net income per share if the Company had applied the fair value recognition provisions of SFAS No. 123, to stock-based employee compensation in periods prior to July 1, 2005 (in thousands, except per share amounts):

	Year Ended December 31,		
	2005	2004	2003
Net income, as reported	\$430,412	\$380,483	\$203,027
Add back: Stock-based employee compensation expense, net of tax included in reported net income, net of tax	11,356	3,081	2,033
Deduct: Total stock-based employee compensation expense determined under fair value-based method for all awards, net of tax	(18,733)	(22,640)	(17,561)
Pro forma net income	\$423,035	\$360,924	\$187,499
Income per share:			
Basic—as reported	\$ 1.16	\$ 1.04	\$ 0.57
Basic—pro forma	\$ 1.14	\$ 0.98	\$ 0.52
Diluted—as reported	\$ 1.12	\$ 0.99	\$ 0.55
Diluted—pro forma	\$ 1.10	\$ 0.94	\$ 0.51

The underlying assumptions to these fair value calculations are discussed in Note 21.

Comprehensive Income—The Company's comprehensive income is comprised of net income, foreign currency cumulative translation adjustments, unrealized gains (losses) on available-for-sale mortgage-backed and investment securities and the effective portion of the unrealized gains (losses) on financial derivatives in cash flow hedge relationships, net of reclassification adjustments and related taxes.

Earnings Per Share—Basic earnings per share ("EPS") is computed by dividing net income by the weighted-average common shares outstanding for the period. Diluted EPS reflects the potential dilution that could occur if securities or other contracts to issue common stock were exercised or converted into common stock. The Units will be reflected in diluted earnings per share calculations using the treasury stock method as defined by SFAS No. 128, *Earnings per Share*. Under this method, the number of shares of common stock used in calculating diluted earnings per share (based on the settlement formula applied at the end of the reporting period) is deemed to be increased by the excess, if any, of the number of shares that would be issued upon settlement of the purchase contracts less the number of shares that could be purchased by the Company in the market at the average market price during the period using the proceeds to be received upon settlement.

Financial Derivative Instruments and Hedging Activities—The Company enters into derivative transactions to protect against the risk of market price or interest rate movements on the value of certain assets, liabilities and future cash flows. The Company must also recognize certain contracts and commitments as derivatives when the characteristics of those contracts and commitments meet the definition of a derivative promulgated by SFAS No. 133, *Accounting for Derivative Instruments and Hedging Activities*, as amended.

Each derivative is recorded on the balance sheet at fair value as a freestanding asset or liability. Financial derivative instruments in hedging relationships that mitigate exposure to changes in the fair value of assets or liabilities are considered fair value hedges under SFAS No. 133. Financial derivative instruments designated in hedging relationships that mitigate the exposure to the variability in expected future cash flows or other forecasted transactions are considered cash flow hedges. The Company formally documents all relationships between hedging instruments and hedged items and the risk management objective and strategy for each hedge transaction.

[Table of Contents](#)

Fair value hedges are accounted for by recording the fair value of the financial derivative instrument and the change in fair value of the asset or liability being hedged on the consolidated balance sheets with the net difference, or hedge ineffectiveness, reported as fair value adjustments of financial derivatives in the consolidated statements of income. Cash payments or receipts and related accruals during the reporting period on derivatives included in fair value hedge relationships are recorded as an adjustment to interest income on the hedged asset or liability. If a financial derivative in a fair value hedging relationship is no longer effective, de-designated from its hedging relationship or terminated, the Company discontinues fair value hedge accounting for the derivative and the hedged item. Changes in the fair value of these derivative instruments no longer designated in an accounting hedge relationship are recorded in gain on sales of loans and securities, net, in the consolidated statements of income. The accumulated adjustment of the carrying amount of the hedged interest-earning asset or liability is recognized in earnings as an adjustment to interest income over the expected remaining life of the asset using the effective interest method.

Cash flow hedges are accounted for by recording the fair value of the financial derivative instrument as either a freestanding asset or a freestanding liability in the consolidated balance sheets, with the effective portion of the change in fair value of the financial derivative recorded in AOCI, net of tax in the consolidated balance sheets. Amounts are then included in interest expense as a yield adjustment in the same period the hedged forecasted transaction affects earnings. The ineffective portion of the change in fair value of the financial derivative is reported as fair value adjustments of financial derivatives in the consolidated statements of income. If it becomes probable that a hedged forecasted transaction will not occur, amounts included in AOCI related to the specific hedging instruments are reported as gain on sales of loans and securities, net in the consolidated statements of income. Derivative gains and losses that are not held as accounting hedges are recognized as gain on sales of loans and securities, net in the consolidated statements of income as these derivatives do not qualify for hedge accounting under SFAS No. 133. If a financial derivative ceases to be highly effective as a hedge, hedge accounting is discontinued prospectively and the financial derivative instrument continues to be recorded at fair value with changes in fair value being reported as gain on sales of loans and securities, net in the consolidated statements of income.

Revenue Recognition

Commissions—The Company derives commissions revenue from its retail and institutional customers. Commissions revenue from securities transactions are recognized on a trade date basis. The Company receives commissions for providing certain institutional customers with market research and other information, which is a common industry practice. These commissions revenue contributed less than 10% of the Company's net revenues for all periods presented. Direct costs from these arrangements are expensed as the commissions are received, in proportion to the cost of the total arrangement. As a result, payments for independent research are deferred or accrued to properly match expenses at the time commission revenue is earned. For these arrangements, payments for independent research of \$6.0 million were deferred and costs of \$19.4 million were accrued at December 31, 2005 and payments of \$6.3 million were deferred and costs of \$18.6 million were accrued at December 31, 2004.

Principal Transactions—Principal transactions consist primarily of revenue from market-making activities. Market-making activities are the matching of buyers and sellers of securities and include transactions where the Company will purchase securities for its balance sheet with the intention of resale to transact the customer's buy or sell order.

Gain on Sales of Loans and Securities, net—Gain on sales of originated loans are recognized at the date of settlement and are based on the difference between the cash received and the carrying value of the related loans sold, less related transaction costs. In cases where the Company retains the servicing rights associated with loans sold, the gain recognized is the difference between cash received and the allocated basis of the loans sold, less the related transaction costs. In accordance with SFAS No. 140, the allocated basis of the loans, which is determined at the sale date, is the result of the allocation of basis between the loans sold and the associated servicing right, based on the relative fair values of the loans at the date of transfer.

[Table of Contents](#)

Gain on sales of loans and securities, net includes gains or losses resulting from sales of loans purchased for resale; the sale or impairment of available-for-sale mortgage-backed and investment securities; and gains or losses on financial derivatives that are not accounted for as hedging instruments under SFAS No. 133. Gains or losses resulting from the sale of loans are recognized at the date of settlement and are based on the difference between the cash received and the carrying value of the related loans, less related transaction costs. Nonrefundable fees and direct costs associated with the origination of mortgage loans are deferred and recognized when the related loans are sold. Gains or losses resulting from the sale of available-for-sale securities are recognized at the trade date, based on the difference between the anticipated proceeds and the amortized cost of the specific securities sold.

Service Charges and Fees—Service charges and fees consist of account maintenance fees, servicing fee income and other customer service fees. Account maintenance fees are charged to the customer either quarterly or annually and accrued as earned.

Other Revenues—Other revenues consists of stock plan administration services, payments for order flow from third party market makers and foreign exchange margin revenue. Stock plan administration services are recognized in accordance with applicable accounting guidance, including SOP 97-2, *Software Revenue Recognition*. Payments for order flow revenues are accrued in the same period in which the related securities transactions are completed or related services are rendered.

Interest Income—Interest income is recognized as earned on interest-earning assets, customer margin loan balances, stock borrow balances, cash required to be segregated under regulatory guidelines and fees on customer assets invested in money market funds. Interest income includes the effect of hedges on interest-earning assets.

Interest Expense—Interest expense is recognized as incurred on interest-bearing liabilities, customer credit balances, interest paid to banks and interest paid to other broker-dealers through a subsidiary's stock loan program. Interest expense includes the effect of hedges on interest-bearing liabilities.

New Accounting Standards—Below are the new accounting pronouncements that relate to activities the Company is engaged.

FSP 123(R)-4—Classification of Options and Similar Instruments Issued as Employee Compensation That Allow for Cash Settlement upon the Occurrence of a Contingent Event

On February 3, 2006, the Financial Accounting Standards Board ("FASB") issued FASB Staff Position ("FSP") No. 123(R)-4, *Classification of Options and Similar Instruments Issued as Employee Compensation That Allow for Cash Settlement upon the Occurrence of a Contingent Event*. FSP 123(R)-4 addresses the classification of options and similar instruments issued as employee compensation that allow for cash settlement upon the occurrence of a contingent event. An entity must recognize a share-based liability equal to the portion of the award attributed to past service, multiplied by the award's fair value on that date for an option or similar instrument that is classified as equity, but subsequently becomes a liability because the contingent cash settlement event is probable of occurring. FSP 123(R)-4 is effective for the Company in the first quarter of 2006, with early adoption permitted. Upon adoption, the Company must retroactively restate prior periods for the change. The Company has not issued any options or similar instruments as employee compensation that allow for cash settlement upon the occurrence of a contingent event that would require a change under the FSP. Therefore, the Company does not believe this FSP will have an impact on its results of operations or financial condition.

EITF 03-01—The Meaning of Other-Than-Temporary Impairment and its Application to Certain Issues

In March 2004, the EITF amended and ratified previous consensus reached on EITF 03-01, *The Meaning of Other-Than-Temporary Impairment*. This amendment, which was originally effective for financial periods beginning after June 15, 2004, introduced qualitative and quantitative guidance for determining whether securities are other-than-temporarily impaired. In September 2004, the FASB's staff issued a number of FSPs

[Table of Contents](#)

that focused primarily upon the application of EITF 03-01 to debt securities that are impaired solely due to interest rates and/or sector spreads. In November 2005, the FASB issued FSP 115-1/124-1, *The Meaning of Other-Than-Temporary Impairment and Its Application to Certain Investments*, which nullified and replaced the qualitative and quantitative guidance for determining whether securities are other-than-temporarily impaired. The new guidance is consistent with the Company's current practice which is primarily found within SFAS No. 115 and EITF 99-20, as to the measurement and recognition of other-than-temporary impairments of its debt and equity securities.

SFAS No. 154—Accounting Changes and Error Corrections

In June 2005, the FASB issued SFAS No. 154, *Accounting Changes and Error Corrections*. This statement supersedes APB Opinion No. 20, *Accounting Changes* and SFAS No. 3, *Reporting Accounting Changes in Interim Financial Statements*. The statement applies to all voluntary changes in accounting principle and changes the requirements for accounting and reporting of a change in accounting principle. SFAS No. 154 requires retrospective application to prior periods' financial statements of a voluntary change in accounting principle unless it is impracticable. The statement requires that a change in method of depreciation, amortization, or depletion for long-lived, nonfinancial assets be accounted for as a change in accounting estimate that is effected by a change in accounting principle. SFAS No. 154 is effective for accounting changes and corrections of errors made in fiscal years beginning after December 15, 2005. The statement does not change the transition provisions of any existing accounting pronouncements, including those that are in a transition phase as of the effective date of this statement. The Company will adopt SFAS No. 154, as applicable, beginning in 2006.

SOP No. 03-3—Accounting for Certain Loans or Debt Securities Acquired in a Transfer

In December 2003, the Accounting Standards Executive Committee of the American Institute of Certified Public Accountants issued SOP No. 03-3, *Accounting for Certain Loans or Debt Securities Acquired in a Transfer* to address accounting for differences between the contractual cash flows of certain loans and debt securities and the cash flows expected to be collected when loans or debt securities are acquired in a transfer and those cash flow differences are attributable, at least in part, to credit quality. As such, SOP No. 03-3 applies to loans and debt securities purchased or acquired in purchase business combinations and does not apply to originated loans. SOP No. 03-3 requires that the excess of contractual cash flows over cash flows expected to be collected (nonaccretable difference) not be recognized as an adjustment of yield or valuation allowance, such as the allowance for credit losses. Subsequent to the initial investment, increases in expected cash flows generally should be recognized prospectively through adjustment of the yield on the loan or debt security over its remaining life. Decreases in expected cash flows should be recognized as impairment. SOP No. 03-3 is effective for loans and debt securities acquired in fiscal years beginning after December 15, 2004, with early application encouraged. In 2005, the Company adopted this new pronouncement, which effect was not material to the Company's financial condition, result of operations or cash flows.

NOTE 2—BUSINESS COMBINATIONS

Over the past two years, the Company completed several business combinations and asset acquisitions which were all accounted for under the purchase method of accounting. The purchase prices have been allocated to the net assets acquired and the liabilities assumed based on their estimated fair values at the date of acquisition. For certain acquisitions, the consolidated financial statements reflect preliminary allocations of purchase price, as appraisals of the net assets acquired have not been finalized. The Company does not expect changes in the preliminary allocations from the finalization of these appraisals to be material to its consolidated statements of income. The results of operations of each are included in the Company's consolidated statements of income from the date of each acquisition.

BrownCo

On November 30, 2005, the Company completed its acquisition of J.P. Morgan Invest, LLC ("BrownCo"), an online discount brokerage business with approximately 186,000 customer accounts, from JP Morgan Chase &

[Table of Contents](#)

Co. for an aggregate purchase price of approximately \$1.6 billion in cash. The purchase price included approximately \$306.6 million in net assets acquired, \$269.7 million in customer list and noncompete intangibles, \$9.0 million in contracts and employee termination liabilities, with the remaining \$1,062.4 million recorded as goodwill. Regulatory capital of \$294.5 million was included in the purchase price. The intangible assets will be amortized over approximately 22 years on an accelerated basis.

Harrisdirect

On October 6, 2005, the Company completed its acquisition of Harrisdirect LLC (“Harrisdirect”), a U.S.-based online discount brokerage business with approximately 425,000 customer accounts, from BMO Financial Group for an aggregate purchase price of approximately \$709.0 million in cash. The purchase price included approximately \$22.4 million in net assets acquired, \$156.4 million in customer list and noncompete intangibles, \$11.1 million in contract and employee termination liabilities, with the remaining \$541.4 million recorded as goodwill. Regulatory capital of \$16.0 million was included in the purchase price. The intangible assets will be amortized over approximately 19 years on an accelerated basis.

Wealth Management Advisors

The Company acquired Kobren Insight Management on November 2, 2005 and Howard Capital Management, Inc. on January 1, 2005. Both companies are registered investment advisory firms. The companies combined have over \$1.5 billion in assets under management. The Company recorded \$24.6 million of intangible assets and \$7.6 million of goodwill related to the acquisitions. The intangible assets will be amortized over approximately 20 years on an accelerated basis. In accordance with the terms of the acquisitions, the Company may pay additional cash and stock if certain milestones are met. These milestones are for certain revenues and earnings targets, which if met, will cause the Company to pay up to an additional \$34.6 million.

Active Accounts

In October 2004, the Company acquired certain active accounts from a brokerage company. The Company paid \$17.0 million in cash and recorded an intangible asset of \$17.0 million which will be amortized over 10 years.

NOTE 3—DISCONTINUED OPERATIONS

In 2005, the Company sold its Consumer Finance Corporation, exited the institutional proprietary trading business conducted by E*TRADE Professional Securities, LLC and announced its intention to sell its professional agency business which conducts its activities as E*TRADE Professional Trading, LLC. In 2004, the Company’s retail segment completed the sale of substantially all of the assets and liabilities of E*TRADE Access, the company that previously owned its ATM network. All of these transactions and intended transactions, except the Consumer Finance Corporation’s servicing operations, were accounted for as discontinued operations as of December 31, 2005, 2004 and 2003.

Below is a table summarizing the gains (losses), net of taxes, resulting from the sale and closure of discontinued operations (in thousands):

	Year ended December 31,	
	2005	2004
Consumer Finance Corporation—origination business ⁽¹⁾	\$ 6,444	\$ —
E*TRADE Professional	(2,421)	—
E*TRADE Access	—	31,408
Total net gain from sale of discontinued operations	\$ 4,023	\$ 31,408

(1) The gain on the servicing business, which was not accounted for as a discontinued operation, is recorded in facility restructuring and other exit activities.

[Table of Contents](#)

Consumer Finance Corporation

On October 31, 2005, the Company completed the sale of the origination and servicing business of Consumer Finance Corporation to GE Capital. The servicing business exited did not qualify as a discontinued operation; however, the origination business is accounted for as a discontinued operation. The sale resulted in a pre-tax gain of \$46.1 million upon close, \$35.5 million relating to the servicing business and \$10.6 million (\$6.4 million, net of tax), relating to the origination business.

The Company will not have significant continuing involvement in the operations of the servicing business but will continue to have significant cost-generating activities in the form of a servicing agreement. As such, the servicing business did not qualify as a discontinued operation. The Company will not have significant continuing involvement in the operations of the origination business and will not continue any significant revenue-producing or cost-generating activities of the origination business. Therefore, the results of operations, net of income taxes, of this origination business are presented as discontinued operations on the Company's consolidated statements of income for all periods presented.

The following table summarizes the results of discontinued operations for the origination business (in thousands):

	Year ended December 31,		
	2005	2004	2003
Net revenues	\$ (7,750)	\$ (5,898)	\$47,318
Income (loss) from discontinued operations before income taxes	\$(22,959)	\$(36,630)	\$18,912
Income tax expense (benefit)	(8,783)	(15,082)	7,432
Net income (loss) from discontinued operations	\$(14,176)	\$(21,548)	\$11,480

E*TRADE Professional

On May 9, 2005, the Company closed E*TRADE Professional Securities, LLC ("ETPS"), a unit that conducted proprietary trading operations. In June 2005, the Company filed to withdraw its broker-dealer license for ETPS, with an effective date of May 31, 2005. ETPS was a Philadelphia Stock Exchange ("PHLX") member and a standalone entity which employed less than 200 traders. This closure resulted in a \$2.4 million, net of tax, loss on disposal of discontinued operations, which included employee terminations, facility closure and impairment of goodwill and intangibles.

In December 2005, the Company decided to sell its professional agency business, E*TRADE Professional Trading, LLC ("ETPT"). This business includes a broker-dealer registered with the SEC and a member of the NASD Inc. ("NASD") who currently executes and clears its customer security transactions through an affiliate, E*TRADE Clearing LLC, on a fully disclosed basis under an introducing broker-dealer relationship. The Company executed a sale agreement on February 17, 2006. Under the terms of the sale agreement, the Company continues to retain the obligation for contingent liabilities that existed prior to the sale, which contingent liabilities would not, in the Company's estimation individually or collectively, be material to the Company's financial results.

The Company will not have significant continuing involvement in the operations of either its proprietary trading or its professional agency businesses and will not continue any significant revenue-producing or cost-generating activities of these businesses. Therefore, the Company's results of operations, net of income taxes, include these businesses as discontinued operations on the Company's consolidated statements of income for all periods presented.

Table of Contents

The following table summarizes the results of discontinued operations for the proprietary and agency trading businesses (in thousands):

	Year ended December 31,		
	2005	2004	2003
Net revenues	\$ 21,408	\$ 50,962	\$ 48,765
Loss from discontinued operations before income taxes	\$(11,103)	\$(13,851)	\$(12,919)
Income tax benefit	(3,784)	(4,499)	(5,610)
Net loss from discontinued operations	\$ (7,319)	\$ (9,352)	\$ (7,309)

E*TRADE Access

In 2004, the Company completed the sale of substantially all of the assets and liabilities of E*TRADE Access to Cardtronics, LP and Cardtronics, Inc. Although the Company believes that an ATM network is an important distribution channel for its customers, it determined that its continued ownership and direct operation of the ATM network was not essential to providing this customer benefit and that the capital it had invested in this endeavor could be better applied to other operations.

The sale resulted in a \$57.5 million pre-tax gain (\$31.4 million after taxes.) As part of the sales agreement, Cardtronics assumed substantially all of the liabilities of E*TRADE Access. The Company has reflected E*TRADE Access' results of operations, financial position and cash flows as discontinued operations in the consolidated financial statements for all periods reported herein.

The following table summarizes the results of discontinued operations of our ATM business for the periods presented (in thousands):

	Year Ended December 31,	
	2004	2003
Revenues	\$ 20,029	\$ 44,909
Loss from discontinued operations before income taxes	\$ (3,085)	\$ (2,700)
Income tax benefit	(1,230)	(1,035)
Loss from discontinued operations	\$ (1,855)	\$ (1,665)

NOTE 4—FACILITY RESTRUCTURING AND OTHER EXIT ACTIVITIES

The following table summarizes the amount recognized by the Company as facility restructuring and other exit activities for the periods presented (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Exit of Consumer Finance Corporation—servicing business	\$(35,496)	\$ —	\$ —
Israel exit activities	—	14,500	1,435
2003 Restructuring Plan	2,002	1,857	112,564
2001 Restructuring Plan	1,096	(800)	16,367
Other exit activities	2,381	131	3,821
Total restructuring and other exit activities	\$(30,017)	\$15,688	\$134,187

[Table of Contents](#)

Exit of Consumer Finance Business

On October 31, 2005, the Company completed the sale of the servicing and origination businesses of Consumer Finance Corporation to GE Capital resulting in a pre-tax gain of \$46.1 million. The pre-tax gain from the servicing business of \$35.5 million is reflected in other exit activity as the servicing business was not deemed to be a discontinued operation. (See Note 3 for additional information.)

Israel Exit Activity

The Company terminated the trademark and technology license of an Israeli-based company in 2002 due to failure to perform obligations and commenced arbitration proceedings. The Israeli company counterclaimed for wrongful termination. An arbitration tribunal in London decided against the Company and as a result, the Company recognized \$14.5 million and \$1.4 million in exit activities for 2004 and 2003.

2003 Restructuring Plan

In April 2003, the Company announced a restructuring plan (“2003 Restructuring Plan”) exiting and consolidating leased facilities and exiting and disposing of certain unprofitable product offerings and initiatives. The original 2003 facility consolidation charge primarily related to charges to exit the E*TRADE FINANCIAL Center in New York and consolidation of excess facilities located in Menlo Park and Rancho Cordova, California. The E*TRADE FINANCIAL Center in New York, encompassing approximately 31,000 square feet, was used by customers to access the Company’s products and services and served as an introduction point for new customers to the Company’s products and services. The Company exited this center as it was not cost effective to engage in these activities within a facility of its size, and subsequently, opened an approximately 2,000 square foot new center in New York that was more cost effective. The leased California facilities were used for corporate and administrative functions and were exited as the Company consolidated employees into nearby offices and moved certain functions to its offices in Virginia.

The other charges related to the exit of or write-off of unprofitable product lines and the early termination of certain contracts, such as the revenue sharing agreements associated with 43 E*TRADE Zones located in Target stores. These unprofitable product lines consisted of our Stock Basket product offered to customers and our online advisory service, eAdvisor, a joint initiative with Enlight Holdings, LLC. The Company terminated its revenue sharing agreements associated with its Zones in Target stores to focus on other methods of reaching its current and potential customers.

Table of Contents

In 2004, the Company completed its exit of the Enlight Holdings, LLC product offering resulting in adjustments to estimated costs associated with its exit. In 2005, the Company made additional adjustment to previously estimated costs associated with the consolidation of facilities in California. The rollforward of the 2003 Restructuring Plan reserve is presented below (in thousands):

	Facility Consolidation	Other	Total
Original 2003 Restructuring Reserve:			
Facility restructuring and other exit activity recorded in 2003	\$ 55,010	\$ 57,960	\$112,970
Cash payments	(11,007)	(16,369)	(27,376)
Non-cash charges	(19,254)	(38,370)	(57,624)
Restructuring liabilities at December 31, 2003	24,749	3,221	27,970
2004 activity on original 2003 restructuring reserve:			
Adjustment and additional charges recorded in 2004	2,458	(601)	1,857
Cash payments	(5,439)	(2,249)	(7,688)
Restructuring liabilities at December 31, 2004	21,768	371	22,139
2005 activity on original 2003 restructuring reserve:			
Adjustment and additional charges recorded in 2005	2,042	(40)	2,002
Cash payments	(5,093)	(331)	(5,424)
Restructuring liabilities at December 31, 2005	\$ 18,717	\$ —	\$ 18,717

2001 Restructuring Plan

In August 2001, the Company announced a restructuring plan ("2001 Restructuring Plan") aimed at streamlining operations primarily by consolidating facilities in the United States and Europe. The restructuring was designed to consolidate certain facilities, bring together key decision-makers and streamline operations. The original 2001 restructuring charge related to facility consolidation represents the undiscounted value of ongoing lease commitments, offset by anticipated third-party sublease revenues, the write-off of capitalized software, hardware and other fixed assets and other costs. Subsequent to 2001, the Company recognized additional facility consolidation adjustments, as a result of updated estimates of sublease income and sublease start dates, driven by economic circumstances. The rollforward of the 2001 Restructuring Plan reserve is presented below (in thousands):

	Facility Consolidation	Asset Write-Off	Other	Total
Total 2001 facility restructuring and other nonrecurring charges recorded in 2001	\$ 128,469	\$ 52,532	\$ 21,764	\$ 202,765
Activity through December 31, 2003:				
Adjustments and additional charges	22,204	2,072	3,499	27,775
Cash payments	(92,881)	(67)	(19,281)	(112,229)
Non-cash charges	(41,263)	(53,877)	(5,810)	(100,950)
Restructuring liabilities at December 31, 2003	16,529	660	172	17,361
2004 activity on original 2001 restructuring reserve:				
Adjustments and additional charges recorded in 2004	(800)	—	—	(800)
Cash payments	(5,489)	—	(6)	(5,495)
Restructuring liabilities at December 31, 2004	10,240	660	166	11,066
2005 activity on original 2001 restructuring reserve:				
Adjustments and additional charges recorded in 2005	543	(220)	773	1,096
Cash payments	(3,328)	(440)	(147)	(3,915)
Restructuring liabilities at December 31, 2005	\$ 7,455	\$ —	\$ 792	\$ 8,247

[Table of Contents](#)

Facility Consolidation Obligations

The components of the facility consolidation restructuring liabilities for the 2003 and 2001 Restructuring Plans at December 31, 2005, and their timing are as follows (in thousands):

Year	Facilities Obligations	Sublease Income		Discounted Rents and Sublease	Net
		Contracted	Estimate		
2006	\$ 12,542	\$ (2,952)	\$ (224)	\$ (1,000)	\$ 8,366
2007	10,537	(2,360)	(966)	(735)	6,476
2008	7,886	(1,839)	(835)	(352)	4,860
2009	6,382	(1,440)	(716)	(151)	4,075
2010	3,535	(731)	(488)	(61)	2,255
Thereafter	922	(782)	—	—	140
Total	\$ 41,804	\$(10,104)	\$(3,229)	\$ (2,299)	\$26,172

Other Exit Activities

Other exit activities in 2005 are primarily related to the liquidation of proprietary money market funds and the outsourcing of certain brokerage activities. These costs primarily relate to customer notification, reimbursement of losses taken on sale of securities and severance. Other exit charges in 2003 were primarily related to the gain on sale of the Company's German subsidiary, partially offset by the charges relating to the exit of the Company's proprietary institutional research business located in Europe.

NOTE 5—BROKERAGE RECEIVABLES, NET AND BROKERAGE PAYABLES

Brokerage receivables, net and brokerage payables consist of the following (in thousands):

	December 31,	
	2005	2004
Receivable from customers and non-customers (less allowance for doubtful accounts of \$8,835 at December 31, 2005 and \$1,970 at December 31, 2004)	\$ 5,678,923	\$ 2,214,210
Receivable from brokers, dealers and clearing organizations:		
Deposits paid for securities borrowed	1,163,125	613,546
Net settlement and deposits with clearing organizations	230,936	158,780
Other	101,191	48,012
Total brokerage receivables, net	\$ 7,174,175	\$ 3,034,548
Payable to customers and non-customers	\$ 5,817,469	\$ 2,805,662
Payable to brokers, dealers and clearing organizations:		
Deposits received for securities loaned	1,320,853	735,622
Other	177,337	77,608
Total brokerage payables	\$ 7,315,659	\$ 3,618,892

Receivables from customers and non-customers are brokerage receivables whereby credit is extended to customers to finance their purchases of securities by borrowing against securities they currently own (also known as margin balances). At December 31, 2005, the fair value of securities that the Company received as collateral, where the Company is permitted to sell or repledge the securities, is approximately \$8.8 billion. Of this amount, \$2.4 billion has been pledged or sold at December 31, 2005 in connection with securities lending, bank borrowings and deposits with clearing organizations.

[Table of Contents](#)

NOTE 6—AVAILABLE-FOR-SALE MORTGAGE-BACKED AND INVESTMENT SECURITIES

The amortized cost basis and estimated fair values of available-for-sale mortgage-backed and investment securities are shown in the following table (in thousands):

	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Values
December 31, 2005:				
Mortgage-backed securities:				
U.S. Government sponsored enterprise obligations:				
Federal National Mortgage Association	\$ 7,468,607	\$ —	\$ (199,259)	\$ 7,269,348
Government National Mortgage Association	2,198,009	—	(59,739)	2,138,270
Federal Home Loan Mortgage Corporation	21,050	—	(1,147)	19,903
Total U.S. government sponsored enterprise	9,687,666	—	(260,145)	9,427,521
Collateralized mortgage obligations and other	1,014,582	315	(19,006)	995,891
Total mortgage-backed securities	10,702,248	315	(279,151)	10,423,412
Investment securities:				
Debt securities:				
Asset-backed securities	1,376,315	1,811	(12,372)	1,365,754
Municipal bonds	168,682	1,884	(882)	169,684
Corporate bonds	74,931	—	(2,171)	72,760
Other debt securities	78,989	—	(5,504)	73,485
Total debt securities	1,698,917	3,695	(20,929)	1,681,683
Publicly traded equity securities	343,392	94,679	(2,306)	435,765
Retained interests from securitizations	22,444	1,434	—	23,878
Total investment securities	2,064,753	99,808	(23,235)	2,141,326
Total available-for-sale securities	\$ 12,767,001	\$ 100,123	\$ (302,386)	\$ 12,564,738
December 31, 2004:				
Mortgage-backed securities:				
U.S. Government sponsored enterprise obligations:				
Federal National Mortgage Association	\$ 5,149,991	\$ 203	\$ (87,990)	\$ 5,062,204
Government National Mortgage Association	2,767,087	349	(56,628)	2,710,808
Federal Home Loan Mortgage Corporation	21,057	—	(862)	20,195
Total U.S. government sponsored enterprise	7,938,135	552	(145,480)	7,793,207
Collateralized mortgage obligations and other	1,266,736	5,008	(12,882)	1,258,862
Total mortgage-backed securities	9,204,871	5,560	(158,362)	9,052,069
Investment securities:				
Debt securities:				
Asset-backed securities	2,789,471	21,662	(14,704)	2,796,429
Municipal bonds	136,362	1,391	(1,082)	136,671
Corporate bonds	87,959	—	(3,444)	84,515
Other debt securities	80,189	—	(4,767)	75,422
Total debt securities	3,093,981	23,053	(23,997)	3,093,037
Publicly traded equity securities	295,593	81,304	(2,055)	374,842
Retained interests from securitizations	23,870	—	—	23,870
Total investment securities	3,413,444	104,357	(26,052)	3,491,749
Total available-for-sale securities	\$ 12,618,315	\$ 109,917	\$ (184,414)	\$ 12,543,818

[Table of Contents](#)

Other-Than-Temporary Impairment of Investments

The following tables show the fair value and unrealized losses on investments, aggregated by investment category and the length of time that individual securities have been in a continuous unrealized loss position (in thousands):

	Less than 12 Months		12 Months or More		Total	
	Fair Value	Unrealized Losses	Fair Value	Unrealized Losses	Fair Value	Unrealized Losses
December 31, 2005:						
Mortgage-backed securities:						
Backed by Federal agencies	\$ 5,914,808	\$ (142,245)	\$ 3,512,713	\$ (117,900)	\$ 9,427,521	\$ (260,145)
Other	351,565	(5,177)	546,291	(13,829)	897,856	(19,006)
Asset-backed securities	412,142	(3,064)	411,595	(9,308)	823,737	(12,372)
Municipal bonds	21,006	(165)	22,775	(717)	43,781	(882)
Corporate bonds	—	—	72,760	(2,171)	72,760	(2,171)
Other debt securities	—	—	73,485	(5,504)	73,485	(5,504)
Publicly traded equity securities	86,538	(1,335)	11,759	(971)	98,297	(2,306)
Total temporarily impaired securities	\$ 6,786,059	\$ (151,986)	\$ 4,651,378	\$ (150,400)	\$ 11,437,437	\$ (302,386)
December 31, 2004:						
Mortgage-backed securities:						
Backed by Federal agencies	\$ 5,504,676	\$ (85,020)	\$ 2,135,727	\$ (60,460)	\$ 7,640,403	\$ (145,480)
Other	704,369	(6,715)	175,678	(6,167)	880,047	(12,882)
Asset-backed securities	771,250	(5,851)	20,769	(8,853)	792,019	(14,704)
Municipal bonds	72,146	(1,082)	—	—	72,146	(1,082)
Corporate bonds	—	—	84,515	(3,444)	84,515	(3,444)
Other debt securities	—	—	74,700	(4,767)	74,700	(4,767)
Publicly traded equity securities	52,717	(2,055)	—	—	52,717	(2,055)
Total temporarily impaired securities	\$ 7,105,158	\$ (100,723)	\$ 2,491,389	\$ (83,691)	\$ 9,596,547	\$ (184,414)

The Company does not believe any individual loss as of December 31, 2005 represents an other-than-temporary impairment. The majority of the unrealized losses on mortgage- and asset-backed securities are attributable to changes in interest rates and not reflective of deterioration in the credit quality of the issuer and/or securitization. Substantially all mortgage-backed securities backed by Federal agencies are “AAA” rated and have unrealized losses due to changes in market interest rates. As market interest rates increase, the fair value of fixed-rate securities will decrease. During 2005, increasing market interest rates caused higher unrealized losses on our fixed-rate securities including mortgage- and asset-backed securities. The Company has the ability and intent to hold these securities until the market value recovers or the securities mature. Asset-backed securities, corporate bonds and other debt securities are evaluated by reviewing the credit worthiness of the lender and based on market conditions. As of December 31, 2005, unrealized losses on mortgage- and asset-backed securities were primarily attributed to rising interest rates and not underlying credit impairment. Based on its evaluation, the Company recorded other-than-temporary charges of \$38.3 million, \$14.0 million and \$2.2 million for 2005, 2004 and 2003, respectively, for its asset- and mortgage-backed securities and interest-only securities. Additionally, the Company recognized \$2.0 million and \$4.4 million of other-than-temporary impairments for 2005 and 2004, respectively, from retained beneficial interests in securitized receivables held by a subsidiary, ETCF Asset Funding Corporation.

[Table of Contents](#)

Publicly Traded Equity Securities

For the years ended December 31, 2005, 2004 and 2003, the Company recognized gains on sales of its publicly traded equity securities of \$82.7 million, \$130.6 million and \$151.7 million, respectively. In 2005, these gains included sales of the Company's holdings in Softbank Investment Corporation ("SBI"), all of its holdings in Archipelago Holdings Incorporated, Ameritrade Holding Corporation and holdings in International Stock Exchange of \$59.7 million, \$9.8 million, \$8.4 million and \$4.8 million, respectively. In 2004 and 2003, these gains primarily included sales of the Company's holdings in SBI.

Contractual Maturities

The contractual maturities of available-for-sale debt securities, including mortgage-backed securities, at December 31, 2005 are shown below (in thousands):

	Amortized Cost	Estimated Fair Values
Due within one year	\$ 3	\$ 3
Due within one to five years	31,371	31,369
Due within five to ten years	99,019	93,298
Due after ten years	12,270,772	11,980,425
Total available-for-sale debt securities	\$ 12,401,165	\$ 12,105,095

The Company pledged \$11.8 billion at December 31, 2005 and \$10.1 billion at December 31, 2004 of mortgage-backed securities as collateral for repurchase agreements, short-term borrowings, derivative instruments and FHLB advances.

Realized Gains (Losses)

Realized gains and losses from the sales and other-than-temporary impairment of available-for-sale investment securities, including mortgage-backed securities, are as follows (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Mortgage-backed securities:			
Realized gains	\$ 130,840	\$ 105,876	\$ 138,781
Realized losses	(100,765)	(47,785)	(47,046)
Impairment charges	(30,924)	(12,400)	—
Net realized gains (losses) on mortgage-backed securities included in gain on sales of loans and securities, net	\$ (849)	\$ 45,691	\$ 91,735
Other investments:			
Realized gains	\$ 126,104	\$ 152,480	\$ 194,511
Realized losses	(8,878)	(6,596)	(21,980)
Impairment charges	(7,419)	(1,558)	(2,198)
Net realized gains included in gain on sales of loans and securities, net and gain on sale and impairment of investments	\$ 109,807	\$ 144,326	\$ 170,333

During 2005, 2004 and 2003, the Company realized gains from the sales of trading securities of \$108.8 million, \$101.3 million and \$81.3 million, respectively. In addition, the Company had unrealized trading asset appreciation of \$0.6 million, \$2.5 million and \$4.8 million in 2005, 2004 and 2003, respectively.

[Table of Contents](#)

NOTE 7—LOANS, NET

Loans, net are summarized as follows (in thousands):

	<u>Held-for- Investment</u>	<u>Held-for- Sale</u>	<u>Total Loans</u>
December 31, 2005:			
Real estate loans:			
One- to four-family	\$ 7,091,664	\$ 87,233	\$ 7,178,897
HELOC, second mortgage and other	8,106,820	74	8,106,894
Total real estate loans	15,198,484	87,307	15,285,791
Consumer and other loans:			
RV	2,692,055	—	2,692,055
Marine	752,645	—	752,645
Automobile	235,388	—	235,388
Credit card	188,600	—	188,600
Other	97,436	—	97,436
Total consumer and other loans	3,966,124	—	3,966,124
Total loans	19,164,608	87,307	19,251,915
Unamortized premiums, net	323,573	64	323,637
Allowance for loan losses	(63,286)	—	(63,286)
Total loans, net	\$ 19,424,895	\$ 87,371	\$ 19,512,266
December 31, 2004:			
Real estate loans:			
One- to four-family	\$ 3,669,594	\$ 244,593	\$ 3,914,187
HELOC, second mortgage and other	3,618,740	3,095	3,621,835
Total real estate loans	7,288,334	247,688	7,536,022
Consumer and other loans:			
RV	2,542,645	25,246	2,567,891
Marine	720,513	3,612	724,125
Automobile	583,354	35	583,389
Credit card	203,169	—	203,169
Other	19,493	—	19,493
Total consumer and other loans	4,069,174	28,893	4,098,067
Total loans	11,357,508	276,581	11,634,089
Unamortized premiums, net	195,928	2,699	198,627
Allowance for loan losses	(47,681)	—	(47,681)
Total loans, net	\$ 11,505,755	\$ 279,280	\$ 11,785,035

In addition to these loans, net, the Company had commitments to originate, buy and sell loans at December 31, 2005 (see Note 24.)

Approximately 32% and 45% of the Company's real estate loans were concentrated in California at December 31, 2005 and 2004, respectively. No other state had concentrations of real estate loans that represented 10% or more of the Company's real estate portfolio.

Table of Contents

The following table shows the percentage of adjustable and fixed-rate loans in the Company's portfolio (dollars in thousands):

	December 31, 2005		December 31, 2004	
	\$ Amount	% of Total	\$ Amount	% of Total
Adjustable rate loans:				
Real estate	\$10,972,028	57.0%	\$ 6,839,796	58.8%
Credit card and other	277,597	1.4	206,039	1.8
Total adjustable rate loans	11,249,625	58.4	7,045,835	60.6
Fixed rate loans	8,002,290	41.6	4,588,254	39.4
Total loans	\$19,251,915	100.0%	\$11,634,089	100.0%

The weighted-average remaining maturity of mortgage loans secured by one- to four-family residences was 341 and 340 months at December 31, 2005 and 2004, respectively. Additionally, all mortgage loans outstanding at December 31, 2005 and 2004 in the held-for-investment portfolio were serviced by other companies.

The Company actively sells its originated loans and loans originated by correspondents. The Company may sell loans that it originally purchased from others. A summary of these activities is presented below (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Loans sold:			
Originated	\$ 2,728,094	\$ 4,339,901	\$ 9,401,248
Purchased	1,028,747	2,395,886	4,114,563
Total loans sold	\$ 3,756,841	\$ 6,735,787	\$ 13,515,811
Gain on sales of loans:			
Originated	\$ 54,847	\$ 82,716	\$ 150,393
Purchased	(1,208)	(3,447)	186
Total gain on sale of loans	\$ 53,639	\$ 79,269	\$ 150,579

Activity in the allowance for loan losses is summarized as follows (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Allowance for loan losses, beginning of year	\$ 47,681	\$ 37,847	\$ 27,666
Provision for loan losses	54,016	38,121	38,523
Acquired through acquisitions	—	1,547	2,748
Charge-offs	(56,847)	(50,341)	(53,734)
Recoveries	18,436	20,507	22,644
Allowance for loan losses, end of year	\$ 63,286	\$ 47,681	\$ 37,847

During 2005, the allowance for loan losses increased by \$15.6 million. Approximately \$12.9 million of this increase is due to higher real estate loans outstanding which increased by \$8.1 billion during 2005. The remaining increase in the allowance was due to slightly higher expected losses on RV and credit card loans offset by lower automobile loan related losses.

The \$8.6 million increase in net charge-offs in 2005 was primarily due to higher net charge-offs on credit cards of \$6.7 million, marine and RV of \$4.7 million and real estate loan portfolios of \$2.8 million, offset partially by lower net charge-offs on automobile loans of \$5.8 million. Higher credit card charge-offs are the

Table of Contents

result of increased bankruptcy filings as customers declared bankruptcy ahead of the new bankruptcy laws in October 2005. We do not anticipate that the 2005 level of credit card charge-offs will continue. The increase in net charge-offs was also due to growth in loans receivable and specific events affecting customer behavior during the period and not indicative of a decline in credit quality.

We classify loans as nonperforming when full and timely collection of interest or principal becomes uncertain or when they are 90 days past due. The following is the relative breakout of nonperforming loans (in thousands):

	December 31,	
	2005	2004
First mortgage loans, secured by one- to four-family residences	\$ 18,067	\$ 11,029
HELOC and second mortgage	9,568	2,755
Credit card	2,858	2,999
RV	2,826	1,416
Other	1,335	1,756
Total nonperforming loans	\$ 34,654	\$ 19,955

If the Company's nonperforming loans at December 31, 2005, had been performing in accordance with their terms, the Company would have recorded additional interest income of approximately \$0.8 million, \$1.0 million and \$1.1 million in 2005, 2004 and 2003, respectively. During 2005, we recognized \$1.0 million in interest on loans that were in nonperforming status at December 31, 2005. At December 31, 2005 and 2004, there were no commitments to lend additional funds to any of these borrowers.

NOTE 8—ASSET SECURITIZATION

Collateralized Debt Obligations

On December 1, 2005, the Company and an unrelated financial advisor transferred asset-backed securities to E*TRADE ABS CDO IV, Ltd. ("CDO IV"). The Company utilized a warehouse line to purchase the asset-backed securities that were sold to CDO IV. As of December 31, 2005, 92% of the pool of underlying securities had been transferred into CDO IV. Additional purchases of asset-backed securities were made in open market transactions and transferred to CDO IV in January and February 2006. In prior years, the Company transferred asset-backed securities to E*TRADE ABS CDO III, Ltd. ("CDO III"), E*TRADE ABS CDO II, Ltd. ("CDO II") and E*TRADE ABS CDO I, Ltd. ("CDO I"). Asset-backed securities were also transferred to CDO III by an unrelated financial advisor. Concurrent with these transfers, the respective CDOs sold beneficial interests to independent investors in the form of senior and subordinated notes and preference shares, collateralized by the asset-backed securities. Neither the CDOs themselves nor the investors in the beneficial interests sold by the CDOs have recourse to the Company. CDO I, II and III are qualifying special purpose entities as defined in SFAS No. 140, and, as such, are not required to be consolidated in the Company's consolidated financial statements.

CDO IV is not a qualified special purpose entity but rather a special purpose entity, as the Company has been appointed by the CDO to actively manage the collateral of the CDO. The transaction was accounted for as a sale in accordance with SFAS No. 140. The CDO IV transaction differs from the previous three CDO transactions in that it is a managed deal whereby the portfolio manager (E*TRADE Global Asset Management ("ETGAM")) is appointed to actively manage the collateral of the CDO as opposed to a static deal where the collateral is fixed throughout the life of the CDO. Because CDO IV is a managed deal, it is a special purpose entity and not a qualified special purpose entity.

The Company reviewed CDO IV to determine if consolidation was necessary under the requirements of FIN 46R. The calculation of the CDO's beneficial interests indicated that ETGAM was not the recipient of the

[Table of Contents](#)

majority of the potential benefits or losses of the deal and therefore, not the primary beneficiary of the transaction and not required to consolidate the CDO.

The Company purchased preference shares in each of the CDOs. Retained interests are subordinate to the notes sold by each CDO and on an equal standing with the preference shares purchased by other preference share investors in each CDO. The Company also purchased \$1 million of the BBB subordinated notes in the CDO IV transaction.

The following table summarizes the asset-backed securities transferred to each CDO, the amount of the cash proceeds, the preference shares purchased by the Company and the current rating for those preference shares (dollars in millions):

CDO	Transaction Date	Asset-Backed Securities Transferred to CDO				Preference Shares Purchased by E*TRADE		
		E*TRADE	Independent Investment Advisor	Total	Proceeds	Amount	Rating at 12/31/05	
							Moody's	S&P
CDO IV	December 2005	\$ 37.0	\$ 238.6	\$ 275.6	\$ 300.0	\$ 1.4	N/A	B
CDO III	December 2004	124.0	175.5	299.5	304.4	5.0	Ba1	BB+
CDO II	August 2003	400.1	—	400.1	400.9	6.0	Ba2	BBB-
CDO I	September 2002	50.2	200.0	250.2	251.7	8.6	Ca	B+
Total		\$ 611.3	\$ 614.1	\$ 1,225.4	\$ 1,257.0	\$ 21.0		

The carrying values of the Company's retained interest in the CDOs are subject to future volatility in credit, interest rate and prepayment risk. The investment in the preference shares is classified as a trading security in the Company's investment portfolio. Therefore, changes in the market value of these securities are recorded in gain on sales of loans and securities, net in the consolidated statements of income. The following table presents a sensitivity analysis of the Company's retained interests in the CDOs at December 31, 2005 (dollars in thousands):

	CDO I	CDO II	CDO III	CDO IV
Fair value of retained preference shares ⁽¹⁾	\$ 195	\$6,288	\$5,178	\$1,399
Weighted-average remaining life (years)	6.71	2.70	3.84	3.72
Weighted-average prepayment speed	15%	10%	10%	— %
Impact of 10% adverse change	\$ (10)	\$ (43)	\$ (98)	\$ (14)
Impact of 20% adverse change	\$ (18)	\$ (85)	\$ (198)	\$ (28)
Weighted-average discount rate	2%	16%	15%	16%
Impact of 10% adverse change	\$ (7)	\$ (257)	\$ (276)	\$ (78)
Impact of 20% adverse change	\$ (10)	\$ (499)	\$ (529)	\$ (150)
Weighted-average expected credit losses	1.95%	0.44%	0.41%	0.65%
Impact of 10% adverse change	\$ (195)	\$ (43)	\$ (22)	\$ (17)
Impact of 20% adverse change	\$ (195)	\$ (86)	\$ (44)	\$ (33)
Actual credit losses to date	\$13,056	\$ —	\$ —	\$ —
For the year ended December 31, 2005 ⁽²⁾				
Actual interest payments received	\$ —	\$1,080	\$ 642	\$ —

(1) Based on calculated discounted expected future cash flows, premised on weighted-average life, prepayment speed, discount rate and expected credit losses shown in this table.

(2) No actual principal payments have been received to-date.

The sensitivities and estimates shown in the preceding table are hypothetical and should be used with the understanding that actual future performance and results can vary significantly. As the sensitivity analysis table shows, changes in the fair value based on a 10% variation in assumptions generally cannot be extrapolated because the relationship of the change in assumption to the change in fair value may not be linear. Also, in this

[Table of Contents](#)

table, the effect of a variation in a particular assumption on the fair value of the preference shares is calculated without changing any other assumption. Changes in one factor may result in changes in another factor (for example, increases in market interest rates could result in lower prepayments and increased credit losses), which could magnify or counteract the sensitivities.

The Company entered into management agreements to provide certain collateral management services for the CDOs. As compensation for its services, it receives a management fee from the trustee based on the quarterly amount of assets managed (as defined.) During 2005, the Company earned \$4.2 million of management fees under the CDOs.

At December 31, 2005, the Company managed both its on-balance sheet asset-backed securities and the off-balance sheet securitized asset-backed securities of the CDOs, which are presented in the following table (in thousands):

Managed on-balance sheet asset-backed securities, classified as:	
Available-for-sale	\$ 1,365,754
Trading securities	63,956
	<hr/>
Total managed on-balance sheet asset-backed securities	1,429,710
	<hr/>
Managed off-balance sheet securitized asset-backed securities:	
CDO I	104,157
CDO II	280,657
CDO III	284,989
CDO IV	274,599
	<hr/>
Total managed off-balance sheet securitized asset-backed securities	944,402
	<hr/>
Total managed asset-backed securities	\$ 2,374,112
	<hr/>

Securitized Consumer Finance Receivables

The origination and servicing businesses of Consumer Finance Corporation were sold in late 2005. As a result of the sale, the Company retained the consumer receivables and beneficial interests in the trusts. Prior to the sale, Consumer Finance Corporation securitized RV and marine consumer receivables by sales or other transfers to ETCF Asset Funding Corporation through the formation of trusts. There were no securitizations of consumer receivables in 2005. During 2004, Consumer Finance Corporation securitized approximately \$0.3 billion of RV and marine receivables. On October 20, 2003, the Company acquired ETCF Asset Funding Corporation and the retained beneficial interests in four trusts.

Table of Contents

The carrying values of the retained beneficial interests are subject to future volatility in credit, interest rate and prepayment risk. The following table presents a sensitivity analysis of each of portfolio of securitized receivables (dollars in thousands):

	RV 1999-1 ⁽¹⁾	Marine 1999-2	RV 1999-3	RV/Marine 2001-1	RV/Marine 2004-1
Fair value of residual investment ⁽²⁾					
At December 31, 2005	\$ 7,870	\$11,861	\$ 2,021	\$ 2,125	\$ 13,527
At initial value ⁽³⁾	\$ 9,740	\$12,775	\$ 4,223	\$ 3,981	\$ 10,877
Weighted-average remaining life (years)	0.08	0.33	1.24	2.24	2.28
Weighted-average prepayment speed	17%	20%	17%	21%	25%
Impact of 10% adverse change	\$ (1)	\$ (1)	\$ 51	\$ 50	\$ (133)
Impact of 20% adverse change	\$ (1)	\$ (2)	\$ 51	\$ 58	\$ (236)
Weighted-average discount rate	9%	9%	9%	9%	16%
Impact of 10% adverse change	\$ (5)	\$ (32)	\$ (21)	\$ (39)	\$ (477)
Impact of 20% adverse change	\$ (11)	\$ (64)	\$ (41)	\$ (77)	\$ (926)
Weighted-average expected credit losses	1.83%	1.58%	1.92%	1.97%	0.48%
Impact of 10% adverse change	\$ (16)	\$ (32)	\$ (106)	\$ (324)	\$ (269)
Impact of 20% adverse change	\$ (32)	\$ (64)	\$ (212)	\$ (590)	\$ (511)
Actual credit losses					
Since trust inception ⁽⁴⁾	\$32,346	\$10,596	\$11,218	\$ 14,557	\$ 624
Since acquisition on October 20, 2003	\$ 6,833	\$ 1,595	\$ 2,957	\$ 6,172	N/A
For the year ended December 31, 2005					
Actual interest payments received	\$ 259	\$ 222	\$ 107	\$ 253	\$ —
Actual principal payments received	\$ 54	\$ 241	\$ 310	N/A	\$ —

(1) On December 14, 2005, the Company exercised its option to redeem at par the collateral associated with 1999-1 and receive cash for its residual interest. Payment of the residual interest was received in January 2006.

(2) Based on calculated discounted expected future cash flows, premised on weighted-average life, prepayment speed, discount rate and expected credit losses shown in this table.

(3) Initial value at December 31, 2004 for 2004-1 and October 20, 2003 for all remaining.

(4) Default base on the entire balance of the amount securitized as follows: 1990-1: \$1,000,003; 1992-2: \$550,000; 1999-3: \$374,531; 2001-1: \$529,467; 2004-1: \$308,996.

The sensitivities and estimates shown in the preceding table are hypothetical; actual future performance and results can vary significantly. As the sensitivity analysis table shows, changes in the fair value based on a 10% variation in assumptions generally cannot be extrapolated because the relationship of the change in assumption to the change in fair value may not be linear. Also, in this table, the effect of a variation in a particular assumption on the fair value of the preference shares is calculated without changing any other assumption. Changes in one factor may result in changes in another factor (for example, increases in market interest rates may result in lower prepayments and increased credit losses), which might magnify or counteract the sensitivities.

[Table of Contents](#)

NOTE 9—SERVICING RIGHTS

The following table shows the net amortized cost of the Company's servicing rights (in thousands):

	December 31,	
	2005	2004
Servicing assets:		
Balance beginning of period	\$29,659	\$32,773
Purchases (sales) ⁽¹⁾	(4,118)	4,614
Amortization of servicing rights	(8,241)	(7,728)
Balance end of period	17,300	29,659
Valuation allowance for impairment:		
Balance beginning of period	(8,146)	(5,379)
Valuation adjustment ⁽¹⁾	1,872	(2,767)
Balance end of period	(6,274)	(8,146)
Servicing rights, end of period	\$11,026	\$21,513

(1) Reflects sale of the Consumer Finance business in October 2005. The origination and servicing of RV and marine loans were provided by this business.

The most important assumptions used in determining the estimated fair value are anticipated loan prepayments and discount rates. The Company uses market-based assumptions and confirms the reasonableness of the Company's valuation model through management's quarterly review, analyses of market quotes and independent broker valuations of the fair value of the servicing rights.

The servicing responsibilities retained by Consumer Finance Corporation for each securitization have been transferred to the purchaser. Prior to the sale, Consumer Finance Corporation received annual servicing fees of 50 basis points of the prior month's balance for the 2004 series trust and all 1999 series trusts and 75 basis points of the prior month's outstanding balance for the 2001 series trust.

The following summarizes the estimated fair values of the Company's servicing assets and significant assumptions (dollars in thousands):

	December 31,	
	2005	2004
Mortgage servicing assets:		
Fair value	\$11,026	\$14,761
Constant prepayment rate	19%	23%
Discount rate	3.5% - 4.0%	1.0% - 1.5%
Consumer servicing assets:		
Fair value	—	\$6,752
Constant prepayment rate	—	21% - 24%
Discount rate	—	8%

[Table of Contents](#)

NOTE 10—PROPERTY AND EQUIPMENT, NET

Property and equipment, net consists of the following (in thousands):

	December 31,	
	2005	2004
Software	\$ 353,120	\$ 331,774
Equipment and transportation	193,051	240,517
Leasehold improvements	93,963	88,066
Buildings	71,927	71,927
Furniture and fixtures	19,040	14,340
Land	3,428	3,428
Total property and equipment, gross	734,529	750,052
Less accumulated depreciation and amortization	(435,273)	(447,761)
Total property and equipment, net	\$ 299,256	\$ 302,291

Depreciation and amortization expense related to property and equipment was \$75.0 million for 2005, \$77.9 million for 2004 and \$85.6 million for 2003.

Software includes capitalized internally developed software costs. These costs were \$34.7 million for 2005, \$31.8 million for 2004 and \$41.8 million for 2003. Completed projects are carried at cost and are amortized on a straight-line basis over their estimated useful lives, generally four years. Amortization expense for the capitalized amounts was \$31.5 million for 2005, \$33.7 million for 2004 and \$29.3 million for 2003. Also included in software is \$17.6 million of internally developed software in the process of development for which amortization has not begun.

NOTE 11—GOODWILL AND OTHER INTANGIBLES, NET

The following table discloses the changes in the carrying value of goodwill for the periods presented (in thousands):

Balance at December 31, 2003	\$ 392,845
Adjustments to 2002 acquisitions	(11,860)
Adjustments to 2003 acquisitions	15,490
Other adjustments	(1,432)
Balance at December 31, 2004	395,043
Additions from 2005 acquisitions	1,612,928
Write-off related to discontinued operations	(4,515)
Balance at December 31, 2005	\$ 2,003,456

The following table discloses the changes in the carrying value of goodwill that occurred in the retail and institutional segments in 2005 (in thousands):

	Retail	Institutional	Total
Balance at December 31, 2004	\$ 153,720	\$ 241,323	\$ 395,043
Additions from 2005 acquisitions	1,611,507	1,421	1,612,928
Write-offs related to discontinued operations	(3,379)	(1,136)	(4,515)
Balance at December 31, 2005	\$ 1,761,848	\$ 241,608	\$ 2,003,456

Table of Contents

Prior periods are not presented, as the Company did not allocate goodwill by its new reporting segments prior to 2005.

The additions to goodwill are the result of our acquisitions during 2005 including *Harrisdirect*, *BrownCo*, *Kobren* and *Howard Capital*. Note 2 has complete descriptions of the transactions. The write-off of goodwill related to discontinued operations was due to the sale of the Consumer Finance Corporation and the exit of E*TRADE Professional Securities, LLC. See Note 3 for a complete description of these transactions.

Other intangible assets with finite lives, which are primarily amortized on an accelerated basis, consist of the following (dollars in thousands):

	Weighted-Average Useful Life (Years)	December 31, 2005			December 31, 2004		
		Gross Amount	Accumulated Amortization	Net Amount	Gross Amount	Accumulated Amortization	Net Amount
Customer list	21	\$ 456,953	\$ (11,592)	\$ 445,361	\$ 10,248	\$ (5,189)	\$ 5,059
Specialist books	28	61,820	(29,280)	32,540	61,820	(8,522)	53,298
Active accounts	8	69,023	(43,234)	25,789	69,023	(36,121)	32,902
Credit cards	15	32,604	(12,496)	20,108	32,672	(4,981)	27,691
Other	5	29,274	(20,964)	8,310	46,859	(31,688)	15,171
Total intangible assets		\$ 649,674	\$ (117,566)	\$ 532,108	\$ 220,622	\$ (86,501)	\$ 134,121

Assuming no future impairments of these assets or additional acquisitions, annual amortization expense will be as follows (in thousands):

Years ending December 31,	
2006	\$ 44,916
2007	42,458
2008	37,667
2009	32,776
2010	30,581
Thereafter	343,710
Total future amortization expense	\$ 532,108

Amortization of other intangibles was \$43.8 million for 2005, \$19.4 million for 2004 and \$24.8 million for 2003.

NOTE 12—ACCOUNTING FOR DERIVATIVE FINANCIAL INSTRUMENTS AND HEDGING ACTIVITIES

The Company enters into derivative transactions to protect against the risk of market price or interest rate movements on the value of certain assets, liabilities and future cash flows. The Company is also required to recognize certain contracts and commitments as derivatives when the characteristics of those contracts and commitments meet the definition of a derivative as promulgated by SFAS No. 133.

Fair Value Hedges

Overview of Fair Value Hedges

The Company uses a combination of interest rate swaps and purchased options on forward-starting swaps, caps and floors to offset its exposure to changes in value of certain fixed rate assets and liabilities. In calculating the effective portion of fair value hedges under SFAS No. 133, changes in the fair value of the derivative are recognized currently in earnings, as changes in value of the hedged asset attributable to the risk being hedged.

Table of Contents

Accordingly, the net difference or hedge ineffectiveness, if any, is recognized currently in fair value adjustments of financial derivatives in the consolidated statements of income.

The following table summarizes information related to financial derivatives in fair value hedge relationships (dollars in thousands):

	Notional Amount of Derivative	Fair Value of Derivatives			Weighted-Average			
		Asset	Liability	Net	Pay Rate	Receive Rate	Strike Rate	Remaining Life (Years)
December 31, 2005:								
Pay-fixed interest rate swaps:								
Mortgage-backed securities	\$ 961,000	\$12,485	\$ (598)	\$11,887	4.50%	4.35%	N/A	4.88
Investment securities	119,485	1,315	(1,750)	(435)	4.62%	4.18%	N/A	7.70
Receive-fixed interest rate swaps:								
Brokered certificates of deposit	132,313	—	(3,740)	(3,740)	4.33%	5.22%	N/A	12.50
FHLB advances	100,000	—	(3,894)	(3,894)	4.37%	3.64%	N/A	3.79
Purchased interest rate forward-starting swaps:								
Mortgage-backed securities	70,000	—	(470)	(470)	5.03%	N/A	N/A	10.01
Purchased interest rate options ⁽¹⁾ :								
Caps	770,000	21,324	—	21,324	N/A	N/A	4.89%	4.82
Floors	1,325,000	3,952	—	3,952	N/A	N/A	3.82%	3.71
Swaptions ⁽³⁾	2,241,000	36,982	—	36,982	N/A	N/A	4.93%	8.47
Total fair value hedges	\$5,718,798	\$76,058	\$(10,452)	\$65,606	4.51%	4.37%	4.59%	6.29
December 31, 2004:								
Pay-fixed interest rate swaps:								
Mortgage-backed securities	\$1,045,000	\$ 3,157	\$ (5,099)	\$ (1,942)	4.42%	2.23%	N/A	6.06
Investment securities	160,885	—	(3,747)	(3,747)	4.63%	2.09%	N/A	8.83
Receive-fixed interest rate swaps:								
Certificates of deposit	315,000	—	(1,901)	(1,901)	2.26%	3.39%	N/A	2.90
Brokered certificates of deposit	10,000	—	(160)	(160)	2.50%	5.00%	N/A	10.01
FHLB advances	100,000	—	(1,159)	(1,159)	2.40%	3.64%	N/A	4.80
Senior Notes ⁽²⁾	50,000	452	—	452	5.98%	8.00%	N/A	6.46
Purchased interest rate forward-starting swaps:								
Mortgage-backed securities	209,000	978	—	978	3.60%	N/A	N/A	3.43
Brokered certificates of deposit	20,000	12	(60)	(48)	5.25%	N/A	N/A	12.55
Purchased interest rate options ⁽¹⁾ :								
Caps	485,000	7,221	—	7,221	N/A	N/A	6.09%	5.01
Floors	100,000	352	—	352	N/A	N/A	4.25%	2.75
Swaptions ⁽³⁾	335,000	9,065	—	9,065	N/A	N/A	5.98%	13.30
Total fair value hedges	\$2,829,885	\$21,237	\$(12,126)	\$ 9,111	3.93%	2.71%	5.85%	6.25

(1) Purchased interest rate options were used to hedge mortgage-backed securities.

(2) Interest rate swap agreement on the Company's \$400.0 million senior notes was terminated during 2005.

(3) Swaptions are options to enter swaps starting on a given day.

De-designated Fair Value Hedges

During 2005 and 2004, certain fair value hedges were de-designated; therefore, hedge accounting was discontinued during those periods. The net gain or loss on these derivative instruments at the time of de-designation is amortized to interest expense or interest income over the original forecasted period of the underlying transactions being hedged. Changes in the fair value of these derivative instruments after de-designation of fair value hedge accounting were recorded in gain on sales of loans and securities, net in the consolidated statements of income.

[Table of Contents](#)

Cash Flow Hedges

Overview of Cash Flow Hedges

The Company uses a combination of interest rate swaps and purchased options on caps and floors to hedge the variability of future cash flows associated with existing variable-rate liabilities and assets and forecasted issuances of liabilities. These cash flow hedge relationships are treated as effective hedges as long as the future issuances of liabilities remain probable and the hedges continue to meet the requirements of SFAS No. 133. The Company also enters into interest rate swaps to hedge changes in the future variability of cash flows of certain investment securities resulting from changes in a benchmark interest rate. Additionally, the Company enters into forward purchase and sale agreements, which are considered cash flow hedges, when the terms of the commitments exactly match the terms of the securities purchased or sold.

Changes in the fair value of derivatives that hedge cash flows associated with repurchase agreements, FHLB advances and HELOCs are reported in AOCI as unrealized gains or losses. The amounts in AOCI are then included in interest expense or interest income as a yield adjustment during the same periods in which the related interest on the fundings or investment securities affect earnings. During the upcoming twelve months, the Company expects to include a pre-tax amount of approximately \$2.4 million of net unrealized gains that are currently reflected in AOCI in interest expense as a yield adjustment in the same periods in which the related items affect earnings.

The Company also recognizes cash flow hedge ineffectiveness. Cash flow hedge ineffectiveness is recorded to the extent that the market value of the derivatives used in the hedge relationship underperforms or outperforms or has a greater increase in market value than a hypothetical derivative, created to match the exact terms of the underlying debt being hedged. The Company recognized this cash flow ineffectiveness as fair value adjustment of financial derivatives in the consolidated statements of income. Cash flow ineffectiveness is re-measured on a quarterly basis.

The following table summarizes information related to our financial derivatives in cash flow hedge relationships, hedging variable rate liabilities and the forecasted issuances of liabilities (dollars in thousands):

	Notional Amount of Derivative	Fair Value of Derivatives			Weighted-Average			
		Asset	Liability	Net	Pay Rate	Receive Rate	Strike Rate	Remaining Life (Years)
December 31, 2005:								
Pay-fixed interest rate swaps:								
Repurchase agreements	\$1,100,000	\$ 6,959	\$ (2,223)	\$ 4,736	4.87%	4.38%	N/A	9.15
Purchased interest rate forward-starting swaps:								
Repurchase agreements	2,675,000	1,219	(19,872)	(18,653)	5.04%	N/A	N/A	9.50
FHLB advances	750,000	—	(4,040)	(4,040)	5.02%	N/A	N/A	9.46
Purchased interest rate options ⁽¹⁾ :								
Caps	2,925,000	64,301	—	64,301	N/A	N/A	4.76%	4.59
Floors	1,900,000	2,527	—	2,527	N/A	N/A	5.50%	3.54
Total cash flow hedges	\$9,350,000	\$75,006	\$(26,135)	\$ 48,871	5.00%	4.38%	5.05%	6.71
December 31, 2004:								
Pay-fixed interest rate swaps:								
Repurchase agreements	\$1,675,000	\$ —	\$(33,121)	\$(33,121)	4.91%	2.28%	N/A	11.12
FHLB advances	425,000	—	(6,093)	(6,093)	4.68%	2.13%	N/A	9.25
Purchased interest rate forward-starting swaps:								
Repurchase agreement	595,000	—	(868)	(868)	4.74%	N/A	N/A	11.16
Purchased interest rate options ⁽¹⁾ :								
Caps	2,775,000	94,340	—	94,340	N/A	N/A	4.43%	6.13
Total cash flow hedges	\$5,470,000	\$94,340	\$(40,082)	\$ 54,258	4.84%	2.25%	4.43%	8.45

(1) Caps are used to hedge repurchase agreements and FHLB advances. Floors are used to hedge HELOCs.

Table of Contents

Under SFAS No. 133, we are required to record the fair value of gains and losses on derivatives designated as cash flow hedges in AOCI in the consolidated balance sheets. In addition, during the normal course of business, the Company terminates certain interest rate swaps and options.

The following tables show: 1) amounts recorded in AOCI related to derivative instruments accounted for as cash flow hedges; 2) the notional amounts and fair values of derivatives terminated for the periods presented; and 3) the amortization of terminated interest rate swaps included in interest expense and interest income (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Impact on AOCI (net of taxes):			
Beginning balance	\$ (118,018)	\$ (123,754)	\$ (188,280)
Gains (losses) on cash flow hedges related to derivatives, net	7,032	(51,137)	(21,173)
Reclassifications into earnings, net	40,155	56,873	85,699
Ending balance	\$ (70,831)	\$ (118,018)	\$ (123,754)
Derivatives terminated during the year:			
Notional	\$ 17,920,000	\$ 5,423,500	\$ 6,329,500
Fair value of net gains (losses) recognized in AOCI	\$ 2,228	\$ (68,039)	\$ 45,927
Amortization of terminated interest rate swaps and options included in interest expense and interest income	\$ 65,110	\$ 101,807	\$ 125,800

The gains (losses) accumulated in AOCI on the derivative instruments terminated shown in the preceding table will be included in interest expense and interest income over the periods the hedged forecasted issuance of liabilities will affect earnings, ranging from 6 days to 15 years.

The following table represents the balance in AOCI attributable to open cash flow hedges and discontinued cash flow hedges (in thousands):

	At December 31,		
	2005	2004	2003
AOCI balance (net of taxes) related to:			
Open cash flow hedges	\$(36,736)	\$ (43,027)	\$ (30,775)
Discontinued cash flow hedges	(34,095)	(74,991)	(92,979)
Total cash flow hedges	\$(70,831)	\$(118,018)	\$(123,754)

Hedge Ineffectiveness

In accordance with SFAS No. 133, the Company recognizes hedge ineffectiveness on both fair value and cash flow hedge relationships. These amounts are reflected in fair value adjustments of financial derivatives in the consolidated statements of income. The following table summarizes the income (expense) recognized by the Company as fair value and cash flow hedge ineffectiveness (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Fair value hedges	\$(4,937)	\$(3,895)	\$(19,711)
Cash flow hedges	45	6,194	4,373
Total fair value adjustments of financial derivatives	\$(4,892)	\$ 2,299	\$(15,338)

[Table of Contents](#)

Mortgage Banking Activities

The Company enters into commitments to originate loans whereby the interest rate on the loan is determined prior to funding; these commitments are referred to as Interest Rate Lock Commitments, ("IRLCs"). IRLCs on loans that the Bank intends to sell are considered to be derivatives and are, therefore, recorded at fair value with changes in fair value recorded in earnings. For purposes of determining their fair value, the Company performs a net present value analysis of the anticipated cash flows associated with these IRLCs. The net present value analysis performed excludes the market value associated with the anticipated sale of servicing rights related to each loan commitment. The fair value of these IRLCs was a \$1.6 million and \$1.5 million asset at December 31, 2005 and 2004, respectively.

The Company also designates fair value relationships of closed loans held-for-sale against a combination of mortgage forwards and short treasury positions. Short treasury relationships are economic hedges, rather than fair value or cash flow hedges. Short treasury positions are marked-to-market, but do not receive hedge accounting treatment under SFAS No. 133. The mark-to-market of the mortgage forwards are included in the net change of the IRLCs and the related hedging instruments. The mark-to-market of the closed loans recorded for 2005 and 2004 were \$0.7 million and \$4.3 million, respectively.

IRLCs, as well as closed loans held-for-sale, expose the Company to interest rate risk. The Company manages this risk by selling mortgages or mortgage-backed securities on a forward basis referred to as forward sale agreements. Changes in the fair value of these derivatives are included as gain on sales of loans and securities, net in the consolidated statements of income. The net change in IRLCs, closed loans and the related hedging instruments generated a net loss of \$0.4 million in 2005 and a net gain of \$3.9 million in 2004.

Credit risk is managed by limiting activity to approved counterparties and setting aggregate exposure limits for each approved counterparty. The credit risk that results from interest rate swaps and purchased interest rate options is represented by the fair value of contracts that have unrealized gains at the reporting date. Conversely, we have \$36.6 million of derivative contracts with unrealized losses at December 31, 2005. These agreements required the Company to pledge approximately \$7.4 million of its mortgage-backed and investment securities as collateral.

While the Company does not expect that any counterparty will fail to perform, the following table shows the maximum exposure, or net credit risk, associated with each counterparty to interest rate swaps and purchased interest rate options at December 31, 2005 (in thousands):

<u>Counterparty</u>	<u>Credit Risk</u>
Union Bank of Switzerland	\$27,733
Lehman Brothers	12,821
Royal Bank of Scotland	7,283
Bank of America	5,361
Credit Suisse First Boston	4,446
Other	1,316
Total exposure	\$58,960

[Table of Contents](#)

NOTE 13—OTHER ASSETS

Other assets consist of the following (in thousands):

	December 31,	
	2005	2004
Third party loan servicing receivable	\$ 79,264	\$ 3,806
Other investments	65,189	46,269
Unamortized debt issue costs	36,088	9,134
Prepays	26,239	25,947
Deferred compensation plan	18,419	11,974
Servicing rights	11,026	21,513
Securities sold, collateral not delivered	9,024	53,152
Deferred tax assets	3,851	41,119
Other	96,577	42,633
Total other assets	\$ 345,677	\$ 255,547

Other Investments

The Company has made investments in low income housing tax credit partnerships (“LIHTC”), venture funds and several non-public, venture capital-backed, high technology companies. The Company recorded no other-than-temporary impairments for 2005 and 2004 and \$8.0 million for 2003, associated with these privately held equity investments. These impairments are recorded in gain on sale and impairment of investments in the consolidated statements of income. The Company has \$45.3 million in commitments in to fund LIHTC, venture funds and joint ventures.

Securities Sold, Collateral Not Delivered

The Bank has receivables for mortgage-backed securities from third-party brokers that the Bank committed to sell, but did not deliver to the brokers by the settlement date. The Bank was unable to deliver the securities primarily because other parties failed to deliver similar securities to the Bank, which the Bank had committed to buy. Securities sold, collateral not delivered for the brokerage subsidiaries are included in brokerage receivables.

NOTE 14—DEPOSITS

Deposits are summarized as follows (dollars in thousands):

	Weighted-Average Rate		Amount		Percentage to Total	
	December 31,		December 31,		December 31,	
	2005	2004	2005	2004	2005	2004
Sweep deposit account	0.57%	0.40%	\$ 7,733,267	\$ 6,167,436	48.5%	50.1%
Money market and savings accounts	3.17%	1.52%	4,635,866	3,340,936	29.1	27.2
Certificates of deposit	3.94%	3.40%	2,703,605	2,069,674	17.0	16.8
Brokered certificates of deposit	3.86%	2.51%	484,612	294,587	3.0	2.4
Checking accounts	0.71%	0.66%	390,665	430,341	2.4	3.5
Total deposits	2.00%	1.27%	\$15,948,015	\$12,302,974	100.0%	100.0%

Table of Contents

Deposits, classified by rates are as follows (in thousands):

	December 31,	
	2005	2004
0.00%–1.99%	\$ 8,488,981	\$ 10,448,712
2.00%–3.99%	5,158,261	1,160,915
4.00%–5.99%	2,278,914	435,972
6.00%–9.99%	27,633	257,504
Subtotal	15,953,789	12,303,103
Fair value adjustments	(5,774)	(129)
Total deposits	\$ 15,948,015	\$ 12,302,974

At December 31, 2005, scheduled maturities of certificates of deposit and brokered certificates of deposit were as follows (in thousands):

	< 1 Year	1-2 Years	2-3 Years	3-4 Years	4-5 Years	> 5 Years	Total
Less than 4.00%	\$ 1,510,063	\$ 167,249	\$ 89,571	\$ 10,407	\$ 1,149	\$ 5,683	\$ 1,784,122
4.00%–5.99%	827,242	234,685	76,006	59,129	85,552	99,960	1,382,574
6.00%–7.99%	3,680	984	1,314	470	384	20,463	27,295
Subtotal	\$ 2,340,985	\$ 402,918	\$ 166,891	\$ 70,006	\$ 87,085	\$ 126,106	3,193,991
Fair value adjustments							(5,774)
Total certificates of deposit and brokered certificates of deposit							\$ 3,188,217

Scheduled maturities of certificates of deposit and brokered certificates of deposit with denominations greater than or equal to \$100,000 were as follows (in thousands):

	December 31,	
	2005	2004
Three months or less	\$ 319,609	\$ 216,671
Three through six months	226,040	75,990
Six through twelve months	266,840	174,049
Over twelve months	307,885	237,533
Total certificates of deposit	\$ 1,120,374	\$ 704,243

Interest expense on deposits is summarized as follows (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Sweep deposit account	\$ 36,147	\$ 13,226	\$ 1,313
Money market and savings accounts	89,073	47,297	73,634
Certificates of deposit	88,733	110,577	185,574
Brokered certificates of deposit	15,679	9,172	10,147
Checking accounts	2,679	2,408	2,496
Total interest expense	\$ 232,311	\$ 182,680	\$ 273,164

Accrued interest payable on these deposits, which is included in accounts payable, accrued and other liabilities, was \$11.6 million at December 31, 2005 and \$5.1 million at December 31, 2004.

[Table of Contents](#)

The Sweep Deposit Account (“SDA”) is a sweep product that transfers brokerage customer balances. The Bank holds these funds as customer deposits in Federal Deposit Insurance Corporation (“FDIC”)-insured Negotiable Order of Withdrawal (“NOW”) and money market deposit accounts.

NOTE 15—SECURITIES SOLD UNDER AGREEMENTS TO REPURCHASE AND OTHER BORROWINGS BY BANK SUBSIDIARY

The maturities of borrowings at December 31, 2005 and total borrowings at December 31, 2004 are shown below (dollars in thousands):

	Repurchase Agreement	Other Borrowings by Bank Subsidiary		Total	Weighted Average Interest Rate
		FHLB Advances	Other		
Due in:					
2006	\$ 9,746,122	\$1,910,000	\$ 5,440	\$11,661,562	4.20%
2007	50,478	700,000	—	750,478	4.45%
2008	—	50,000	—	50,000	3.82%
2009	100,145	96,106	—	196,251	3.15%
2010	—	100,000	—	100,000	4.38%
Thereafter	1,204,797	1,000,000	305,046	2,509,843	3.80%
Total borrowings at December 31, 2005	\$11,101,542	\$3,856,106	\$310,486	\$15,268,134	4.13%
Total borrowings at December 31, 2004	\$ 9,897,191	\$1,487,841	\$272,891	\$11,657,923	2.17%

Securities Sold Under Agreements to Repurchase

The Company sells securities under agreements to repurchase similar securities (“Repurchase Agreements”). Repurchase Agreements are collateralized by fixed- and variable-rate mortgage-backed securities or investment grade securities. Repurchase Agreements are treated as financings for financial statement purposes and obligations to repurchase securities sold are reflected as borrowings in the consolidated balance sheets. The brokers retain possession of the securities collateralizing the repurchase agreements until maturity. At December 31, 2005, there were no counterparties with whom the Company’s amount at risk exceeded 10% of its shareholders’ equity.

Other Borrowings by Bank Subsidiary

FHLB Advances—The Company had \$2.2 billion floating-rate and \$1.7 billion fixed-rate FHLB advances at December 31, 2005. The floating-rate advances adjust quarterly based on the LIBOR. The Company is required to be a member of the FHLB System and maintain a FHLB investment at least equal to the greater of: one percent of the unpaid principal balance of its residential mortgage loans; one percent of 30 percent of its total assets; or one-twentieth of its outstanding FHLB advances. In addition, the Company must maintain qualified collateral equal to 85 to 90 percent of its advances, depending on the collateral type. These advances are secured with specific mortgage loans and mortgage-backed securities. At December 31, 2005 and 2004, the Company pledged \$9.3 billion and \$3.4 billion, respectively, of the one- to four-family first-mortgage loans, HELOCs and second mortgage loans as collateral.

Other—ETB Holdings (“ETBH”) raises capital through the formation of trusts, which sell trust preferred stock in the capital markets. The capital securities are mandatorily redeemable in whole at the due date, which is generally 30 years after issuance. Each trust issued Floating Rate Cumulative Preferred Securities, at par with a liquidation amount of \$1,000 per capital security. ETBH uses the proceeds from the sale of issuances to purchase Floating Rate Junior Subordinated Debentures issued by ETBH, guarantees the trust obligations and contributes proceeds from the sale of its subordinated debentures to the Bank in the form of a capital contribution.

Table of Contents

During 2005, ETBH formed two trusts, ETBH Capital Trust XXI and ETBH Capital Trust XXII. These two trusts issued 20,000 shares and 30,000 shares, respectively, of Floating Rate Cumulative Preferred Securities for a total of \$20 million and \$30 million, respectively. Net proceeds from these issuances were invested in Floating Rate Junior Subordinated Debentures that mature in 2035 and have variable rates of 2.40% and 2.20%, respectively, above the three-month LIBOR, payable quarterly.

The face values of outstanding trusts at December 31, 2005 are shown below (dollars in thousands):

Trusts	Face Value	Maturity Date	Annual Interest Rate
Telebank Capital Trust I	\$ 9,000	2027	11.00%
ETBH Capital Trust II	\$ 5,000	2031	10.25%
ETBH Capital Trust I, III	\$35,000	2031	3.75% above 6-month LIBOR
ETBH Capital Trust V—VIII	\$66,000	2032	3.25%-3.65% above 3-month LIBOR
ETBH Capital Trust IV	\$10,000	2032	3.70% above 6-month LIBOR
ETBH Capital Trust IX—XII	\$50,000	2033	3%-3.25% above 3-month LIBOR
ETBH Capital Trust XIII—XVIII, XX	\$77,000	2034	2.45%-2.90% above 3-month LIBOR
ETBH Capital Trust XIX, XXI, XXII	\$60,000	2035	2.20%-2.4% above 3-month LIBOR

Other borrowings also includes \$5.4 million of overnight and other short-term borrowings from the Federal Reserve Bank in connection with the Federal Reserve Bank's special direct investment and treasury, tax and loan programs. The Company pledged \$0.5 billion of securities and RV loans to secure these borrowings.

Below is additional information regarding borrowings (in thousands):

	December 31,	
	2005	2004
Weighted-average balance during the year (calculated on a daily basis)	\$10,115,764	\$ 8,139,736
Weighted-average interest rate:		
During the year (calculated on a daily basis)	3.70%	3.18%
At year-end	4.15%	2.15%
Maximum month-end balance during the year	\$11,412,028	\$10,285,738
Balance at year-end	\$11,412,028	\$10,170,082
Securities and loans underlying the repurchase agreements at the end of the year:		
Carrying value, including accrued interest	\$11,665,421	\$10,001,607
Estimated market value	\$11,325,412	\$ 9,958,744

NOTE 16—CORPORATE DEBT

The Company's long-term debt by type is shown below (in thousands):

	December 31,	
	2005	2004
Senior notes:		
8.00% Notes, due 2011	\$ 504,407	\$400,452
7 ³ / ₈ % Notes, due 2013	597,540	—
7 ⁷ / ₈ % Notes, due 2015	300,000	—
Total senior notes	1,401,947	400,452
Mandatory convertible notes 6 ¹ / ₈ %, due 2018	435,589	—
Convertible subordinated notes 6.00%, due 2007	185,165	185,165
Total corporate debt	\$2,022,701	\$585,617

[Table of Contents](#)

8.00% Senior Notes Due June 2011

In 2005 and 2004, the Company issued an aggregate principal amount of \$100 million and \$400 million in senior notes due June 2011 (the “8.00% Notes”), respectively. Interest is payable semi-annually and notes are non-callable for four years and may then be called by the Company at a premium, which declines over time. Original debt issuance costs of \$1.5 million are included in other assets and are being amortized over the term of the senior notes.

7³/₈% Senior Notes due September 2013

In 2005, the Company issued an aggregate principal amount of \$600 million in senior notes due September 2013 (the “7³/₈% Notes”.) Interest is payable semi-annually and the notes are non-callable for four years and may then be called by the Company at a premium, which declines over time. Original debt issuance costs of \$8.5 million are included in other assets and are being amortized over the term of the notes.

7⁷/₈% Senior Notes Due December 2015

In 2005, the Company issued an aggregate principal amount of \$300 million in senior notes due December 2015 (the “7⁷/₈% Notes”.) Interest is payable semi-annually and the notes are non-callable for four years and may then be called by the Company at a premium, which declines over time. Original debt issuance costs of \$3.7 million are included in other assets and are being amortized over the term of the notes.

All senior notes are unsecured and will rank equal in right of payment with all of the Company’s existing and future unsubordinated indebtedness and will rank senior in right of payment to all our existing and future subordinated indebtedness.

6¹/₄% Mandatory Convertible Notes Due November 2018

In November 2005, the Company issued 18.0 million of mandatory convertible notes (“Units”) with a face value of \$450 million. Each Unit consists of a purchase contract and a 6¹/₈% senior note. The Company recorded the purchase contracts and senior notes at fair value, with \$15 million recorded in equity and \$435 million in debt, respectively.

Each purchase contract obligates the holder to purchase, and the Company to sell, at a purchase price of \$25.00 in cash, a variable number of shares of the Company’s common stock. The stock conversion ratio varies depending on the average closing price of the Company’s common stock over a 20-day trading period ending on the third trading day immediately preceding November 18, 2008 (“Reference Price”). If the Reference Price is equal to or greater than \$21.816 per share, the settlement rate will be 1.1459 shares of common stock. If the Reference Price is less than \$21.816 per share but greater than \$18.00 per share, the settlement rate is equal to \$25.00 divided by the Reference Price. If the Reference Price is less than or equal to \$18.00 per share, the settlement rate will be 1.3889 shares of common stock. The Company is obligated under the purchase contract to sell shares of its common stock under the agreement in November 2008. In November 2008, the aggregate principal amount of the senior notes will be remarketed, which may result in a change in the interest rate and maturity date of the senior notes.

Before the Purchase Date, the Units will be reflected in diluted earnings per share calculations using the treasury stock method as defined by SFAS No. 128, *Earning per Share*. Under this method, the number of shares of common stock used in calculating diluted earnings per share (based on the settlement formula applied at the end of the reporting period) is deemed to be increased by the excess, if any, of the number of shares that would be issued upon settlement of the purchase contracts less the number of shares that could be purchased by the Company in the market at the average market price during the period using the proceeds to be received upon settlement. Therefore, dilution will occur for periods when the average market price of the Company’s common stock for the reporting period is above \$21.816.

[Table of Contents](#)**6.00% Convertible Subordinated Notes Due February 2007**

In 2000, the Company issued an aggregate principal amount of \$650 million of the 6.00% convertible subordinated notes due February 2007 (the "6.00% Notes"). The 6.00% Notes are convertible, at the option of the holder, into common stock at a conversion price of \$23.60 per share (7.8 million shares based on the \$185.2 million principal amount of notes outstanding at December 31, 2005.) The notes bear interest at 6.00%, payable semiannually, and are non-callable for three years and may then be called by the Company at a premium, which declines over time. The holders have the right to require redemption at a premium in the event of a change in control or other defined redemption events. Debt issuance costs of \$19.1 million were incurred in connection with the issuance of this debt and included in other assets. To date, the Company has retired or called \$464.8 million of the 6.00% Notes.

Senior Secured Revolving Credit Facility

In September 2005, the Company entered into a \$250 million, three-year senior secured revolving credit facility. The facility is secured by certain assets of the Company. The facility will be used for general corporate purposes, including regulatory capital needs arising from acquisitions. Draws under the facility currently bear interest, at our option, at adjusted LIBOR plus 2% or prime plus 1%. Undrawn facility funds currently bear commitment fees of 0.25% per annum payable quarterly in arrears. At December 31, 2005, no amounts were outstanding under this credit facility. Issuance costs of \$2.2 million are included in other assets and are being amortized over the term of the facility.

Corporate Debt Covenants

Certain of the Company's corporate senior debt described above have terms which include customary financial covenants. As of December 31, 2005, the Company was in compliance with all such covenants.

Early Extinguishment of Debt

The Company recorded a \$19.4 million loss on early extinguishment of debt in 2004. In 2004, loss on early extinguishment of debt included a \$12.6 million loss from the retirement of a portion of our 6.75% convertible subordinated notes and \$6.8 million loss from the retirement of the 6.00% Notes, both charges relating to the portion of the premium paid and write-off of unamortized debt offering costs. In 2005, the Company did not have any early extinguishments of debt.

NOTE 17—ACCOUNTS PAYABLE, ACCRUED AND OTHER LIABILITIES

Accounts payable, accrued and other liabilities consist of the following (in thousands):

	December 31,	
	2005	2004
Accounts payable and accrued expenses	\$ 272,402	\$ 224,989
Notes payable	66,953	40,393
Restructuring liabilities and purchase accounting accruals	52,808	33,049
Subserved loan advances	27,565	14,360
Senior and convertible debt accrued interest	24,396	6,021
Margin call collaterals	21,837	36,097
Securities purchased collateral not delivered	9,135	53,131
Income tax payable	—	53,937
Other	100,449	124,790
Total accounts payable, accrued and other liabilities	\$ 575,545	\$ 586,767

[Table of Contents](#)**Securities Purchased, Collateral Not Received**

The Bank has payables to third-party brokers for mortgage-backed securities that the Bank committed to buy, but did not receive from the brokers by December 31, 2005 and 2004.

Notes Payable

The Company maintains committed and uncommitted financing facilities with banks totaling \$825 million to meet corporate liquidity needs and finance margin lending. There was none outstanding under these lines at December 31, 2005 and 2004. The Company also has multiple term loans from financial institutions. These loans are collateralized by equipment. Borrowings under these term loans bear interest at 5.43% and 2.95% above LIBOR. The Company had approximately \$40.5 million of principal outstanding under these loans at December 31, 2005.

NOTE 18—INCOME TAXES

The components of income tax expense from continuing operations are as follows (in thousands)

	Year Ended December 31,		
	2005	2004	2003
Current:			
Federal	\$158,050	\$ 95,862	\$ 80,302
Foreign	3,518	4,442	5,894
State	19,237	14,540	18,390
Total current	180,805	114,844	104,586
Deferred:			
Federal	45,200	44,086	(5,368)
Foreign	(1,264)	2,328	5,418
State	5,082	20,506	6,965
Total deferred	49,018	66,920	7,015
Income tax expense from continuing operations	\$229,823	\$181,764	\$111,601

The Company is subject to examination by the Internal Revenue Service (the "IRS"), taxing authorities in foreign countries and states in which the Company has significant business operations. The Company regularly assesses the likelihood of additional tax deficiencies in each of the taxing jurisdictions resulting from ongoing and subsequent years' examinations. Included in current tax expense are charges to accruals for expected tax contingencies in accordance with SFAS No. 5.

The components of income before income taxes and discontinued operations are as follows (in thousands):

	Year Ended December 31,		
	2005	2004	2003
Domestic	\$653,131	\$545,197	\$308,901
Foreign	22,995	19,290	(1,840)
Total income before income taxes and discontinued operations	\$676,126	\$564,487	\$307,061

Table of Contents

Deferred income taxes are recorded when revenues and expenses are recognized in different periods for financial statement and tax return purposes. The temporary differences and tax carry-forwards that created deferred tax assets and deferred tax liabilities are as follows (in thousands):

	December 31,	
	2005	2004
Deferred tax assets:		
Reserves and allowances	\$ 20,826	\$ 15,237
Net unrealized gain on equity investments and Bank assets held-for-sale	109,871	78,411
Net operating loss carry-forwards	59,433	68,939
Deferred compensation	13,613	9,235
Capitalized technology development	4,739	7,382
Tax credits	—	6,520
Restructuring reserve and related write-downs	56,805	66,116
Other	—	1,225
Total deferred tax assets	265,287	253,065
Deferred tax liabilities:		
Internally developed software	(20,925)	(20,690)
Acquired intangibles	(21,759)	(36,552)
Basis differences in investments	(117,642)	(53,007)
Loan fees	(6,966)	(7,092)
Depreciation and amortization	(32,232)	(28,753)
Purchased software	(3,024)	(3,024)
Retained servicing rights	(2,755)	(6,298)
Other	(16,774)	(3,859)
Total deferred tax liabilities	(222,077)	(159,275)
Valuation allowance	(39,359)	(52,671)
Net deferred tax asset	\$ 3,851	\$ 41,119

The Company maintains a valuation allowance of \$39.4 million and \$52.7 million at December 31, 2005 and 2004, respectively, against certain of its deferred tax assets, as it is more likely than not that they will not be fully realized. The deferred tax assets for which a valuation allowance has been established include certain state and foreign country net operating loss carry-forwards and excess tax bases in certain illiquid investments.

- At December 31, 2005, the Company had foreign country net operating loss carry-forwards of approximately \$83.0 million for which a deferred tax asset of approximately \$25 million was established. The foreign net operating losses represent the foreign tax loss carry-forwards in numerous foreign countries, some of which are subject to expiration from 2006-2008. In most of these foreign countries, the Company has historical tax losses, and the Company continues to project to incur operating losses in most of these countries. Accordingly, the Company has provided a valuation allowance of \$23.5 million against such deferred tax asset at December 31, 2005.
- During 2005, the Company reversed the valuation allowance of approximately \$2.0 million related to its Danish subsidiary's operations due to positive evidence, principally sustained profitability, that led management to conclude that it is now more likely than not that realization of its net operating losses and other tax attributes will be recognized.
- At December 31, 2005, the Company had gross state net operating loss carry-forwards of \$171 million that expire between 2012 and 2024, most of which are subject to reduction for apportionment when utilized. A deferred tax asset of approximately \$13 million has been established related to these state net

Table of Contents

operating loss carry-forwards with a valuation allowance of \$2 million against such deferred tax asset at December 31, 2005.

- At December 31, 2005, the Company maintains a valuation allowance against the excess tax basis in certain capital assets of approximately \$11 million. The capital assets in question are certain investments in e-commerce and Internet startup venture funds that have no ready market or liquidity at December 31, 2005. The Company has concluded that the realization of these excess tax benefits on these capital assets are uncertain and not in the control of the Company, as there is no ready market or liquidity for these investments.
- The valuation allowance was decreased in 2005 for the elimination of a valuation allowance of \$7 million related to foreign tax credits when the corresponding deferred tax asset was written off upon the conversion of all outstanding Exchangeable Shares to the Company's common stock. The elimination of the valuation allowance did not impact income tax expense.
- The majority of the balance of the reduction in the valuation allowance of approximately \$5 million related to foreign net operating loss carry-forwards and other foreign deferred tax items.

At December 31, 2005, the Company had federal net operating loss carry-forwards of approximately \$59 million for which no valuation allowance has been provided. These carry-forwards expire through 2020. These federal net operating loss carry-forwards relate to pre-acquisition losses from acquired subsidiaries and, accordingly, are generally subject to annual limitations in their use of \$4.9 million per year in accordance with Internal Revenue Code Section 382. Accordingly, the extent to which the loss carry-forwards can be used to offset future taxable income may be limited.

The Company has not provided deferred income taxes on \$31 million of undistributed earnings and profits in its foreign subsidiaries at December 31, 2005. The Company intends to permanently reinvest such earnings. The Company has not provided deferred income taxes of \$10.9 million on such undistributed earnings and profits. The American Jobs Creation Act of 2004 (the "Act") provided for a temporary incentive for U.S. multinational corporations to repatriate accumulated income earned abroad by providing an 85% exclusion from taxable income for certain dividends from controlled foreign corporations. As a result of this special temporary tax incentive, the Company distributed \$20 million from its Canadian subsidiaries in 2004. The Company did not record any cumulative tax expense in connection with such repatriation since the Company believes the distribution was a tax-free return of capital for tax purposes.

The effective tax rates differed from the Federal statutory rates as follows:

	Year Ended December 31,		
	2005	2004	2003
Federal statutory rate	35.0 %	35.0 %	35.0 %
State income taxes, net of Federal tax benefit	2.3	4.4	3.6
Difference between statutory rate and foreign effective tax rate and establishment of valuation allowance for foreign deferred tax assets	(0.9)	(0.7)	3.8
IRS tax settlement	—	(2.8)	—
Excess tax basis upon sale of partnership interests	—	(2.2)	—
Change in valuation allowance	(0.3)	(0.5)	(5.2)
Other	(2.1)	(1.0)	(0.9)
Effective tax rate	34.0 %	32.2 %	36.3 %

The increase to our 2005 tax rate was principally due to the one-time tax benefits recorded in 2004 related to (i) the IRS tax settlement and (ii) the excess tax basis upon the sale of partnership interests, offset somewhat by our declining state tax rate and overall foreign tax rate differential. In 2004, the Company reached a favorable tax

[Table of Contents](#)

settlement with the IRS. This agreement resolved various issues for all federal tax liabilities through 2000, including most notably certain research and experimentation credit claims.

NOTE 19—SHAREHOLDERS' EQUITY

Preferred Stock

The Company has 1.0 million shares authorized in preferred stock. None were issued and outstanding at December 31, 2005 and 2004.

Shares Exchangeable into Common Stock

At December 31, 2005, there were no shares of common stock that were exchangeable into the Company's common stock ("Exchangeable Shares") outstanding. In August 2000, EGI Canada Corporation issued approximately 9.4 million Exchangeable Shares in connection with the Company's acquisition of E*TRADE Technologies. In 2005, the Company called and exchanged the remaining Exchangeable Shares. Upon exchange, these shares were converted on a one-for-one basis to the Company's common stock. Exchangeable Shares converted were 1.3 million in 2005, 0.1 million in 2004 and 0.2 million in 2003.

Issuance of Common Stock

In 2005, the Company issued \$718.4 million or 41.1 million shares of common stock including \$691.8 million sold in conjunction with the funding of our BrownCo acquisition.

Mandatory Convertible Notes

In November 2005, the Company issued 18.0 million Units that are convertible into up to 25.0 million shares of common stock, on or before the Purchase Date. The conversion ratio depends on the market price of our common stock 20 trading days prior to conversion. Units are generally convertible only on or near the Purchase Date. (See Note 16 for additional details on the transaction.)

Share Repurchases

From time to time, the Company's Board of Directors authorizes share repurchase and debt retirement plans, as they determine that they are likely to create long-term value for its shareholders. These plans are open-ended and provide the flexibility to buy back common stock, redeem for cash its outstanding convertible subordinated notes, retire debt in the open market or a combination of all three. Under these authorized plans, the Company has repurchased common stock and retired portions of its convertible subordinated notes.

In 2005, the Company repurchased nearly 4.6 million shares of its common stock for an aggregate \$58.2 million. In 2004, the Company repurchased 13.7 million shares of its common stock for an aggregate \$175.8 million. Also under the repurchase plans, the Company used \$86.2 million in cash for a partial redemption of its 6.75% convertible subordinated notes.

As of December 31, 2005, the Company had approximately \$179.8 million available under its authorized share repurchase and debt retirement plans to purchase additional shares of its common stock or retire additional debt.

[Table of Contents](#)

NOTE 20—INCOME PER SHARE

The following table is a reconciliation of basic and diluted EPS (in thousands, except per share data):

	Year Ended December 31,		
	2005	2004	2003
BASIC:			
Numerator:			
Income from continuing operations	\$ 446,238	\$ 381,830	\$ 200,521
Net income (loss) from discontinued operations	(17,472)	(1,347)	2,506
Net income before cumulative effect of accounting change	428,766	380,483	203,027
Cumulative effect of accounting change, net of tax	1,646	—	—
Net income	\$ 430,412	\$ 380,483	\$ 203,027
Denominator:			
Basic weighted-average shares outstanding	371,468	366,586	358,320
DILUTED:			
Numerator:			
Net income	\$ 430,412	\$ 380,483	\$ 203,027
Interest on convertible subordinated notes, net of tax	—	19,963	—
Net income, as adjusted	\$ 430,412	\$ 400,446	\$ 203,027
Denominator:			
Basic weighted-average shares outstanding	371,468	366,586	358,320
Effect of dilutive securities:			
Weighted-average options and restricted stock issued to employees	11,137	10,461	6,495
Weighted-average warrants and contingent shares outstanding	2,025	2,532	2,546
Shares issuable for assumed conversion of convertible subordinated notes	—	25,810	—
Diluted weighted-average shares outstanding	384,630	405,389	367,361
PER SHARE:			
Basic Income Per Share:			
Income per share from continuing operations	\$ 1.20	\$ 1.04	\$ 0.56
Net income (loss) per share from discontinued operations	(0.04)	(0.00)	0.01
Net income per share before cumulative effect of accounting changes	1.16	1.04	0.57
Cumulative effect of accounting change	0.00	—	—
Income per share	\$ 1.16	\$ 1.04	\$ 0.57
Diluted Income Per Share:			
Income per share from continuing operations	\$ 1.16	\$ 0.99	\$ 0.55
Net income (loss) per share from discontinued operations	(0.04)	(0.00)	0.00
Net income per share before cumulative effect of accounting change	1.12	0.99	0.55
Cumulative effect of accounting change	0.00	—	—
Net income per share	\$ 1.12	\$ 0.99	\$ 0.55

Excluded from the calculations of diluted income (loss) per share are 7.8 million and 45.4 million shares of common stock for 2005 and 2003, respectively, issuable under convertible subordinated notes as the effect of applying the treasury stock method on an if-converted basis would be anti-dilutive. In addition, in 2005, 25.0 million shares of common stock potentially issuable related to the conversion of mandatory convertible notes was excluded from the calculations because it would be anti-dilutive.

Table of Contents

The following options to purchase shares of common stock have not been included in the computation of diluted income per share because the options' exercise price was greater than the average market price of the Company's common stock for the following years stated, therefore, the effect would be anti-dilutive (in thousands, except exercise price ranges):

	Year Ended December 31,		
	2005	2004	2003
Options excluded from computation of diluted income per share	7,209	10,665	14,860
Exercise price ranges:			
High	\$58.19	\$ 58.19	\$ 58.19
Low	\$12.76	\$ 12.50	\$ 7.97

NOTE 21—EMPLOYEE SHARE-BASED PAYMENTS AND OTHER BENEFITS

Adoption of SFAS No. 123(R)

As discussed in Note 1, effective July 1, 2005, the Company early adopted SFAS No. 123(R.) The adoption resulted in the recognition of or changes to the recognition method of expense for the Company's employee stock option plans, restricted stock awards and employee stock purchase plan. The combined impact of the adoption in 2005 is as follows: \$13.7 million in compensation expense for stock options; \$0.4 million compensation expense for the stock purchase plan; and a pre-tax credit of \$2.8 million in cumulative effect of accounting change for 2005. Results for prior periods have not been restated. Total compensation expense for stock-based compensation also includes \$4.2 million for restricted stock awards, which were previously expensed by the Company under APB No. 25, prior to the adoption of SFAS No. 123(R).

Employee Stock Option Plans

In 2005, the Company adopted and the shareholders approved the 2005 Stock Incentive Plan (the "2005 Plan") to replace the 1996 Stock Incentive Plan (the "1996 Plan") which provides for the grant of nonqualified or incentive stock options to officers, directors, key employees and consultants for the purchase of newly issued shares of the Company's common stock at a price determined by the Board of Directors (the "Board") at the date the option is granted. Options are generally exercisable ratably over a four-year period from the date the option is granted and expire within ten years from the date of grant. Certain options provide for accelerated vesting upon a change in control. Exercise prices are generally equal to the fair market value of the shares on the grant date. A total of 85.4 million shares have been authorized under the 2005 Plan since inception and 36.6 million shares were available for grant at December 31, 2005.

The fair value of each option award is estimated on the date of grant using a Black-Scholes-Merton option pricing model based on the assumptions noted in the table below. Expected volatility is based on a combination of historical volatility of the Company's stock and implied volatility of publicly traded options on the Company's stock. The expected term represents the period of time that options granted are expected to be outstanding. The expected term is estimated using employees' actual historical behavior and projected future behavior based on expected exercise patterns. The risk-free interest rate is based on the U.S. Treasury zero-coupon bond where the remaining term equals the expected term. Dividend yield is zero as the Company has not, nor does it currently plan to, issue dividends to its shareholders.

	Year Ended December 31,		
	2005	2004	2003
Expected volatility	34%	55%	66%
Expected term (years)	4.9	4.3	3.3
Risk-free interest rate	4%	3%	3%
Dividend yield	—	—	—

Table of Contents

The weighted-average fair values of options granted were \$4.57 for 2005, \$5.95 for 2004 and \$2.83 for 2003. Intrinsic value of options exercised were \$67.0 million for 2005, \$53.1 million for 2004 and \$30.9 million for 2003.

A summary of option activity under the 2005 Plan is presented below:

	Shares (in thousands)	Weighted- Average Exercise Price	Weighted- Average Remaining Contractual Life	Aggregate Intrinsic Value (in thousands)
Outstanding at December 31, 2004:	42,789	\$ 9.68		
Granted	6,856	\$ 12.80		
Exercised	(7,780)	\$ 6.84		
Canceled	(4,699)	\$ 13.36		
Outstanding at December 31, 2005	37,166	\$ 10.37	6.76	\$ 389,766
Exercisable at December 31, 2005	21,217	\$ 9.31	5.74	\$ 244,988

As of December 31, 2005, there was \$31.3 million of total unrecognized compensation cost related to non-vested options. This cost is expected to be recognized over a weighted-average period of 2.2 years. The total fair value of shares vested was \$39.8 million for 2005, \$60.5 million for 2004 and \$122.2 for 2003.

Restricted Stock Awards

The Company recorded \$4.2 million for 2005, \$4.7 million for 2004 and \$2.3 million for 2003 in compensation expense relating to restricted stock awards. In addition, the Company recorded a pre-tax credit of \$2.8 million in cumulative effect of accounting change as a result of adopting SFAS No. 123(R) in 2005.

The Company issues restricted stock awards to its officers and senior executives. These awards are issued at the fair market value on the date of grant and generally vest ratably over four years. However, certain awards vest on the fifth anniversary of the date of grant. The fair value is calculated as the market price upon issuance.

Prior to its adoption of SFAS No. 123(R), the Company recorded compensation expense for restricted stock awards on a straight-line basis over their vesting period. If an employee forfeited the award prior to vesting, the Company reversed out the previously expensed amounts in the period of forfeiture. As required upon adoption of SFAS No. 123(R), the Company must base its accruals of compensation expense on the estimated number of awards for which the requisite service period is expected to be rendered. Actual forfeitures are no longer recorded in the period of forfeiture. The Company recorded a pre-tax credit of \$2.8 million in cumulative effect of accounting change, that represents the amount by which compensation expense would have been reduced in periods prior to adoption of SFAS No. 123(R) for restricted stock awards outstanding on July 1, 2005 that are anticipated to be forfeited.

Under the provision of SFAS No. 123(R), the recognition of deferred stock compensation, a contra-equity account representing the amount of unrecognized restricted stock expense is no longer required. Therefore, as of July 1, 2005, "Deferred Stock Compensation" was combined with "Additional Paid-in Capital" in the Company's consolidated balance sheet.

Table of Contents

A summary of non-vested restricted stock award activity is presented below:

	Shares (in thousands)	Weighted- Average Grant Date Fair Value
Non-vested at December 31, 2004:	2,615	\$ 9.35
Issued	830	\$ 11.93
Released (vested)	(276)	\$ 10.31
Canceled	(516)	\$ 9.18
Non-vested at December 31, 2005	<u>2,653</u>	<u>\$ 10.09</u>

As of December 31, 2005, there was \$14.0 million of total unrecognized compensation cost related to non-vested awards. This cost is expected to be recognized over a weighted-average period of 2.9 years.

Employee Stock Purchase Plan

For the year ended December 31, 2005, the Company recorded \$0.4 million in compensation expense for its employee stock purchase plan. Effective August 1, 2005, the Company changed the terms of its purchase plan to reduce the discount to 5% and discontinued the look-back provision. As a result, the purchase plan was not compensatory beginning August 1, 2005. At December 31, 2005, 1,083,195 shares were available for purchase under the 2002 Employee Stock Purchase Plan ("2002 Purchase Plan").

Prior to the plan change, the shareholders of the Company had approved the 2002 Purchase Plan, and reserved 5,000,000 shares of common stock for sale to employees at a price no less than 85% of the lower of the fair market value of the common stock at the beginning of the one-year offering period or the end of each of the six-month purchase periods. Under SFAS No. 123(R), the 2002 Purchase Plan was considered compensatory. As a result, the Company recorded \$0.4 million of compensation expense for the subscription period ended July 31, 2005.

401(k) Plan

The Company has a 401(k) salary deferral program for eligible employees who have met certain service requirements. The Company matches certain employee contributions; additional contributions to this plan are at the discretion of the Company. Total contribution expense under this plan was \$5.2 million for 2005, \$5.0 million for 2004 and \$8.7 million for 2003.

NOTE 22—REGULATORY REQUIREMENTS

Registered Broker-Dealers

The Company's broker-dealer subsidiaries are subject to the Uniform Net Capital Rule (the "Rule") under the Securities Exchange Act of 1934 administered by the SEC, the New York Stock Exchange ("NYSE") and the NASD, which requires the maintenance of minimum net capital. The minimum net capital requirements can be met under either the Aggregate Indebtedness or the Alternative method. Under the Aggregate Indebtedness method, a broker-dealer is required to maintain minimum net capital of at least the greater of 6²/₃% of its aggregate indebtedness, as defined, or a minimum dollar amount. Under the Alternative method, a broker-dealer is required to maintain net capital of at least 5% of aggregate debit balances or a minimum dollar amount. Broker-dealers who do not meet one of these requirements may not repay subordinated borrowings, pay cash dividends or make any unsecured advances or loans to its parent or employees.

Table of Contents

The table below summarizes the minimum excess capital requirements for the Company's broker-dealer subsidiaries (in thousands):

	December 31, 2005		
	Required Net Capital	Net Capital	Excess Net Capital
E*TRADE Clearing LLC ⁽¹⁾	\$ 57,914	\$ 345,957	\$ 288,043
BrownCo LLC ⁽¹⁾	67,292	309,576	242,284
E*TRADE Securities LLC ⁽¹⁾	250	33,720	33,470
E*TRADE Capital Markets, LLC	1,206	24,018	22,812
Harrisdirect LLC ⁽²⁾	250	19,376	19,126
E*TRADE Global Asset Management, Inc. ⁽²⁾	1,177	18,862	17,685
E*TRADE Capital Markets—Execution Services, LLC ⁽²⁾	449	3,533	3,084
E*TRADE Professional Trading, LLC ⁽¹⁾	250	2,044	1,794
VERSUS Brokerage Service (U.S.) Inc. ⁽²⁾	100	797	697
International broker-dealers	28,871	68,452	39,581
Totals	\$ 157,759	\$ 826,335	\$ 668,576

(1) Elected to use the Alternative method to compute net capital.

(2) Elected to use the Aggregate Indebtedness method to compute net capital.

Banking

The Bank is subject to various regulatory capital requirements administered by Federal banking agencies. Failure to meet minimum capital requirements can trigger certain mandatory and possibly additional discretionary actions by regulators that, if undertaken, could have a direct material effect on the Bank's financial statements. Under capital adequacy guidelines and the regulatory framework for prompt corrective action, the Bank must meet specific capital guidelines that involve quantitative measures of the Bank's assets, liabilities and certain off-balance sheet items as calculated under regulatory accounting practices. The Bank's capital amounts and classification are also subject to qualitative judgments by the regulators about components, risk weightings and other factors.

Quantitative measures established by regulation to ensure capital adequacy require the Bank to maintain minimum amounts and ratios of Total and Tier I Capital to Risk-weighted assets and Tier I Capital to Adjusted total assets. As shown in the table below, at December 31, 2005, the most recent date of notification, the Office of Thrift Supervision ("OTS") categorized the Bank as "well capitalized" under the regulatory framework for prompt corrective action. There are no conditions or events since that notification that management believes have changed the Bank's category. At December 31, 2005, management believes that the Bank meets all capital adequacy requirements to which it is subject. However, events beyond management's control, such as fluctuations in interest rates or a downturn in the economy in areas in which the Bank's loans or securities are concentrated, could adversely affect future earnings and consequently, the Bank's ability to meet its future capital requirements.

Table of Contents

The Bank's required actual capital amounts and ratios are presented in the table below (dollars in thousands):

	Actual		Required for Capital Adequacy Purposes		Required to be Well Capitalized Under Prompt Corrective Action Provisions	
	Amount	Ratio	Amount	Ratio	Amount	Ratio
At December 31, 2005:						
Total Capital to risk-weighted assets	\$2,021,091	10.94%	>\$1,478,238	>8.0%	>\$1,847,797	>10.0%
Tier I Capital to risk-weighted assets	\$1,957,805	10.60%	>\$ 739,119	>4.0%	>\$1,108,678	> 6.0%
Tier I Capital to adjusted total assets	\$1,957,805	5.92%	>\$1,322,343	>4.0%	>\$1,652,929	> 5.0%
At December 31, 2004:						
Total Capital to risk-weighted assets	\$1,533,934	11.09%	>\$1,106,778	>8.0%	>\$1,383,472	>10.0%
Tier I Capital to risk-weighted assets	\$1,486,422	10.74%	>\$ 553,389	>4.0%	>\$ 830,083	> 6.0%
Tier I Capital to adjusted total assets	\$1,486,422	5.83%	>\$1,019,659	>4.0%	>\$1,274,574	> 5.0%

The Bank is also required by OTS regulations to maintain tangible capital of at least 1.50% of tangible assets. The Bank satisfied this requirement at both December 31, 2005 and 2004.

The Bank is subject to certain restrictions on the amount of dividends it may declare without prior regulatory approval. At December 31, 2005, the Bank has approximately \$192.5 million of capital available for dividend declaration without regulatory approval while still maintaining a "well capitalized" status.

NOTE 23—LEASE ARRANGEMENTS

The Company has non-cancelable operating leases for facilities through 2016. Future minimum rental commitments under these leases are as follows (in thousands):

Years ending December 31:	
2006	\$ 27,503
2007	26,872
2008	25,374
2009	22,397
2010	19,753
Thereafter	27,596
Total future minimum lease payments	\$ 149,495

Certain leases contain provisions for renewal options and rent escalations based on increases in certain costs incurred by the lessor. Rent expense was \$22.2 million for 2005, \$23.9 million for 2004 and \$31.4 million for 2003.

NOTE 24—COMMITMENTS, CONTINGENCIES AND OTHER REGULATORY MATTERS

Legal Matters

In June 2002, the Company acquired from MarketXT Holdings, Inc. (formerly known as Tradescape Corporation) ("MarketXT") certain entities referred to as Tradescape Securities, LLC, Tradescape Technologies, LLC and Momentum Securities, LLC. Numerous disputes have arisen among the parties regarding the value of and responsibility for various liabilities that first became apparent following the sale. The parties have been unable to resolve these disputes and have asserted claims against each other. On April 8, 2004, MarketXT filed a complaint in the United States District Court for the Southern District of New York against the Company, certain

[Table of Contents](#)

of its officers and directors and other third parties, including Softbank Finance Corporation and Softbank Corporation, alleging that the defendants acted improperly in preventing plaintiffs from obtaining certain contingent payments and claiming damages of \$1.5 billion. On April 9, 2004, the Company filed a complaint in the United States District Court for the Southern District of New York against certain directors and officers of MarketXT seeking declaratory relief and monetary damages in an amount to be proven at trial for defendants' fraud in connection with the 2002 sale transaction, including, but not limited to, having presented the Company with fraudulent financial statements of the condition of Momentum Securities during the due diligence process. The Company amended its complaint in October 2004 to add additional defendants. In January 2005, the Company filed an adversary proceeding against MarketXT and others seeking compensatory and punitive damages, and certain declaratory relief in those Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York entitled, "In re MarketXT Holdings Corp., Debtor" and a separate adversary proceeding against Omar Amanat, in the same bankruptcy court in those Chapter 7 bankruptcy proceedings entitled, "In re Amanat, Omar Shariff." In October 2005, MarketXT answered the Company's adversary proceeding and asserted various counterclaims, including some of the claims MarketXT had asserted in its district court action (which action MarketXT subsequently abandoned), seeking unspecified damages according to proof at trial. The Company has moved to dismiss certain aspects of MarketXT's counterclaim, and discovery related to the adversary proceeding continues. The Company continues to believe that the claims brought against it by MarketXT and Omar Amanat are without merit and intends both to vigorously defend all such claims and to fully pursue its own claims as described above.

In September 2001, the Company engaged in certain stock loan transactions that resulted in litigation between the Company and certain counterparties to the transactions including Nomura Securities, Inc. and certain of its affiliates ("Nomura"). In the lawsuits, Nomura sought approximately \$10.0 million in damages and asserted the right to keep an additional \$5.0 million, plus interest, unspecified punitive damages, attorney fees, and other relief from the Company for conversion and breach of contract. The Company asserted claims and defenses against Nomura relating to the same amount and alleged, *inter alia*, that Nomura, among others, participated in a stock lending fraud and violated federal and state securities laws among other allegations. The Company sought, among other things, compensatory damages for all expenses and losses that it had incurred to date. On December 5, 2005, the Company entered into an agreement with Nomura and its subsidiaries and affiliates to settle the lawsuits pending between the parties in New York and Minnesota. Pursuant to that agreement, Nomura, without admission of liability, agreed to pay, and has paid, \$35.0 million to the Company to resolve these disputes; the Company and Nomura further agreed to dismiss their claims against each other. With the resolution of these matters, this litigation will no longer be included in our disclosures.

An unfavorable outcome in any matter that is not covered by insurance could have a material adverse effect on our business, financial condition, results of operations and cash flows. In addition, even if the ultimate outcomes are resolved in our favor, the defense of such litigation could entail considerable cost and the diversion of the efforts of management, either of which could have a material adverse effect on our results of operation. In addition to the matters described above, the Company is subject to various legal proceedings and claims that arise in the normal course of business. The Company contests liability and/or the amount of damages in each pending matter. In view of the inherent difficulty of predicting the outcome of such matters, particularly in cases where claimants seek substantial or indeterminate damages or where investigations and proceedings are in the early stages, the Company cannot predict with certainty the loss or range of loss related to such matters, how such matters will be resolved, when they will ultimately be resolved, or what the eventual settlement, fine, penalty or other relief might be. Subject to the foregoing, the Company believes, based on current knowledge and after consultation with counsel, that the outcome of each such pending matter will not have a material adverse effect on the consolidated financial condition of the Company, although the outcome could be material to the Company's or a business segment's operating results for a particular future period, depending on, among other things, the level of the Company's or a business segment's income for such period. Legal reserves have been established in accordance with SFAS No. 5. Once established, reserves are adjusted when there is more information available or when an event occurs requiring a change.

[Table of Contents](#)

Regulatory Matters

The securities and banking industries are subject to extensive regulation under Federal, state and applicable international laws. As a result, the Company is required to comply with many complex laws and rules and its ability to so comply is dependent in part on the establishment and maintenance of a qualified compliance system. From time to time, the Company has been threatened with, or named as a defendant in, lawsuits, arbitrations and administrative claims involving securities, banking and other matters. The Company is also subject to periodic regulatory audits and inspections. Compliance and trading problems that are reported to regulators, such as the SEC, the NYSE, the NASD or the OTS by dissatisfied customers or others are investigated by such regulators, and may, if pursued, result in formal claims being filed against the Company by customers and/or disciplinary action being taken against the Company by regulators. The regulators may also initiate investigations and take disciplinary action against the Company or its employees. Any such claims or disciplinary actions that are decided against the Company could have a material impact on the financial results of the Company or any of its subsidiaries.

Insurance Matters

The Company maintains insurance coverage that management believes is reasonable and prudent. The principal insurance coverage it maintains covers commercial general liability, property damage, hardware/software damage, cyber liability, directors and officers, employment practices liability, certain criminal acts against the Company and errors and omissions. The Company believes that such insurance coverage is adequate for the purpose of its business. The Company's ability to maintain this level of insurance coverage in the future, however, is subject to the availability of affordable insurance in the marketplace.

Commitments—Loans

In the normal course of business, the Bank makes various commitments to extend credit and incur contingent liabilities that are not reflected in the consolidated balance sheets. The Bank had the following mortgage loan commitments (in thousands):

	December 31, 2005		
	Fixed Rate	Variable Rate	Total
Purchase loans	\$316,040	\$ 46,163	\$362,203
Originate loans	\$ 94,512	\$ 17,940	\$112,452
Sell loans	\$ 24,294	\$ 10,793	\$ 35,087

Significant changes in the economy or interest rate influence the impact that these commitments and contingencies have on the Company in the future.

At December 31, 2005, the Bank had commitments to purchase \$0.9 billion and sell \$1.0 billion in securities. In addition, the Bank had approximately \$2.3 billion of certificates of deposit scheduled to mature in less than one year and \$6.2 billion of unfunded commitments to extend credit.

Guarantees

The Bank provides guarantees to investors purchasing mortgage loans, which are considered standard representations and warranties within the mortgage industry. The primary guarantees are as follows:

- The mortgage and the mortgage note have been duly executed and each is the legal, valid and binding obligation of the Bank, enforceable in accordance with its terms. The mortgage has been duly acknowledged and recorded and is valid. The mortgage and the mortgage note are not subject to any right of rescission, set-off, counterclaim or defense, including, without limitation, the defense of usury, and no such right of rescission, set-off, counterclaim or defense has been asserted with respect thereto. If these

[Table of Contents](#)

- claims prove to be untrue, the investor can require the Bank to repurchase the loan and return all loan purchase and servicing release premiums.
- Should any eligible mortgage loan delivered pay off prior to the receipt of the first payment, the loan purchase and servicing release premiums shall be fully refunded.
- Should any eligible mortgage loan delivered to an investor pay off between the receipt of the first payment and a contractually designated period of time (typically 60—120 days from the date of purchase), the servicing release premiums shall be fully refunded.

Management has determined that the maximum potential liability under these guarantees is \$18.3 million and \$38.1 million based on all available information at December 31, 2005 and December 31, 2004, respectively. The current carrying amount of the liability recorded at December 31, 2005 is \$0.4 million and is considered adequate based upon analysis of historical trends and current economic conditions for these guarantees.

During the 30-year period prior to the redemption of the Floating Rate Cumulative Preferred Securities, ETBH guarantees the accrued and unpaid distributions on these securities as well as the redemption price of the securities and certain costs that may be incurred in liquidating, terminating or dissolving the trusts (all of which would otherwise be payable by the trusts.) At December 31, 2005, management estimated that the maximum potential liability under this arrangement is equal to approximately \$312 million or the total face value of these securities plus dividends, which may be unpaid at the termination of the trust arrangement.

NOTE 25—SEGMENT AND GEOGRAPHIC INFORMATION

In January 2005, the Company revised its financial reporting to reflect the manner in which its chief operating decision maker has begun assessing the Company's performance and makes resource allocation decisions. As a result, the Company now reports its operating results in two segments, retail and institutional, rather than its former brokerage and banking segments.

Retail includes:

- investing, trading, cash management and lending products and services to individuals; and
- stock plan administration products and services activity

Institutional includes:

- balance sheet management, including generation of institutional net interest spread, gain on sales of loans and securities, net and management income;
- market-making; and
- global execution and settlement services

Table of Contents

The Company evaluates the performance of its segments based on segment contribution (net revenues less expenses excluding interest.) All corporate overhead, administrative and technology charges are allocated to segments either in proportion to their respective direct costs or based upon specific operating criteria. Financial information for the Company's reportable segments is presented in the following tables (in thousands):

	Year Ended December 31, 2005			
	Retail	Institutional	Eliminations ⁽¹⁾	Total
Revenues:				
Commissions	\$ 339,654	\$ 119,180	\$ —	\$ 458,834
Principal transactions	—	99,175	161	99,336
Gain on sales of loans and securities, net	63,705	35,153	—	98,858
Service charges and fees	116,102	19,212	—	135,314
Other revenues	112,836	10,383	(28,800)	94,419
Interest income	685,067	1,395,769	(430,572)	1,650,264
Interest expense	(239,943)	(969,631)	430,410	(779,164)
Net interest income	445,124	426,138	(162)	871,100
Provision for loan losses	—	(54,016)	—	(54,016)
Net interest income after provision for loan losses	445,124	372,122	(162)	817,084
Total revenues	1,077,421	655,225	(28,801)	1,703,845
Expense excluding interest:				
Compensation and benefits	232,494	148,309	—	380,803
Occupancy and equipment	57,869	11,220	—	69,089
Communications	71,693	10,792	—	82,485
Professional services	55,081	20,156	—	75,237
Commissions, clearance and floor brokerage	42,715	106,347	(8,256)	140,806
Advertising and market development	96,918	9,017	—	105,935
Servicing and other banking expenses	6,166	66,705	(20,545)	52,326
Fair value adjustments of financial derivatives	—	4,892	—	4,892
Depreciation and amortization	60,604	14,377	—	74,981
Amortization of other intangibles	13,894	29,871	—	43,765
Facility restructuring and other exit activities	(32,754)	2,737	—	(30,017)
Other	13,984	39,767	—	53,751
Total expenses excluding interest	618,664	464,190	(28,801)	1,054,053
Segment income	\$ 458,757	\$ 191,035	\$ —	\$ 649,792

(1) Reflects elimination of transactions between retail and institutional segments, which includes deposit transfer pricing, servicing and order flow rebates.

[Table of Contents](#)

	Year Ended December 31, 2004			
	Retail	Institutional	Eliminations ⁽¹⁾	Total
Revenues:				
Commissions	\$ 328,889	\$ 102,749	\$ —	\$ 431,638
Principal transactions	—	126,893	—	126,893
Gain on sales of loans and securities, net	93,694	47,024	—	140,718
Service charges and fees	84,445	13,130	—	97,575
Other revenues	106,457	16,684	(34,064)	89,077
Interest income	492,233	956,972	(303,608)	1,145,597
Interest expense	(169,955)	(644,108)	303,608	(510,455)
Net interest income	322,278	312,864	—	635,142
Provision for loan losses	—	(38,121)	—	(38,121)
Net interest income after provision for loan losses	322,278	274,743	—	597,021
Total revenues	935,763	581,223	(34,064)	1,482,922
Expense excluding interest:				
Compensation and benefits	227,867	122,573	—	350,440
Occupancy and equipment	57,437	12,135	—	69,572
Communications	61,112	8,562	—	69,674
Professional services	43,470	24,277	—	67,747
Commissions, clearance and floor brokerage	42,227	100,205	(12,736)	129,696
Advertising and market development	57,193	4,962	—	62,155
Servicing and other banking expenses	7,754	49,545	(21,328)	35,971
Fair value adjustments of financial derivatives	—	(2,299)	—	(2,299)
Depreciation and amortization	65,599	12,293	—	77,892
Amortization of other intangibles	11,863	7,580	—	19,443
Facility restructuring and other exit activities	4,784	10,904	—	15,688
Other	48,840	42,304	—	91,144
Total expenses excluding interest	628,146	393,041	(34,064)	987,123
Segment income	\$ 307,617	\$ 188,182	\$ —	\$ 495,799

(1) Reflects elimination of transactions between retail and institutional segments, which includes deposit transfer pricing, servicing and order flow rebates.

[Table of Contents](#)

	Year Ended December 31, 2003			
	Retail	Institutional	Eliminations ⁽¹⁾	Total
Revenues:				
Commissions	\$ 316,092	\$ 106,617	\$ —	\$ 422,709
Principal transactions	—	107,601	—	107,601
Gain on sales of loans and securities, net	235,064	12,590	—	247,654
Service charges and fees	104,531	5,527	—	110,058
Other revenues	104,157	24,737	(42,380)	86,514
Interest income	353,483	748,819	(209,470)	892,832
Interest expense	(219,513)	(476,086)	209,470	(486,129)
Net interest income	133,970	272,733	—	406,703
Provision for loan losses	—	(38,523)	—	(38,523)
Net interest income after provision for loan losses	133,970	234,210	—	368,180
Total revenues	893,814	491,282	(42,380)	1,342,716
Expense excluding interest:				
Compensation and benefits	256,982	107,616	—	364,598
Occupancy and equipment	63,502	14,879	—	78,381
Communications	63,645	10,005	—	73,650
Professional services	38,827	16,889	—	55,716
Commissions, clearance and floor brokerage	33,100	104,689	(12,921)	124,868
Advertising and market development	55,011	2,876	—	57,887
Servicing and other banking expenses	29,518	37,516	(29,459)	37,575
Fair value adjustments of financial derivatives	—	15,338	—	15,338
Depreciation and amortization	72,531	13,084	—	85,615
Amortization of other intangibles	16,530	8,228	—	24,758
Facility restructuring and other exit activities	83,864	50,323	—	134,187
Other	55,808	45,234	—	101,042
Total expenses excluding interest	769,318	426,677	(42,380)	1153,615
Segment income	\$ 124,496	\$ 64,605	\$ —	\$ 189,101

(1) Reflects elimination of transactions between retail and institutional segments, which includes deposit transfer pricing, servicing and order flow rebates.

Total assets for each segment are shown below (in thousands):

	Retail	Institutional	Total
At December 31, 2005	\$ 12,901,008	\$ 31,666,678	\$ 44,567,686
At December 31, 2004	\$ 5,294,487	\$ 25,738,096	\$ 31,032,583

[Table of Contents](#)

Geographic Information

The Company operates in both U.S. and international markets. The Company's international operations are conducted through offices in Europe, Asia and Canada. The following information provides a reasonable representation of each region's contribution to the consolidated amounts (in thousands):

	United States	Europe	Asia	Canada	Total
Net revenues:					
Year ended December 31, 2005	\$ 1,496,204	\$ 80,505	\$ 71,683	\$ 55,453	\$ 1,703,845
Year ended December 31, 2004	\$ 1,310,234	\$ 89,979	\$ 32,360	\$ 50,349	\$ 1,482,922
Year ended December 31, 2003	\$ 1,220,774	\$ 67,815	\$ 10,384	\$ 43,743	\$ 1,342,716
Long-lived assets:					
At December 31, 2005	\$ 285,870	\$ 5,047	\$ 1,254	\$ 7,085	\$ 299,256
At December 31, 2004	\$ 286,183	\$ 7,699	\$ 728	\$ 7,681	\$ 302,291

No single customer accounted for greater than 10% of gross revenues for 2005, 2004 and 2003.

NOTE 26—FAIR VALUE DISCLOSURE OF FINANCIAL INSTRUMENTS

The fair value of financial instruments whose estimated fair values were their carrying values are summarized as follows:

- *Cash and equivalents, cash and investments required to be segregated, brokerage receivables, net and brokerage payables*—Fair value is estimated to be carrying value.
- *Available-for-sale investment securities including mortgage-backed, trading securities and other investments*—Fair value is estimated by using quoted market prices for most securities. For illiquid securities, market prices are estimated by obtaining market price quotes on similar liquid securities and adjusting the price to reflect differences between the two securities, such as credit risk, liquidity, term coupon, payment characteristics and other information.
- *FHLB stock*—Cost is considered to be a reasonable estimate of fair value because the FHLB has historically redeemed these securities at cost.
- *Financial derivatives and off-balance instruments*—The fair value of financial derivatives and off-balance sheet instruments is the amount the Company would pay or receive to terminate the agreement as determined from quoted market prices, which is equal to the carrying value.
- *Commitments to purchase and originate loans*—The fair value is estimated by calculating the net present value of the anticipated cash flows associated with IRLCs.

The fair value of financial instruments whose estimated fair values were different from their carrying values are summarized below (in thousands):

	December 31, 2005		December 31, 2004	
	Carrying Value	Fair Value	Carrying Value	Fair Value
Assets:				
Loans receivable, net and loans held-for-sale, net	\$ 19,512,266	\$ 19,242,275	\$ 11,785,035	\$ 11,765,901
Liabilities:				
Deposits	\$ 15,948,015	\$ 15,937,684	\$ 12,302,974	\$ 12,359,634
Securities sold under agreements to repurchase	\$ 11,101,542	\$ 11,014,478	\$ 9,897,191	\$ 9,894,611
Other borrowings by Bank subsidiary	\$ 4,166,592	\$ 4,091,755	\$ 1,760,732	\$ 1,745,850
Senior notes	\$ 1,401,947	\$ 1,437,132	\$ 400,452	\$ 428,452
Mandatory convertible notes	\$ 435,589	\$ 493,958	—	—
Convertible subordinated notes	\$ 185,165	\$ 187,942	\$ 185,165	\$ 189,794

[Table of Contents](#)

- *Loans receivable, net and loans held-for-sale, net*—For certain residential mortgage loans, fair value is estimated using quoted market prices for similar types of products. The fair value of certain other types of loans is estimated using quoted market prices for securities backed by similar loans. The fair value for loans that could not be reasonably established using the previous two methods was estimated by discounting future cash flows using current rates for similar loans. Management adjusts the discount rate to reflect the individual characteristics of the loan, such as credit risk, coupon, term, payment characteristics and the liquidity of the secondary market for these types of loans. The fair value for certain consumer loans was calculated using a discounted cash flow model incorporating prepayment and loss curves for the specific product type. Loans were valued in groups based on rate and term with the discount rate applied to each group derived from the swap curve. The calculation of loss and prepayment curves was based on past performance of similar credit quality originations by the same counterparty.
- *Deposits*—For SDA, money market, passbook savings and checking accounts, fair value is estimated to be carrying value. For fixed maturity certificates of deposit, fair value is estimated by discounting future cash flows at the currently offered rates for deposits of similar remaining maturities.
- *Securities sold under agreements to repurchase*—Fair value is determined by discounting future cash flows at the rate implied for other similar instruments with similar remaining maturities.
- *Other borrowings by Bank subsidiary*—For adjustable-rate borrowings, fair value is estimated to be carrying value. For fixed-rate borrowings, fair value is estimated by discounting future cash flows at the currently offered rates for fixed-rate borrowings of similar remaining maturities.
- *Senior, mandatory convertible and convertible subordinated notes*—Fair value is estimated using quoted market prices.

NOTE 27—RELATED PARTY TRANSACTIONS

In the normal course of business, the Company extends credit to its principal officers, directors and employees to finance their purchases of securities on margin. Margin loans to the Company's principal officers totaled approximately \$5.3 million at December 31, 2005 and \$6.6 million as of December 31, 2004; however, there were revolving margin balances outstanding during 2005 and 2004 with certain directors. These margin loans are made on the same terms and conditions as the Company's loans to other non-affiliated customers.

[Table of Contents](#)

NOTE 28—CONDENSED FINANCIAL INFORMATION (PARENT COMPANY ONLY)

The following presents the Parent's condensed balance sheets, statements of income and cash flows:

BALANCE SHEETS
(in thousands)

	December 31,	
	2005	2004
<u>ASSETS</u>		
Cash and equivalents	\$ 93,514	\$ 69,007
Property and equipment, net	205,796	199,706
Investment securities	48,246	49,530
Investment in Bank subsidiary	1,551,024	1,246,259
Investment in other consolidated subsidiaries	3,566,531	1,402,645
Receivable from subsidiaries	116,100	3,382
Other assets	49,074	41,709
	<u>5,630,285</u>	<u>3,012,238</u>
Total assets	\$ 5,630,285	\$ 3,012,238
<u>LIABILITIES AND SHAREHOLDERS' EQUITY</u>		
Senior notes	\$ 1,401,947	\$ 400,452
Mandatory convertible notes	435,589	—
Convertible subordinated notes	185,165	185,165
Other liabilities	208,024	198,419
Shareholders' equity	3,399,560	2,228,202
	<u>5,630,285</u>	<u>3,012,238</u>
Total liabilities and shareholders' equity	\$ 5,630,285	\$ 3,012,238

STATEMENTS OF INCOME
(in thousands)

	Year Ended December 31,		
	2005	2004	2003
Revenues:			
Management fees from subsidiaries	\$ 224,894	\$318,772	\$312,947
Net revenues	224,894	318,772	312,947
Expenses excluding interest:			
Compensation and benefits	130,081	124,208	107,391
Occupancy and equipment	25,036	32,335	29,543
Communications	18,973	17,949	19,090
Depreciation and amortization	50,528	54,664	57,776
Professional services	27,647	30,445	22,563
Commissions, clearance and floor brokerage	206	(1,062)	2,347
Advertising and market development	13,498	6,154	3,308
Facility restructuring and other exit activities	2,991	14,478	115,412
Intercompany allocations and charges	(120,598)	(30,260)	3,529
Other	17,545	33,089	23,879
Total expenses excluding interest	165,907	282,000	384,838
Income (loss) before other loss, income taxes and cumulative effect of accounting change	58,987	36,772	(71,891)
Other loss:			
Corporate interest income	2,265	740	1,445
Corporate interest expense	(71,510)	(45,775)	(44,468)
Gain on sale and impairment of investments	982	1,427	16,175
Loss on early extinguishment of debt	—	(19,443)	—
Equity in income of investment and venture funds	6,247	4,858	9,051
Total other loss	(62,016)	(58,193)	(17,797)
Pre-tax loss	(3,029)	(21,421)	(89,688)
Income tax benefit	(10,806)	(42,007)	(57,821)
Income (loss) before cumulative effect of accounting change	7,777	20,586	(31,867)
Cumulative effect of accounting change	1,646	—	—
Equity in income of Bank subsidiary	284,987	215,614	133,632
Equity in income of other consolidated subsidiaries	136,002	144,283	101,262
Net income	430,412	380,483	203,027
Other comprehensive income (loss), net of tax	(34,513)	(51,222)	141,480
Total comprehensive income	\$ 395,899	\$329,261	\$344,507

STATEMENTS OF CASH FLOWS
(in thousands)

	Year Ended December 31,		
	2005	2004	2003
CASH FLOWS FROM OPERATING ACTIVITIES:			
Net income	\$ 430,412	\$ 380,483	\$ 203,027
Adjustments to reconcile net income to net cash provided by operating activities:			
Equity in undistributed income of Bank subsidiary	(284,987)	(215,614)	(133,632)
Equity in undistributed loss (income) of other subsidiaries	229,777	(100,771)	(51,262)
Equity in net income of investments	(6,475)	(10,272)	(14,584)
Depreciation and amortization	50,528	54,664	57,668
Stock-based compensation expense	6,916	—	—
Gain on investments and impairment charges	(946)	(1,427)	(93)
Unrealized loss on venture fund	228	5,412	4,103
Non cash restructuring costs and other exit activities	2,991	14,478	30,770
Cumulative effect of accounting change	(1,646)	—	—
Other	1,459	4,645	(1,348)
Other changes, net:			
Other assets and liabilities, net	(83,483)	77,771	(45,877)
Decrease in restructuring liabilities	(4,581)	(9,299)	(27,389)
Net cash provided by operating activities	<u>340,193</u>	<u>200,070</u>	<u>21,383</u>
CASH FLOWS FROM INVESTING ACTIVITIES:			
Purchase of property and equipment	(66,191)	(70,206)	(38,344)
Purchase of investments	(9,785)	(10,566)	(5,800)
Proceeds from sale/maturity of investments	18,803	16,409	4,246
Business acquisitions	(2,312,879)	—	—
Cash contribution to subsidiaries	(80,000)	—	(68,153)
Other	1,021	—	(1,471)
Net cash used in investing activities	<u>(2,449,031)</u>	<u>(64,363)</u>	<u>(109,522)</u>
CASH FLOWS FROM FINANCING ACTIVITIES:			
Proceeds from sale of investments	—	—	4,946
Proceeds from issuance of common stock	753,134	43,974	51,740
Tax benefit on option exercises	10,352	17,913	13,186
Proceeds from issuance of senior notes	992,064	394,000	—
Proceeds from issuance of Units	436,500	—	—
Repurchase of treasury stock	(58,215)	(175,776)	—
Redemption of subordinated notes	—	(428,902)	—
Payment of capital leases	(157)	(734)	(6,031)
Other	(333)	260	9,123
Net cash provided by (used in) financing activities	<u>2,133,345</u>	<u>(149,265)</u>	<u>72,964</u>
INCREASE (DECREASE) IN CASH AND EQUIVALENTS	24,507	(13,558)	(15,175)
CASH AND EQUIVALENTS—Beginning of year	<u>69,007</u>	<u>82,565</u>	<u>97,740</u>
CASH AND EQUIVALENTS—End of year	<u>\$ 93,514</u>	<u>\$ 69,007</u>	<u>\$ 82,565</u>

[Table of Contents](#)

Parent Company Guarantees

Guarantees are contingent commitments issued by the Company for the purpose of guaranteeing the financial obligations of a subsidiary to a financial institution. The collective obligation of the corporation does not change by the existence of corporate guarantees. Rather, the guarantees shift ultimate payment responsibility of an existing financial obligation from a subsidiary to the parent company.

In support of the Company's brokerage business, the Company has provided guarantees on the settlement of its subsidiaries' financial obligations with several financial institutions related to its securities lending activities. Terms and conditions of the guarantees, although typically undefined in the guarantees themselves, are governed by the conditions of the underlying obligation that the guarantee covers. Thus, the Company's obligation to pay under these guarantees coincides exactly with the terms and conditions of those underlying obligations. At December 31, 2005, no claims had been filed with the Company for payment under any guarantees. These guarantees are not collateralized.

In addition to guarantees issued on behalf of subsidiaries participating in securities lending programs, the Company also issues guarantees for the settlement of foreign exchange transactions. If a subsidiary fails to deliver currency on the settlement date of a foreign exchange arrangement, the beneficiary financial institution may seek payment from the Company. Terms are undefined, and are governed by the terms of the underlying financial obligation. At December 31, 2005, no claims had been made on the Company under these guarantees and thus, no obligations had been recorded. These guarantees are not collateralized.

NOTE 29—SUBSEQUENT EVENTS

On February 17, 2006, the Company signed an agreement to sell its professional agency business, E*TRADE Professional Trading, LLC for approximately \$5.0 million. This business includes a broker-dealer registered with the SEC and a member of the NASD who currently executes and clears its customer security transactions through E*TRADE Clearing LLC, on a fully disclosed basis under an introducing broker-dealer relationship.

NOTE 30—QUARTERLY DATA (UNAUDITED)

The information presented below reflects all adjustments, which, in the opinion of management, are of a normal and recurring nature necessary to present fairly the results of operations for the periods presented (in thousands, except per share amounts):

	2005				2004			
	1 st Quarter	2 nd Quarter	3 rd Quarter	4 th Quarter	1 st Quarter	2 nd Quarter	3 rd Quarter	4 th Quarter
Net revenues	\$ 417,397	\$ 387,687	\$ 419,836	\$ 478,925	\$ 374,662	\$ 374,465	\$ 330,122	\$ 403,673
Income from continuing operations	\$ 102,206	\$ 109,383	\$ 109,138	\$ 125,511	\$ 91,045	\$ 103,204	\$ 88,103	\$ 99,478
Net income	\$ 91,994	\$ 101,567	\$ 107,491	\$ 129,360	\$ 88,475	\$ 122,905	\$ 79,274	\$ 89,829
Income per share from continuing operations:								
Basic	\$ 0.28	\$ 0.30	\$ 0.30	\$ 0.32	\$ 0.25	\$ 0.28	\$ 0.24	\$ 0.26
Diluted	\$ 0.27	\$ 0.29	\$ 0.29	\$ 0.31	\$ 0.23	\$ 0.27	\$ 0.23	\$ 0.26
Income per share:								
Basic	\$ 0.25	\$ 0.28	\$ 0.29	\$ 0.33	\$ 0.24	\$ 0.34	\$ 0.21	\$ 0.24
Diluted	\$ 0.24	\$ 0.27	\$ 0.28	\$ 0.32	\$ 0.23	\$ 0.31	\$ 0.21	\$ 0.24

[Table of Contents](#)

ITEM 9. CHANGES IN AND DISAGREEMENTS WITH ACCOUNTANTS ON ACCOUNTING AND FINANCIAL DISCLOSURE

Not applicable.

ITEM 9A. CONTROLS AND PROCEDURES

- (a) Our Chief Executive Officer and our Chief Financial Officer, after evaluating the effectiveness of the Company's "disclosure controls and procedures" (as defined in Rules 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934 as amended) at December 31, 2005, have concluded that our disclosure controls and procedures are effective and are designed to ensure that the information the Company is required to disclose is recorded, processed, summarized and reported within the necessary time periods.
- (b) Our Chief Executive Officer and Chief Financial Officer have evaluated the changes to the Company's internal control over financial reporting that occurred during our fiscal year ended December 31, 2005, as required by paragraph (d) Rules 13a-15 and 15d-15 under the Securities Exchange Act of 1934, as amended, and have concluded that there were no such changes that materially affected or are reasonably likely to materially affect the Company's internal control over financial reporting.

ITEM 9B. OTHER INFORMATION

Not applicable.

PART III

The Company's Proxy Statement for its Annual Meeting of Shareholders, to be held May 25, 2006 which, when filed pursuant to Regulation 14A under the Securities Exchange Act of 1934, will be incorporated by reference in this Annual Report on Form 10-K pursuant to General Instruction G(3) of Form 10-K, provides the information required under Part III (Items 10, 11, 12, 13 and 14.)

PART IV

ITEM 15. EXHIBITS AND FINANCIAL STATEMENT SCHEDULES

- (a) *The following documents are filed as part of this report:*

Consolidated Financial Statements and Financial Statement Schedules

Consolidated Financial Statement Schedules have been omitted because the required information is not present, or not present in amounts, sufficient to require submission of the schedules or because the required information is provided in the Consolidated Financial Statements or Notes thereto.

[Table of Contents](#)

EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>
2.1	Agreement and Plan of Acquisition and Reorganization at May 31, 1999 by and among the Registrant, Turbo Acquisition Corp. and Telebank Financial Corporation (Incorporated by reference to Exhibit 2.1 of the Company's Registration Statement on Form S-4, Registration Statement No. 333-91467.)
2.2	Merger Agreement made at June 14, 2000 between the Company, 3045157 Nova Scotia Company, EGI Canada Corporation, Versus Technologies Inc., Versus Brokerage Services Inc., Versus Brokerage Services (U.S.) Inc. and Fairvest Securities Corporation (Incorporated by reference to Exhibit 2.1 of the Company's Registration Statement on Form S-3, Registration Statement No. 333-41628.)
2.3	Agreement and Plan of Mergers, Member Interest Purchase Agreement and Reorganization, dated at August 29, 2001, by and among the Company, Dempsey LLC and the individuals and entities names therein (Incorporated by reference to Exhibit 99.1 of the Company's Current Report on Form 8-K filed on September 19, 2001.)
2.4	Sale and Purchase Agreement, dated September 28, 2005, by and among the Company, J.P. Morgan Chase & Co. and J.P. Morgan Invest Inc. (Incorporated by reference to Exhibit 2.1 of the Company's Current Report on Form 8-K filed on October 3, 2005.)
2.5	First Amendment to Purchase and Sale Agreement, dated October 6, 2005, by and among Harris Financial Corp, Harrisdirect LLC and E*TRADE Financial Corporation (Incorporated by reference to Exhibit 2.1 of the Company's Current Report on Form 8-K filed on October 7, 2005.)
3.1	Certificate of Incorporation of E*TRADE Financial Corporation as currently in effect. (Incorporated by reference to Exhibit 3.1 to the Company's Quarterly Report on Form 10-Q filed November 7, 2003.)
3.2	Certificate of Designation of Series A Preferred Stock of the Company (Incorporated by reference to Exhibit 4.2 of Amendment No. 1 to the Company's Registration Statement on Form S-3, Registration Statement No. 333-41628.)
3.3	Restated Bylaws of the Registrant (Incorporated by reference to Exhibit 3.3 to the Company's Annual Report on Form 10-K filed November 9, 2000.)
3.4	Certificate of Designation of Series B Participating Cumulative Preferred Stock of the Company (Incorporated by reference to Exhibit 3.1 of the Company's Form 10-Q filed August 14, 2001.)
4.1	Specimen of Common Stock Certificate (Incorporated by reference to Exhibit 4.1 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
4.2	Reference is hereby made to Exhibits 3.1, 3.2 and 3.3.
4.3	Indenture, dated February 1, 2000, by and between the Company and The Bank of New York. (Incorporated by reference to Exhibit 4.4 of the Company's Registration Statement on Form S-3, Registration Statement No. 333-35802.)
4.4	Registration Rights Agreement, dated February 1, 2000, by and among the Company, FleetBoston Robertson Stephens Inc., Hambrecht & Quist LLC and Goldman, Sachs & Co. (Incorporated by reference to Exhibit 4.5 of the Company's Registration Statement on Form S-3, Registration Statement No. 333-35802.)
4.5	Indenture dated May 29, 2001 by and between the Company and The Bank of New York (Incorporated by reference to Exhibit 4.1 to the Company's Registration Statement on Form S-3, Registration Statement No. 333-64102.)
4.6	Rights Agreement dated at July 9, 2001 between E*TRADE Financial Corporation and American Stock Transfer and Trust Company, as Rights Agent (Incorporated by reference to Exhibit 99.2 to the Company's Current Report on Form 8-K filed on July 9, 2001.)

Table of Contents

<u>Exhibit Number</u>	<u>Description</u>
4.7	Indenture dated June 8, 2004 between E*TRADE Financial Corporation and the Trustee (Incorporated by reference to Exhibit 4 of the Company's Form 10-Q filed on August 5, 2004.)
4.8	Registration Rights Agreement dated as of June 8, 2004 between E*TRADE Financial Corporation and Morgan Stanley & Co. Incorporated, Credit Suisse First Boston LLC, Deutsche Bank Securities Inc. and Sandler O'Neill & Partners, L.P., as Initial Purchasers (Incorporated by reference to Exhibit I of the Company's Form S-4 filed July 1, 2004.)
*4.9	Purchase Contract and Pledge Agreement dated November 22, 2005 between E*TRADE Financial Corporation and The Bank of New York
*4.10	Form of Corporate Unit (included in Exhibit 4.9—Purchase Contract and Pledge Agreement)
*4.11	Form of Treasury Unit (included in Exhibit 4.9—Purchase Contract and Pledge Agreement)
*4.12	Subordinated Indenture dated November 22, 2005 between E*TRADE Financial Corporation and The Bank of New York
*4.13	Supplemental Indenture No. 1 dated November 22, 2005 to the Subordinated Indenture between E*TRADE Financial Corporation and The Bank of New York
*4.14	Form of Subordinated Note (included in Exhibit 4.13—Supplemental Indenture No. 1 to the Subordinated Indenture)
*4.15	Indenture dated November 22, 2005 between E*TRADE Financial Corporation and The Bank of New York
*4.16	Form of Senior Note (included in Exhibit 4.15—Indenture dated November 22, 2005)
4.17	First Supplemental Indenture dated September 19, 2005 by and between the Company and the Bank of New York, as Trustee (Incorporated by reference to Exhibit 4.1 of the Company's Form 10-Q filed November 1, 2005.)
4.18	Indenture dated September 19, 2005 by and between the Company and the Bank of New York, as Trustee (Incorporated by reference to Exhibit 4.1 of the Company's Form 10-Q filed November 1, 2005.)
4.19	Registration Rights Agreement dated as of September 19, 2005, among E*TRADE Financial Corporation and J.P. Morgan Securities Inc. and Morgan Stanley & Co. Incorporated, as Initial Purchasers, relating to the Company's 8% Senior Notes due 2011 (Incorporated by reference to Exhibit 4.1 of the Company's Form 10-Q filed November 1, 2005.)
4.20	Registration Rights Agreement dated as of September 19, 2005, among E*TRADE Financial Corporation and J.P. Morgan Securities Inc. and Morgan Stanley & Co. Incorporated, as Initial Purchasers, relating to the Company's 7 ³ / ₈ % Senior Notes due 2011 (Incorporated by reference to Exhibit 4.1 of the Company's Form 10-Q filed November 1, 2005.)
4.21	Supplemental Indenture dated November 10, 2005, between E*TRADE Financial Corporation and the Bank of New York, as Trustee (Incorporated by reference to Exhibit 4.1 of the Company's Current Report on Form 8-K filed on November 15, 2005.)
4.22	Registration Rights Agreement dated November 10, 2005, between E*TRADE Financial Corporation and J.P. Morgan Securities Inc. and Morgan Stanley & Co., relating to the Company's 7 ³ / ₈ % Senior Notes Due 2013 (Incorporated by reference to Exhibit 4.2 of the Company's Current Report on Form 8-K filed on November 15, 2005.)
4.23	Common Stock Underwriting Agreement among E*TRADE Financial Corporation and Morgan Stanley & Co. Incorporated and J.P. Morgan Securities Inc., as representatives of the underwriters named therein, Morgan Stanley & Co. Incorporated and J.P. Morgan Securities Inc., as forward sellers, and Morgan Stanley & Co. International Limited and JPMorgan Chase Bank, National Association, as forward counterparties, dated November 16, 2005 (Incorporated by reference to Exhibit 1.1 of the Company's Current Report on Form 8-K filed on November 18, 2005.)

[Table of Contents](#)

<u>Exhibit Number</u>	<u>Description</u>
4.24	Notes Underwriting Agreement among E*TRADE Financial Corporation and Morgan Stanley & Co. Incorporated and J.P. Morgan Securities Inc., as representatives of the underwriters therein, dated November 16, 2005 (Incorporated by reference to Exhibit 1.2 of the Company's Current Report on Form 8-K filed on November 18, 2005.)
4.25	Equity Units Underwriting Agreement among E*TRADE Financial Corporation and Morgan Stanley & Co. Incorporated and J.P. Morgan Securities Inc., as representatives of the underwriters named therein, dated November 16, 2005 (Incorporated by reference to Exhibit 1.3 of the Company's Current Report on Form 8-K filed on November 18, 2005.)
4.26	Confirmation of Forward Stock Sale Transaction between E*TRADE Financial Corporation and Morgan Stanley & Co. International Limited dated November 16, 2005 (Incorporated by reference to Exhibit 4.1 of the Company's Current Report on Form 8-K filed on November 18, 2005.)
4.27	Confirmation of Forward Stock Sale Transaction between E*TRADE Financial Corporation and JPMorgan Chase Bank, National Association dated November 16, 2005 (Incorporated by reference to Exhibit 4.2 of the Company's Current Report on Form 8-K filed on November 18, 2005.)
10.1	Form of Indemnification Agreement entered into between the Registrant and its directors and certain officers (Incorporated by reference to Exhibit 10.1 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.2	1983 Employee Incentive Stock Option Plan (Incorporated by reference to Exhibit 10.2 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.3	1993 Stock Option Plan (Incorporated by reference to Exhibit 10.3 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.4	Amended 1996 Stock Incentive Plan (Incorporated by reference to Exhibit 10.4 to the Company's Annual Report on Form 10-K filed November 9, 2000.)
10.5	401(k) Plan (Incorporated by reference to Exhibit 10.8 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.6	1996 Stock Purchase Plan (Incorporated by reference to Exhibit 99.13 of the Company's Registration Statement on Form S-8, Registration Statement No. 333-12503.)
10.7	Employee Bonus Plan (Incorporated by reference to Exhibit 10.10 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.8	Menlo Oaks Corporate Center Standard Business Lease by and between Menlo Oaks Partners, L.P. and E*TRADE Financial Corporation, dated August 18, 1998 (Incorporated by reference to Exhibit 10.8 to the Company's Annual Report on Form 10-K filed November 9, 2000.)
10.10	Lease of premises at 10951 White Rock Road, Rancho Cordova, California (Incorporated by reference to Exhibit 10.12 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.11	Clearing Agreement between E*TRADE Securities, Inc. and Herzog, Heine, Geduld, Inc. dated May 11, 1994 (Incorporated by reference to Exhibit 10.14 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.12	Guarantee by the Registrant to Herzog, Heine, Geduld, Inc. (Incorporated by reference to Exhibit 10.15 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.13	BETAHOST Master Subscription Agreement between E*TRADE Securities, Inc. and BETA Systems Inc. dated June 27, 1996 (Incorporated by reference to Exhibit 10.13 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.14	Stock Purchase Agreement among the Registrant, General Atlantic Partners II, L.P. and GAP Coinvestment Partners, L.P. dated September 28, 1995 (Incorporated by reference to Exhibit 10.17 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)

Table of Contents

<u>Exhibit Number</u>	<u>Description</u>
10.15	Stock Purchase Agreement among the Registrant, General Atlantic Partners II, L.P., and GAP Coinvestment Partners, L.P., Richard S. Braddock and the Cotsakos Group dated April 10, 1996 (Incorporated by reference to Exhibit 10.18 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.16	Stock Purchase Agreement between the Registrant and SOFTBANK Holdings Inc. dated June 6, 1996 (Incorporated by reference to Exhibit 10.19 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.17	Shareholders Agreement among the Registrant, General Atlantic Partners II, L.P., GAP Coinvestment Partners, L.P. and the Shareholders named therein dated September 1995 (the "Shareholders Agreement") (Incorporated by reference to Exhibit 10.20 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.18	Supplement No. 1 to Shareholders Agreement dated at April 10, 1996 (Incorporated by reference to Exhibit 10.21 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.19	Shareholders Agreement Supplement and Amendment dated at June 6, 1996 (Incorporated by reference to Exhibit 10.22 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.20	Purchase Agreement, dated February 1, 2000, by and among the Company, FleetBoston Robertson Stephens Inc., Hambrecht & Quist LLC and Goldman, Sachs & Co. (Incorporated by reference to Exhibit 10.3 of the Company's Form 10-Q, filed on February 14, 2000.)
10.21	Consulting Agreement between the Registrant and George Hayter dated at June 1996 (Incorporated by reference to Exhibit 10.23 of the Company's Registration Statement on Form S-1, Registration Statement No. 333-05525.)
10.24	Joint Venture Agreement dated June 3, 1998 by and between E*TRADE Financial Corporation and SOFTBANK CORP. (Incorporated by reference to Exhibit 10.1 of the Company's Form 8-K filed on June 12, 1998.)
10.25	Promissory Note dated June 5, 1998 issued by E*TRADE Financial Corporation to SOFTBANK CORP. (Incorporated by reference to Exhibit 10.2 of the Company's Form 8-K filed on June 12, 1998.)
10.26	Stock Purchase Agreement dated June 5, 1998 by and between E*TRADE Financial Corporation and SOFTBANK Holdings, Inc. (Incorporated by reference to Exhibit 10.3 of the Company's Form 8-K filed on June 12, 1998.)
10.27	Stock Purchase Agreement dated July 9, 1998 by and between E*TRADE Financial Corporation and SOFTBANK Holdings, Inc. (Incorporated by reference to Exhibit 10.1 of the Company's Form 8-K filed on July 17, 1998.)
10.28	E*TRADE Ventures I, LLC, Limited Liability Company Operating Agreement (Incorporated by reference to Exhibit 10.5 of the Company's Form 10-Q/A filed on April 17, 2000.)
10.29	E*TRADE eCommerce Fund, L.P., Amended and Restated Limited Partnership Agreement (Incorporated by reference to Exhibit 10.6 of the Company's Form 10-Q/A filed on April 17, 2000.)
10.30	E*TRADE Ventures II, LLC, Limited Liability Company Operating Agreement (Incorporated by reference to Exhibit 10.30 to the Company's Annual Report on Form 10-K filed November 9, 2000.)
10.31	E*TRADE eCommerce Fund II, L.P., Limited Partnership Agreement (Incorporated by reference to Exhibit 10.7 of the Company's Form 10-Q filed on August 14, 2000.)
10.32	[redacted] Amended and Restated Strategic Alliance Agreement dated September 26, 2000 by and between the Company and Wit SoundView Group, Inc. (Incorporated by reference to Exhibit 10.14 of the Company's Form 10-Q/A filed on October 25, 2000.)

Table of Contents

<u>Exhibit Number</u>	<u>Description</u>
10.35	Form of Note Secured by Stock Pledge Agreement by and between the Company and Christos M. Cotsakos, Jerry Gramaglia, Connie M. Dotson, Pamela Kramer, and Leonard C. Purkis. (Incorporated by reference to Exhibit 10.11 of the Company's Form 10-Q filed on August 14, 2000.)
10.36	Form of Stock Pledge Agreement by and between the Company and Christos M. Cotsakos, Jerry Gramaglia, Connie M. Dotson, Pamela Kramer, and Leonard C. Purkis. (Incorporated by reference to Exhibit 10.12 of the Company's Form 10-Q filed on August 14, 2000.)
10.43	Form of Stock Pledge Agreement by and between the Company and Jerry Gramaglia dated December 20, 2000 (Incorporated by reference to Exhibit 10.1 of the Company's Form 10-Q filed on February 14, 2001.)
10.44	Form of Note Secured by Stock Pledge Agreement by and between the Company and Jerry Gramaglia dated December 20, 2000 (Incorporated by reference to Exhibit 10.2 of the Company's Form 10-Q filed February 14, 2001.)
10.45	Form of Note, Loan Agreement and Unit Pledge Agreement dated November 20, 2000 by and between the Company and William A. Porter (Incorporated by reference to Exhibit 10.4 of the Company's Form 10-Q filed February 14, 2001.)
10.46	Supplemental Executive Retirement Plan dated January 1, 2001 (Incorporated by reference to Exhibit 10.5 of the Company's Form 10-Q filed February 14, 2001.)
10.47	Form of Residential Lease with option to buy entered into between B.R.E. Holdings LLC, a wholly owned subsidiary of the Company and Jerry Gramaglia, as lessee (Incorporated by reference to Exhibit 10.3 of the Company's Form 10-Q filed May 15, 2001.)
10.48	Form of Loan and Note Agreement between the Company and Dennis Lundien, dated May 9, 2001 (Incorporated by reference to Exhibit 10.4 of the Company's Form 10-Q filed August 14, 2001.)
10.49	Form of Note and Stock Pledge Agreement between the Company and Christos M. Cotsakos, dated June 19, 2001 (Incorporated by reference to Exhibit 10.5 of the Company's Form 10-Q filed August 14, 2001.)
10.50	Termination Agreement and General Release by and between the Company and SoundView Technology Group, Inc. dated August 20, 2001 (Incorporated by reference to Exhibit 10.1 of the Company's Form 10-Q filed November 6, 2001.)
10.51	Agreement Regarding Increase of Capital Commitment of the Company and Modification of Order of Fund Distribution by and between the Company and ArrowPath Venture Partners I, LLC dated October 1, 2001 (Incorporated by reference to Exhibit 10.2 of the Company's Form 10-Q filed November 6, 2001.)
10.52	Amendment to Amended and Restated Limited Partnership Agreement of E*TRADE eCommerce Fund L.P. (Incorporated by reference to Exhibit 10.4 of the Company's Form 10-Q filed November 6, 2001.)
10.53	Second Amended Employment Agreement dated August 27, 2001 by and between the Company and Christos M. Cotsakos (Incorporated by reference to Exhibit 10.5 of the Company's Form 10-Q filed November 6, 2001.)
10.54	Employment Agreement dated October 1, 2001 by and between the Company and Jerry Gramaglia (Incorporated by reference to Exhibit 10.54 of the Company's Form 10-K filed April 1, 2002.)
10.55	Form of Employment Agreement dated October 1, 2001 by and between the Company and Mitchell H. Caplan, R. (Robert) Jarrett Lilien and Joshua S. Levine, as individuals (Incorporated by reference to Exhibit 10.55 of the Company's Form 10-K filed April 1, 2002.)
10.56	Employment Agreement dated May 15, 2002 by and between the Company and Christos M. Cotsakos (Incorporated by reference to Exhibit 10.1 of the Company's Form 8-K filed May 10, 2002.)

Table of Contents

<u>Exhibit Number</u>	<u>Description</u>
10.57	Separation Agreement dated January 23, 2003 by and between the Company and Christos M. Cotsakos (Incorporated by reference to Exhibit 10.57 of the Company's Form 10-K filed March 27, 2003.)
10.58	Employment Agreement dated January 23, 2003 by and between the Company and Mitchell H. Caplan. (Incorporated by reference to Exhibit 10.58 of the Company's Form 10-K filed March 27, 2003.)
10.59	Form of Employment Agreement dated January 21, 2003 by and between the Company and Mitchell H. Caplan, Arlen W. Gelbard, Joshua S. Levine and R. Jarrett Lilien (Incorporated by reference to Exhibit 10.59 of the Company's Form 10-K filed March 27, 2003.)
10.60	[redacted] Master Service Agreement and Global Services Schedule, dated April 9, 2003, between E*TRADE Group, Inc. and ADP Financial Information Services, Inc. (Incorporated by reference to Exhibit 10.1 of the Company's Form 10-Q filed August 8, 2003.)
10.61	E*TRADE FINANCIAL Sweep Deposit Account Brokerage and Servicing Agreement, dated September 12, 2003, by and between E*TRADE Bank and E*TRADE Clearing LLC. (Incorporated by reference to Exhibit 10.1 of the Company's Form 10-Q filed November 7, 2003.)
10.62	Stock Purchase Agreement, dated as of November 25, 2003, between Deutsche Bank AG, a German Corporation and E*TRADE Bank, a federal savings bank under the laws of United States (Incorporated by reference to Exhibit 99.1 of the Company's Form 8-K filed January 7, 2003.)
10.63	Settlement Agreement dated as of December 10, 2003, between E*TRADE Financial Corporation and its subsidiaries and affiliates and Christos M. Cotsakos (Incorporated by reference to Exhibit 10.63 of the Company's Form 10-K filed March 11, 2004.)
10.64	Form of Employment dated September 1, 2004, by and between the Company and each of Mitchell H. Caplan, R. Jarret Lilien, Arlen W. Gelbard, Louis Klobuchar, Joshua Levine, Robert J. Simmons and Russell S. Elmer (Incorporated by reference to Exhibit 10.64 of the Company's Form 10-Q filed November 5, 2004.)
10.65	Code of Conduct (Incorporated by reference to Exhibit 10.65 of the Company's Form 10-Q filed November 5, 2004.)
*10.66	Remarketing Agreement dated November 22, 2005 among E*TRADE and Morgan Stanley & Co. Incorporated and The Bank of New York.
10.67	2005 Equity Incentive Plan and Forms of Award Agreements (incorporated by reference to Exhibit 10.66 to the Company's Current Report on Form 8-K filed on May 31, 2005.)
10.68	Executive Bonus Plan (incorporated by reference to Exhibit 10.67 to the Company's Current Report on Form 8-K filed on May 31, 2005.)
10.69	Credit Agreement dated September 19, 2005 between the Company and JP Morgan Chase Bank, N.A. as Administrative Agent (incorporated by reference as exhibit 10.01 in 10-Q filed November 1, 2005.)
*12.1	Statement of Earnings to Fixed Charges.
*21.1	Subsidiaries of the Registrant.
*23.1	Consent of Independent Registered Public Accounting Firm.
*31.1	Certification—Section 302 of the Sarbanes-Oxley.
*31.2	Certification—Section 302 of the Sarbanes-Oxley.
*32.1	Certification —Section 906 of the Sarbanes-Oxley.

* Filed herewith.

E*TRADE FINANCIAL CORPORATION

and

The Bank of New York,

as Purchase Contract Agent,

and

The Bank of New York,

as Collateral Agent, Custodial Agent and Securities Intermediary

PURCHASE CONTRACT AND PLEDGE AGREEMENT

Dated as of November 22, 2005

TABLE OF CONTENTS

ARTICLE 1

DEFINITIONS AND OTHER PROVISIONS OF GENERAL APPLICATION

Section 1.01	Definitions	1
Section 1.02	Compliance Certificates and Opinions	13
Section 1.03	Form of Documents Delivered to Purchase Contract Agent	14
Section 1.04	Acts of Holders; Record Dates	14
Section 1.05	Notices	15
Section 1.06	Notice to Holders; Waiver	15
Section 1.07	Effect of Headings and Table of Contents	16
Section 1.08	Successors and Assigns	16
Section 1.09	Separability Clause	16
Section 1.10	Benefits of Agreement	16
Section 1.11	Governing Law	16
Section 1.12	Legal Holidays	16
Section 1.13	Counterparts	17
Section 1.14	Inspection of Agreement	17
Section 1.15	Appointment of Financial Institution as Agent for the Company	17
Section 1.16	No Waiver	17

ARTICLE 2

CERTIFICATE FORMS

Section 2.01	Forms of Certificates Generally	17
Section 2.02	Form of Purchase Contract Agent's Certificate of Authentication	17

ARTICLE 3

THE UNITS

Section 3.01	Amount; Form and Denominations	18
Section 3.02	Rights and Obligations Evidenced by the Certificates	18
Section 3.03	Execution, Authentication, Delivery and Dating	19
Section 3.04	Temporary Certificates	19
Section 3.05	Registration; Registration of Transfer and Exchange	20
Section 3.06	Book-entry Interests	21
Section 3.07	Notices to Holders	21
Section 3.08	Appointment of Successor Depository	22
Section 3.09	Definitive Certificates.	22
Section 3.10	Mutilated, Destroyed, Lost and Stolen Certificates	22
Section 3.11	Persons Deemed Owners	23
Section 3.12	Cancellation	24
Section 3.13	Creation of Treasury Units by Substitution of Treasury Securities	24
Section 3.14	Recreation of Corporate Units	26
Section 3.15	Transfer of Collateral Upon Occurrence of Termination Event	27
Section 3.16	No Consent to Assumption	29
Section 3.17	Substitutions	29

ARTICLE 4
THE SUBORDINATED NOTES

Section 4.01	Interest Payments; Rights to Interest Payments Preserved	30
Section 4.02	Payments Prior to or on Purchase Contract Settlement Date	31
Section 4.03	Notice and Voting	31
Section 4.04	Special Event Redemption	32
Section 4.05	Payments to Purchase Contract Agent	33
Section 4.06	Payments Held in Trust	33

ARTICLE 5
THE PURCHASE CONTRACTS

Section 5.01	Purchase of Shares of Common Stock	33
Section 5.02	Cash Settlement; Remarketing; Payment of Purchase Price	36
Section 5.03	Issuance of Shares of Common Stock	40
Section 5.04	Adjustment of each Fixed Settlement Rate	41
Section 5.05	Notice of Adjustments and Certain Other Events	51
Section 5.06	Termination Event; Notice.	51
Section 5.07	Early Settlement	52
Section 5.08	No Fractional Shares	54
Section 5.09	Charges and Taxes	54

ARTICLE 6
RIGHTS AND REMEDIES OF HOLDERS

Section 6.01	Unconditional Right of Holders to Purchase Shares of Common Stock	55
Section 6.02	Restoration of Rights and Remedies	55
Section 6.03	Rights and Remedies Cumulative	55
Section 6.04	Delay or Omission Not Waiver	55
Section 6.05	Undertaking for Costs	55
Section 6.06	Waiver of Stay or Extension Laws	55

ARTICLE 7
THE PURCHASE CONTRACT AGENT

Section 7.01	Certain Duties and Responsibilities	56
Section 7.02	Notice of Default	57
Section 7.03	Certain Rights of Purchase Contract Agent	57
Section 7.04	Not Responsible for Recitals or Issuance of Units	58
Section 7.05	May Hold Units	58
Section 7.06	Money Held in Custody	58
Section 7.07	Compensation and Reimbursement.	59
Section 7.08	Corporate Purchase Contract Agent Required; Eligibility	59
Section 7.09	Resignation and Removal; Appointment of Successor	59
Section 7.10	Acceptance of Appointment by Successor	61
Section 7.11	Merger, Conversion, Consolidation or Succession to Business	61
Section 7.12	Preservation of Information; Communications to Holders	61
Section 7.13	No Obligations of Purchase Contract Agent	62
Section 7.14	Tax Compliance	62

ARTICLE 8
SUPPLEMENTAL AGREEMENTS

Section 8.01	Supplemental Agreements without Consent of Holders	62
Section 8.02	Supplemental Agreements with Consent of Holders	63
Section 8.03	Execution of Supplemental Agreements	64
Section 8.04	Effect of Supplemental Agreements	64
Section 8.05	Reference to Supplemental Agreements	64

ARTICLE 9
CONSOLIDATION, MERGER, CONVEYANCE, TRANSFER OR LEASE

Section 9.01	Covenant Not To Consolidate, Merge, Convey, Transfer or Lease Property except under Certain Conditions	64
Section 9.02	Rights and Duties of Successor Corporation	65
Section 9.03	Officers' Certificate and Opinion of Counsel Given to Purchase Contract Agent	65

ARTICLE 10
COVENANTS

Section 10.01	Performance under Purchase Contracts	66
Section 10.02	Maintenance of Office or Agency	66
Section 10.03	Company To Reserve Common Stock	66
Section 10.04	Covenants as to Common Stock; Listing	66
Section 10.05	Statements of Officers of the Company as to Default	67
Section 10.06	ERISA	67
Section 10.07	Tax Treatment	67

ARTICLE 11
PLEDGE

Section 11.01	Pledge	67
Section 11.02	Termination	67

ARTICLE 12
ADMINISTRATION OF COLLATERAL

Section 12.01	Initial Deposit of Subordinated Notes	68
Section 12.02	Establishment of Collateral Account	68
Section 12.03	Treatment as Financial Assets	68
Section 12.04	Sole Control by Collateral Agent	68
Section 12.05	Jurisdiction	69
Section 12.06	No Other Claims	69
Section 12.07	Investment and Release	69
Section 12.08	Statements and Confirmations	69
Section 12.09	Tax Allocations	69
Section 12.10	No Other Agreements	69
Section 12.11	Powers Coupled with an Interest	69
Section 12.12	Waiver of Lien; Waiver of Set-off	69

ARTICLE 13
RIGHTS AND REMEDIES OF THE COLLATERAL AGENT

Section 13.01	Rights and Remedies of the Collateral Agent	70
---------------	---	----

ARTICLE 14
REPRESENTATIONS AND WARRANTIES TO
COLLATERAL AGENT; HOLDER COVENANTS

Section 14.01	Representations and Warranties	71
Section 14.02	Covenants	71

ARTICLE 15
THE COLLATERAL AGENT, THE CUSTODIAL AGENT
AND THE SECURITIES INTERMEDIARY

Section 15.01	Appointment, Powers and Immunities	72
Section 15.02	Instructions of the Company	72
Section 15.03	Reliance by Collateral Agent, Custodial Agent and Securities Intermediary	73
Section 15.04	Certain Rights	73
Section 15.05	Merger, Conversion, Consolidation or Succession to Business	73
Section 15.06	Rights in Other Capacities	74
Section 15.07	Non-reliance on the Collateral Agent, Custodial Agent and Securities Intermediary	74
Section 15.08	Compensation and Indemnity	74
Section 15.09	Failure to Act	75
Section 15.10	Resignation of Collateral Agent, the Custodial Agent and the Securities Intermediary	75
Section 15.11	Right to Appoint Agent or Advisor	76
Section 15.12	Survival	77
Section 15.13	Exculpation	77
Section 15.14	Expenses, Etc	77

ARTICLE 16
MISCELLANEOUS

Section 16.01	Security Interest Absolute	78
Section 16.02	Notice of Special Event, Special Event Redemption and Termination Event	78

EXHIBITS

Exhibit A	- Form of Corporate Units Certificate
Exhibit B	- Form of Treasury Units Certificate
Exhibit C	- Instruction to Purchase Contract Agent From Holder to Create Treasury Units or Corporate Units
Exhibit D	- Notice from Purchase Contract Agent to Holders Upon Termination Event
Exhibit E	- Notice to Settle by Separate Cash
Exhibit F	- Reserved
Exhibit G	- Instruction from Purchase Contract Agent to Collateral Agent (Creation of Treasury Units)
Exhibit H	- Instruction from the Collateral Agent to the Securities Intermediary (Creation of Treasury Units)

-
- Exhibit I - Instruction from Purchase Contract Agent to Collateral Agent (Recreation of Corporate Units)
 - Exhibit J - Instruction from Collateral Agent to Securities Intermediary (Recreation of Corporate Units)
 - Exhibit K - Notice of Cash Settlement from Collateral Agent to Purchase Contract Agent
 - Exhibit L - Instruction to Custodial Agent Regarding Remarketing
 - Exhibit M - Instruction to Custodial Agent Regarding Withdrawal from Remarketing

PURCHASE CONTRACT AND PLEDGE AGREEMENT, dated as of November 22, 2005, among E*TRADE Financial Corporation, a Delaware corporation (the “**Company**”), The Bank of New York, a New York banking corporation, acting as purchase contract agent for, and as attorney-in-fact of, the Holders from time to time of the Units (in such capacities, together with its successors and assigns in such capacities, the “**Purchase Contract Agent**”), and The Bank of New York, as collateral agent hereunder for the benefit of the Company (in such capacity, together with its successors in such capacity, the “**Collateral Agent**”), as custodial agent (in such capacity, together with its successors in such capacity, the “**Custodial Agent**”), and as securities intermediary (as defined in Section 8-102(a)(14) of the UCC) with respect to the Collateral Account (in such capacity, together with its successors in such capacity, the “**Securities Intermediary**”).

RECITALS

WHEREAS, the Company has duly authorized the execution and delivery of this Agreement and the Certificates evidencing the Units;

WHEREAS, all things necessary to make the Purchase Contracts, when the Certificates are executed by the Company and authenticated, executed on behalf of the Holders and delivered by the Purchase Contract Agent, as provided in this Agreement, the valid obligations of the Company, and to constitute these presents a valid agreement of the Company, in accordance with its terms, have been done; and

WHEREAS, pursuant to the terms of this Agreement and the Purchase Contracts, the Holders of the Units have irrevocably authorized the Purchase Contract Agent, as attorney-in-fact of such Holders, among other things, to execute and deliver this Agreement on behalf of such Holders and to grant the Pledge provided herein of the Collateral to secure the Obligations.

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE 1

DEFINITIONS AND OTHER PROVISIONS OF GENERAL APPLICATION

Section 1.01 *Definitions*. For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

(a) the terms defined in this Article have the meanings assigned to them in this Article and include the plural as well as the singular, and nouns and pronouns of the masculine gender include the feminine and neuter genders;

(b) all accounting terms not otherwise defined herein have the meanings assigned to them in accordance with generally accepted accounting principles in the United States;

(c) the words “herein,” “hereof” and “hereunder” and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section, Exhibit or other subdivision;

(d) the following terms which are defined in the UCC shall have the meanings set forth therein: “**certificated security**,” “**control**,” “**financial asset**,” “**entitlement order**,” “**securities account**” and “**security entitlement**”; and

(e) the following terms have the meanings given to them in this Section 1.01(e):

“**Accounting Event**” has the meaning set forth in the Supplemental Indenture.

“**Act**” has the meaning, with respect to any Holder, set forth in Section 1.04.

“**Affiliate**” of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, “control” when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

“**Agreement**” means this instrument as originally executed or as it may from time to time be supplemented or amended by one or more agreements supplemental hereto entered into pursuant to the applicable provisions hereof.

“**Applicable Market Value**” has the meaning set forth in Section 5.01(a).

“**Applicable Ownership Interest in the Treasury Portfolio**” shall mean, with respect to a Corporate Unit and the Treasury Portfolio, (i) 1/40th or a 2.5% undivided beneficial ownership interest in \$1,000 face amount of U.S. treasury securities (or principal or interest strips thereof) included in such Treasury Portfolio that matures on or prior to November 17, 2008, and (ii) for each scheduled Payment Date on the Subordinated Notes that occurs after the Special Event Redemption Date to and including the Purchase Contract Settlement Date, a 0.03828125% undivided beneficial ownership interest in \$1,000 face amount of U.S. treasury securities (or principal or interest strips thereof) included in such Treasury Portfolio that mature on or prior to the Business Day immediately preceding such scheduled Payment Date.

“**Applicable Ownership Interest in Subordinated Notes**” means, a 2.5% undivided beneficial ownership interest in \$1,000 principal amount of Subordinated Notes that is a component of a Corporate Unit, and “**Applicable Ownership Interests in Subordinated Notes**” means the aggregate of each Applicable Ownership Interest in Subordinated Notes that is a component of each Corporate Unit then Outstanding.

“**Applicants**” has the meaning set forth in Section 7.12(b).

“**Bankruptcy Code**” means Title 11 of the United States Code, or any other law of the United States that from time to time provides a uniform system of bankruptcy laws.

“**Beneficial Owner**” means, with respect to a Book-Entry Interest, a Person who is the beneficial owner of such Book-Entry Interest as reflected on the books of the Depository or on the books of a Person maintaining an account with such Depository (directly as a Depository Participant or as an indirect participant, in each case in accordance with the rules of such Depository).

“**Board of Directors**” means the board of directors of the Company or a duly authorized committee of that board.

“**Board Resolution**” means one or more resolutions of the Board of Directors, a copy of which has been certified by the Secretary or an Assistant Secretary of the Company to have been duly adopted by the Board of Directors and to be in full force and effect on the date of such certification and delivered to the Purchase Contract Agent.

“**Book-Entry Interest**” means a beneficial interest in a Global Certificate, registered in the name of a Depository or a nominee thereof, ownership and transfers of which shall be maintained and made through book entries by such Depository as described in Section 3.05(ii).

“**Business Day**” means any day other than a Saturday or Sunday or any other day on which banking institutions in New York City, New York are authorized or required by law or executive order to remain closed; *provided* that for purposes of the second paragraph of Section 1.12 only, the term “Business Day” shall also be deemed to exclude any day on which the Depository is closed.

“**Cash**” means any coin or currency of the United States as at the time shall be legal tender for payment of public and private debts.

“**Cash Merger**” has the meaning set forth in Section 5.04(b)(ii).

“**Cash Merger Early Settlement**” has the meaning set forth in Section 5.04(b)(ii).

“**Cash Merger Early Settlement Date**” has the meaning set forth in Section 5.04(b)(ii).

“**Cash Settlement**” has the meaning set forth in Section 5.02(a)(i).

“**Certificate**” means a Corporate Units Certificate or a Treasury Units Certificate, as the case may be.

“**Closing Price**” has the meaning set forth in Section 5.01(a).

“**Code**” means the Internal Revenue Code of 1986, as amended.

“**Collateral**” means the collective reference to:

(i) the Collateral Account and all investment property and other financial assets from time to time credited to the Collateral Account and all security entitlements with respect thereto, including, without limitation, (A) the Applicable Ownership Interests in Subordinated Notes and security entitlements relating thereto (and the Subordinated Notes and security entitlements relating thereto delivered to the Collateral Agent in respect of such Applicable Ownership Interests in Subordinated Notes), (B) the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) and security entitlements relating thereto, (C) any Treasury Securities and security entitlements relating thereto Transferred to the Securities Intermediary from time to time in connection with the creation of Treasury Units in accordance with Section 3.13 hereof and (D) payments made by Holders pursuant to Section 5.02 hereof;

(ii) all Proceeds of any of the foregoing (whether such Proceeds arise before or after the commencement of any proceeding under any applicable bankruptcy, insolvency or other similar law, by or against the pledgor or with respect to the pledgor); and

(iii) all powers and rights now owned or hereafter acquired under or with respect to the Collateral.

“Collateral Account” means the securities account of The Bank of New York, as Collateral Agent, maintained on the books of the Securities Intermediary and designated “The Bank of New York, as Collateral Agent of E*TRADE Financial Corporation, as pledgee of The Bank of New York, as the Purchase Contract Agent on behalf of and as attorney-in-fact for the Holders”.

“Collateral Agent” means the Person named as “Collateral Agent” in the first paragraph of this Agreement until a successor Collateral Agent shall have become such pursuant to this Agreement, and thereafter “Collateral Agent” shall mean the Person who is then the Collateral Agent hereunder.

“collateral event of default” has the meaning set forth in Section 13.01(b).

“Collateral Substitution” means (i) with respect to the Corporate Units, (x) the substitution of the Pledged Applicable Ownership Interests in Subordinated Notes included in such Corporate Units (if the Applicable Ownership Interests in the Treasury Portfolio have not replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units) with Treasury Securities in an aggregate principal amount at maturity equal to the aggregate principal amount of such Pledged Applicable Ownership Interests in Subordinated Notes, or (y) the substitution of the Pledged Applicable Ownership Interests in the Treasury Portfolio included in such Corporate Units (if the Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units) with Treasury Securities in an aggregate principal amount at maturity equal to such Pledged Applicable Ownership Interests in the Treasury Portfolio, or (ii) with respect to the Treasury Units, (x) the substitution of the Pledged Treasury Securities included in such Treasury Units (if the Applicable Ownership Interests in the Treasury Portfolio have not replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units) with Subordinated Notes in an aggregate principal amount equal to the aggregate principal amount at stated maturity of the Pledged Treasury Securities, or (y) the substitution of the Pledged Treasury Securities included in such Treasury Units (if the Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units) with the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition thereof).

“Common Stock” means the common stock, \$0.01 par value, of the Company.

“Company” means the Person named as the “Company” in the first paragraph of this instrument until a successor shall have become such pursuant to the applicable provision of this Agreement, and thereafter “Company” shall mean such successor.

“Constituent Person” has the meaning set forth in Section 5.04(b)(i).

“Corporate Trust Office” means the office of the Purchase Contract Agent at which, at any particular time, its corporate trust business shall be principally administered, which office at the date hereof is located at 101 Barclay Street, 8W, New York, NY 10286 Attention: Corporate Trust Division - Corporate Finance Unit.

“Corporate Unit” means the collective rights and obligations of a Holder of a Corporate Units Certificate in respect of the Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, subject in each case (except that the Applicable Ownership Interests in the Treasury Portfolio as specified in clause (ii) of the definition of such term shall not be subject to the Pledge) to the Pledge thereof, and the related Purchase Contract.

“Corporate Units Certificate” means a certificate evidencing the rights and obligations of a Holder in respect of the number of Corporate Units specified on such certificate.

“Coupon Rate” has the meaning set forth in the Supplemental Indenture.

“Current Market Price” means, in respect of a share of Common Stock on any date of determination, the average of the daily Closing Prices for the 20 consecutive Trading Days ending the earlier of the day in question and the day before the “ex date” with respect to the issuance or distribution requiring such computation. For purposes of this definition, the term “ex date,” when used with respect to any issuance or distribution, shall mean the first date on which Common Stock trades regular way on such exchange or in such market without the right to receive such issuance or distribution.

“Custodial Agent” means the Person named as Custodial Agent in the first paragraph of this Agreement until a successor Custodial Agent shall have become such pursuant to the applicable provisions of this Agreement, and thereafter “Custodial Agent” shall mean the Person who is then the Custodial Agent hereunder.

“Depository” means a clearing agency registered under Section 17A of the Exchange Act that is designated to act as Depository for the Units as contemplated by Sections 3.06 and 3.08.

“Depository Participant” means a broker, dealer, bank, other financial institution or other Person for whom from time to time the Depository effects book entry transfers and pledges of securities deposited with the Depository.

“Distributed Property” has the meaning set forth in Section 5.04(a)(iv).

“DTC” means The Depository Trust Company.

“Early Settlement” has the meaning set forth in Section 5.07(a).

“Early Settlement Amount” has the meaning set forth in Section 5.07(b).

“Early Settlement Date” has the meaning set forth in Section 5.07(b).

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“Exchange Act” means the Securities Exchange Act of 1934 and any statute successor thereto, in each case as amended from time to time, and the rules and regulations promulgated thereunder.

“Exchange Property” has the meaning set forth in Section 5.04(b)(i).

“Ex-Dividend Date” has the meaning set forth in Section 5.04(a)(iv).

“Expiration Date” has the meaning set forth in Section 1.04(e).

“Expiration Time” has the meaning set forth in Section 5.04(a)(vi).

“Failed Final Remarketing” has the meaning set forth in Section 5.02(b)(v).

“**Failed Remarketing**” has the meaning set forth in Section 5.02(b)(iii).

“**Final Remarketing Date**” means the third Business Day immediately preceding the Purchase Contract Settlement Date.

“**Fixed Settlement Rate**” means each of the Minimum Settlement Rate and the Maximum Settlement Rate.

“**Global Certificate**” means a Certificate that evidences all or part of the Units and is registered in the name of the Depository or a nominee thereof.

“**Holder**” means, with respect to a Unit, the Person in whose name the Unit evidenced by a Certificate is registered in the Security Register.

“**Indenture**” means the Indenture, dated as of November 22, 2005, between the Company and the Indenture Trustee (including any provisions of the TIA that are deemed incorporated therein), as amended and supplemented by the Supplemental Indenture pursuant to which the Subordinated Notes will be issued.

“**Indemnitees**” has the meaning set forth in Section 7.07(c).

“**Indenture Trustee**” means The Bank of New York, a New York banking corporation, as trustee under the Indenture, or any successor thereto as described in the Indenture.

“**Initial Remarketing Date**” means the fifth Business Day immediately preceding the Purchase Contract Settlement Date.

“**Issuer Order**” or “**Issuer Request**” means a written order or request signed in the name of the Company by (i) either its Chief Executive Officer, its President or one of its Vice Presidents, and (ii) either its Corporate Secretary or one of its Assistant Corporate Secretaries or its Treasurer or one of its Assistant Treasurers, and delivered to the Purchase Contract Agent.

“**Losses**” has the meaning set forth in Section 15.08(b).

“**Maximum Settlement Rate**” has the meaning set forth in Section 5.01(a).

“**Minimum Settlement Rate**” has the meaning set forth in Section 5.01(a).

“**non-electing share**” has the meaning set forth in Section 5.04(b)(i).

“**NYSE**” has the meaning set forth in Section 5.01(a).

“**Obligations**” means, with respect to each Holder, all obligations and liabilities of such Holder under such Holder’s Purchase Contract and this Agreement or any other document made, delivered or given in connection herewith or therewith, in each case whether on account of principal, interest (including, without limitation, interest accruing before and after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, relating to such Holder, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding), fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to the Company or the Collateral Agent or the Securities Intermediary that are required to be paid by the Holder pursuant to the terms of any of the foregoing agreements).

“Officers’ Certificate” means a certificate signed by (i) either the Company’s Chief Executive Officer, its President or one of its Vice Presidents, and (ii) either the Company’s Corporate Secretary or one of its Assistant Corporate Secretaries or its Treasurer or one of its Assistant Treasurers, and delivered to the Purchase Contract Agent. Any Officers’ Certificate delivered with respect to compliance with a condition or covenant provided for in this Agreement (other than the Officers’ Certificate provided for in Section 10.05) shall include the information set forth in Section 1.02 hereof.

“Opinion of Counsel” means a written opinion of counsel, who may be counsel to the Company (and who may be an employee of the Company), and who shall be reasonably acceptable to the Purchase Contract Agent. An opinion of counsel may rely on certificates as to matters of fact.

“Outstanding” means, as of any date of determination, all Units evidenced by Certificates theretofore authenticated, executed and delivered under this Agreement, except:

- (i) all Units, if a Termination Event has occurred;
- (ii) Units evidenced by Certificates theretofore cancelled by the Purchase Contract Agent or delivered to the Purchase Contract Agent for cancellation or deemed cancelled pursuant to the provisions of this Agreement; and
- (iii) Units evidenced by Certificates in exchange for or in lieu of which other Certificates have been authenticated, executed on behalf of the Holder and delivered pursuant to this Agreement, other than any such Certificate in respect of which there shall have been presented to the Purchase Contract Agent proof satisfactory to it that such Certificate is held by a protected purchaser in whose hands the Units evidenced by such Certificate are valid obligations of the Company;

provided, however, that in determining whether the Holders of the requisite number of the Units have given any request, demand, authorization, direction, notice, consent or waiver hereunder, Units owned by the Company or any Affiliate of the Company shall be disregarded and deemed not to be Outstanding Units, except that, in determining whether the Purchase Contract Agent shall be authorized and protected in relying upon any such request, demand, authorization, direction, notice, consent or waiver, only Units that a Responsible Officer of the Purchase Contract Agent actually knows to be so owned shall be so disregarded. Units so owned that have been pledged in good faith may be regarded as Outstanding Units if the pledgee establishes to the satisfaction of the Purchase Contract Agent the pledgee’s right so to act with respect to such Units and that the pledgee is not the Company or any Affiliate of the Company.

“Payment Date” means each February 18, May 18, August 18 and November 18 of each year, commencing February 18, 2006.

“Permitted Investments” means any one of the following, in each case maturing on the Business Day following the date of acquisition:

- (1) any evidence of indebtedness with an original maturity of 365 days or less issued, or directly and fully guaranteed or insured, by the United States of America or any agency or instrumentality thereof (*provided* that the full faith and credit of the United States of America is pledged in support of the timely payment thereof or such indebtedness constitutes a general obligation of it);
- (2) deposits, certificates of deposit or acceptances with an original maturity of 365 days or less of any institution which is a member of the Federal Reserve System having combined capital and surplus and undivided profits of not less than \$500 million at the time of deposit (and which may include the Collateral Agent);

(3) investments with an original maturity of 365 days or less of any Person that is fully and unconditionally guaranteed by a bank referred to in clause (2);

(4) repurchase agreements and reverse repurchase agreements relating to marketable direct obligations issued or unconditionally guaranteed by the United States of America or issued by any agency thereof and backed as to timely payment by the full faith and credit of the United States of America;

(5) investments in commercial paper, other than commercial paper issued by the Company or its affiliates, of any corporation incorporated under the laws of the United States or any State thereof, which commercial paper has a rating at the time of purchase at least equal to “A-1” by Standard & Poor’s Ratings Services (“S&P”) or at least equal to “P-1” by Moody’s Investors Service, Inc. (“Moody’s”); and

(6) investments in money market funds (including, but not limited to, money market funds managed by the Collateral Agent or an affiliate of the Collateral Agent) registered under the Investment Company Act of 1940, as amended, rated in the highest applicable rating category by S&P or Moody’s.

“**Person**” means a legal person, including any individual, corporation, estate, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof or any other entity of whatever nature.

“**Plan**” means an employee benefit plan that is subject to ERISA, a plan or individual retirement account that is subject to Section 4975 of the Code or any entity whose assets are considered assets of any such plan.

“**Pledge**” means the lien and security interest in the Collateral created by this Agreement.

“**Pledged Applicable Ownership Interests in Subordinated Notes**” means the Applicable Ownership Interests in Subordinated Notes and security entitlements with respect thereto from time to time credited to the Collateral Account and not then released from the Pledge.

“**Pledged Applicable Ownership Interests in the Treasury Portfolio**” means the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition thereof) and security entitlements with respect thereto from time to time credited to the Collateral Account and not then released from the Pledge.

“**Pledged Securities**” means the Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Applicable Ownership Interests in the Treasury Portfolio and the Pledged Treasury Securities, collectively.

“**Pledged Treasury Securities**” means Treasury Securities and security entitlements with respect thereto from time to time credited to the Collateral Account and not then released from the Pledge.

“**Pledge Indemnities**” has the meaning set forth in Section 15.08(b).

“Predecessor Certificate” means a Predecessor Corporate Units Certificate or a Predecessor Treasury Units Certificate.

“Predecessor Corporate Units Certificate” of any particular Corporate Units Certificate means every previous Corporate Units Certificate evidencing all or a portion of the rights and obligations of the Company and the Holder under the Corporate Units evidenced thereby; and, for the purposes of this definition, any Corporate Units Certificate authenticated and delivered under Section 3.10 in exchange for or in lieu of a mutilated, destroyed, lost or stolen Corporate Units Certificate shall be deemed to evidence the same rights and obligations of the Company and the Holder as the mutilated, destroyed, lost or stolen Corporate Units Certificate.

“Predecessor Treasury Units Certificate” of any particular Treasury Units Certificate means every previous Treasury Units Certificate evidencing all or a portion of the rights and obligations of the Company and the Holder under the Treasury Units evidenced thereby; and, for the purposes of this definition, any Treasury Units Certificate authenticated and delivered under Section 3.10 in exchange for or in lieu of a mutilated, destroyed, lost or stolen Treasury Units Certificate shall be deemed to evidence the same rights and obligations of the Company and the Holder as the mutilated, destroyed, lost or stolen Treasury Units Certificate.

“Pro Rata” shall mean pro rata to each Holder according to the aggregate Stated Amount of the Units held by such Holder in relation to the aggregate Stated Amount of all Units outstanding.

“Proceeds” has the meaning ascribed thereto in the UCC and includes, without limitation, all interest, dividends, cash, instruments, securities, financial assets and other property received, receivable or otherwise distributed upon the sale (including, without limitation, any Remarketing), exchange, collection or disposition of any financial assets from time to time credited to the Collateral Account.

“Prospectus” means the prospectus relating to the delivery of shares or any securities in connection with an Early Settlement pursuant to Section 5.07 or a Cash Merger Early Settlement of Purchase Contracts pursuant to Section 5.04(b)(ii), in the form in which first filed, or transmitted for filing, with the Securities and Exchange Commission after the effective date of the Registration Statement pursuant to Rule 424(b) under the Securities Act, including the documents incorporated by reference therein as of the date of such Prospectus.

“Purchase Contract” means, with respect to any Unit, the contract forming a part of such Unit and obligating the Company to sell, and the Holder of such Unit to purchase, shares of Common Stock and on the terms and subject to the conditions set forth in Article 5 hereof.

“Purchase Contract Agent” means the Person named as the “Purchase Contract Agent” in the first paragraph of this Agreement until a successor Purchase Contract Agent shall have become such pursuant to the applicable provisions of this Agreement, and thereafter “Purchase Contract Agent” shall mean such Person or any subsequent successor who is appointed pursuant to this Agreement.

“Purchase Contract Settlement Date” means November 18, 2008.

“Purchase Contract Settlement Fund” has the meaning set forth in Section 5.03.

“Purchase Price” has the meaning set forth in Section 5.01(a).

“Purchased Shares” has the meaning set forth in Section 5.04(a)(vi).

“**Put Right**” has the meaning set forth in Section 8.05(a) of the Supplemental Indenture.

“**Quotation Agent**” has the meaning set forth in the Supplemental Indenture.

“**Record Date**” for any distribution payable on any Payment Date means the first day of the calendar month in which the relevant Payment Date falls.

“**Redemption Amount**” has the meaning set forth in the Supplemental Indenture.

“**Redemption Price**” has the meaning set forth in clause (i) of the definition of such term in the Supplemental Indenture.

“**Reference Price**” has the meaning set forth in Section 5.01(a).

“**Registration Statement**” means a registration statement under the Securities Act prepared by the Company covering, inter alia, the delivery by the Company of any securities in connection with an Early Settlement on the Early Settlement Date or a Cash Merger Early Settlement of Purchase Contracts on the Cash Merger Early Settlement Date under Section 5.04(b)(ii), including all exhibits thereto and the documents incorporated by reference in the prospectus contained in such registration statement, and any post-effective amendments thereto.

“**Remarketing**” has the meaning set forth in the Remarketing Agreement.

“**Remarketing Agent**” has the meaning set forth in Section 1.01 of the Supplemental Indenture.

“**Remarketing Agreement**” has the meaning set forth in Section 1.01 of the Supplemental Indenture.

“**Remarketing Date**” means any of the Initial Remarketing Date, the Second Remarketing Date or the Final Remarketing Date.

“**Remarketing Fee**” has the meaning set forth in the Remarketing Agreement.

“**Remarketing Price**” has the meaning set forth in Section 5.02(b)(iii).

“**Reorganization Event**” has the meaning set forth in Section 5.04(b)(i).

“**Reset Rate**” has the meaning set forth in the Remarketing Agreement.

“**Responsible Officer**” means, when used with respect to the Purchase Contract Agent, any officer of the Purchase Contract Agent within the Corporate Trust Division—Corporate Finance Unit (or any successor unit, department or division of the Purchase Contract Agent) located at the Corporate Trust Office of the Purchase Contract Agent who has direct responsibility for the administration of the Agreement and for the purposes of Section 7.03(a), also means, with respect to a particular corporate trust matter, any other officer, trust officer or person performing similar functions to whom such matter is referred because of his or her knowledge of and familiarity of the particular subject.

“**Rights**” has the meaning set forth in Section 5.04(a)(xi).

“**Second Remarketing Date**” means the fourth Business Day immediately preceding the Purchase Contract Settlement Date.

“**Securities Act**” means the Securities Act of 1933 and any statute successor thereto, in each case as amended from time to time, and the rules and regulations promulgated thereunder.

“**Securities Intermediary**” means the Person named as Securities Intermediary in the first paragraph of this Agreement until a successor Securities Intermediary shall have become such pursuant to the applicable provisions of this Agreement, and thereafter “Securities Intermediary” shall mean such successor or any subsequent successor.

“**Security Register**” and “**Securities Registrar**” have the respective meanings set forth in Section 3.05.

“**Subordinated Notes**” means the series of notes designated the 6.125% Subordinated Notes due 2018 of the Company.

“**Separate Subordinated Notes**” means Subordinated Notes that have been released from the Pledge following Collateral Substitution and therefore no longer underlie Corporate Units.

“**Settlement Rate**” has the meaning set forth in Section 5.01(a).

“**Special Event**” has the meaning set forth in the Supplemental Indenture.

“**Special Event Redemption**” has the meaning set forth in the Supplemental Indenture.

“**Special Event Redemption Date**” has the meaning set forth in the Supplemental Indenture.

“**Stated Amount**” means \$25.

“**Successful Remarketing**” has the meaning set forth in Section 5.02(b)(iv).

“**Supplemental Indenture**” means the Supplemental Indenture No. 1 dated as of the date hereof between the Company and the Indenture Trustee pursuant to which the Subordinated Notes are issued.

“**Tax Event**” has the meaning set forth in the Supplemental Indenture.

“**Termination Date**” means the date, if any, on which a Termination Event occurs.

“**Termination Event**” means the occurrence of any of the following events:

(i) at any time on or prior to the Purchase Contract Settlement Date, a decree or order by a court having jurisdiction in the premises shall have been entered adjudging the Company a bankrupt or insolvent, or approving as properly filed a petition seeking reorganization of the Company under the Bankruptcy Code or any other similar applicable Federal or state law and if such judgment, decree or order shall have been entered more than 60 days prior to the Purchase Contract Settlement Date, such decree or order shall have continued undischarged and unstayed for a period of 60 days;

(ii) at any time on or prior to the Purchase Contract Settlement Date, a decree or order of a court having jurisdiction in the premises for the appointment of a receiver or liquidator or trustee or assignee (or other similar official) in bankruptcy or insolvency of the Company or of all or substantially all of its property, or for the winding up or liquidation of its affairs, shall have been entered and if such decree or order shall have been entered more than 60 days prior to the Purchase Contract Settlement Date, such judgment, decree or order shall have continued undischarged and unstayed for a period of 60 days; or

(iii) at any time on or prior to the Purchase Contract Settlement Date, the Company shall institute proceedings to be adjudicated a voluntary bankrupt, or shall consent to the filing of a bankruptcy proceeding against it, or shall file a petition or answer or consent seeking reorganization under the Bankruptcy Code or any other similar applicable Federal or state law, or shall consent to the filing of any such petition, or shall consent to the appointment of a receiver or liquidator or trustee or assignee (or other similar official) in bankruptcy or insolvency of it or of its property, or shall make an assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts generally as they become due.

“**Threshold Appreciation Price**” has the meaning set forth in Section 5.01(a).

“**TIA**” means the Trust Indenture Act of 1939, as amended from time to time, or any successor legislation.

“**TRADES**” means the Treasury/Reserve Automated Debt Entry System maintained by the Federal Reserve Bank of New York pursuant to the TRADES Regulations.

“**TRADES Regulations**” means the regulations of the United States Department of the Treasury, published at 31 C.F.R. Part 357, as amended from time to time. Unless otherwise defined herein, all terms defined in the TRADES Regulations are used herein as therein defined.

“**Trading Day**” has the meaning set forth in Section 5.01(a).

“**Transfer**” means (i) in the case of certificated securities in registered form, delivery as provided in Section 8-301(a) of the UCC, indorsed to the transferee or in blank by an effective endorsement; (ii) in the case of Treasury Securities, registration of the transferee as the owner of such Treasury Securities on TRADES; and (iii) in the case of security entitlements, including, without limitation, security entitlements with respect to Treasury Securities, a securities intermediary indicating by book entry that such security entitlement has been credited to the transferee’s securities account.

“**Treasury Portfolio**” has the meaning set forth in the Supplemental Indenture.

“**Treasury Portfolio Purchase Price**” has the meaning set forth in the Supplemental Indenture.

“**Treasury Securities**” means zero-coupon U.S. treasury securities that mature on November 15, 2008 (CUSIP No. 912 820 DK0).

“**Treasury Unit**” means, following the substitution of Treasury Securities for Pledged Applicable Ownership Interests in Subordinated Notes or Pledged Applicable Ownership Interests in the Treasury Portfolio, as the case may be, as collateral to secure a Holder’s obligations under the Purchase Contract, the collective rights and obligations of a Holder of a Treasury Units Certificate in respect of such Treasury Securities, subject to the Pledge thereof, and the related Purchase Contract.

“**Treasury Units Certificate**” means a certificate evidencing the rights and obligations of a Holder in respect of the number of Treasury Units specified on such certificate.

“**Trigger Event**” has the meaning set forth in Section 5.04(a)(iv).

“**UCC**” means the Uniform Commercial Code as in effect in the State of New York from time to time.

“**Unit**” means a Corporate Unit or a Treasury Unit, as the case may be.

“**Units Prospectus**” means the registration statement, as amended, filed with the Securities and Exchange Commission (File No. 333-129077) and the prospectus contained therein dated November 22, 2005, describing, among other things, the terms of the Units.

“**Value**” means, with respect to any item of Collateral on any date, as to (1) Cash, the amount thereof, (2) Treasury Securities, the aggregate principal amount thereof at maturity, (3) Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term), the appropriate aggregate percentage of the aggregate principal amount at maturity of the Treasury Portfolio and (4) Applicable Ownership Interests in Subordinated Notes, the appropriate aggregate percentage of the aggregate principal amount at maturity of the underlying Subordinated Notes.

“**Vice President**” means any vice president, whether or not designated by a number or a word or words added before or after the title “vice president.”

Section 1.02 *Compliance Certificates and Opinions*. Except as otherwise expressly provided by this Agreement, upon any application or request by the Company to the Purchase Contract Agent to take any action in accordance with any provision of this Agreement, the Company shall furnish to the Purchase Contract Agent an Officers’ Certificate stating that all conditions precedent, if any, provided for in this Agreement relating to the proposed action have been complied with and, if requested by the Purchase Contract Agent, an Opinion of Counsel stating that, in the opinion of such counsel, all such conditions precedent, if any, have been complied with, except that in the case of any such application or request as to which the furnishing of such documents is specifically required by any provision of this Agreement relating to such particular application or request, no additional certificate or opinion need be furnished.

Every certificate or opinion with respect to compliance with a condition or covenant provided for in this Agreement (other than the Officers’ Certificate provided for in Section 10.05) shall include:

(i) a statement that each individual signing such certificate or opinion has read such covenant or condition and the definitions herein relating thereto;

(ii) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(iii) a statement that, in the opinion of each such individual, he or she has made such examination or investigation as is necessary to enable such individual to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(iv) a statement as to whether, in the opinion of each such individual, such condition or covenant has been complied with.

Section 1.03 *Form of Documents Delivered to Purchase Contract Agent*. In any case where several matters are required to be certified by, or covered by an opinion of, any specified Person, it is not necessary that all such matters be certified by, or covered by the opinion of, only one such Person, or that they be so certified or covered by only one document, but one such Person may certify or give an opinion with respect to some matters and one or more other such Persons as to other matters, and any such Person may certify or give an opinion as to such matters in one or several documents. Any certificate or opinion of an officer of the Company may be based, insofar as it relates to legal matters, upon a certificate or opinion of, or representations by, counsel, unless such officer knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to the matters upon which its certificate or opinion is based are erroneous. Any such certificate or Opinion of Counsel may be based, insofar as it relates to factual matters, upon a certificate or opinion of, or representations by, an officer or officers of the Company unless such counsel knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to such matters are erroneous.

Where any Person is required to make, give or execute two or more applications, requests, consents, certificates, statements, opinions or other instruments under this Agreement, they may, but need not, be consolidated and form one instrument.

Section 1.04 *Acts of Holders; Record Dates*. (a) Any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Agreement to be given or taken by Holders may be embodied in and evidenced by one or more instruments of substantially similar tenor signed by such Holders in person or by an agent duly appointed in writing; and, except as herein otherwise expressly provided, such action shall become effective when such instrument or instruments are delivered to the Purchase Contract Agent and, where it is hereby expressly required, to the Company. Such instrument or instruments (and the action embodied therein and evidenced thereby) are herein sometimes referred to as the “**Act**” of the Holders signing such instrument or instruments. Proof of execution of any such instrument or of a writing appointing any such agent shall be sufficient for any purpose of this Agreement and (subject to Section 7.01) conclusive in favor of the Purchase Contract Agent and the Company, if made in the manner provided in this Section.

(b) The fact and date of the execution by any Person of any such instrument or writing may be proved in any manner that the Purchase Contract Agent deems sufficient.

(c) The ownership of Units shall be proved by the Security Register.

(d) Any request, demand, authorization, direction, notice, consent, waiver or other Act of the Holder of any Unit shall bind every future Holder of the same Unit and the Holder of every Certificate evidencing such Unit issued upon the registration of transfer thereof or in exchange therefor or in lieu thereof in respect of anything done, omitted or suffered to be done by the Purchase Contract Agent or the Company in reliance thereon, whether or not notation of such action is made upon such Certificate.

(e) The Company may set any date as a record date for the purpose of determining the Holders of Outstanding Units entitled to give, make or take any request, demand, authorization, direction, notice, consent, waiver or other action provided or permitted by this Agreement to be given, made or taken by Holders. If any record date is set pursuant to this paragraph, the Holders of the Outstanding Corporate Units and the Outstanding Treasury Units, as the case may be, on such record date, and no other Holders, shall be entitled to take the relevant action with respect to the Corporate Units or the Treasury Units, as the case may be, whether or not such Holders remain Holders after such record date; *provided* that no such action shall be effective hereunder unless taken prior to or on the applicable Expiration Date by Holders of the requisite number of Outstanding Units on such record date. Nothing contained in this paragraph shall be construed to prevent the Company from setting a new record date for

any action for which a record date has previously been set pursuant to this paragraph (whereupon the record date previously set shall automatically and with no action by any Person be cancelled and be of no effect), and nothing contained in this paragraph shall be construed to render ineffective any action taken by Holders of the requisite number of Outstanding Units on the date such action is taken. Promptly after any record date is set pursuant to this paragraph, the Company, at its own expense, shall cause notice of such record date, the proposed action by Holders and the applicable Expiration Date to be given to the Purchase Contract Agent in writing and to each Holder in the manner set forth in Section 1.06.

With respect to any record date set pursuant to this Section 1.04(e), the Company may designate any date as the “**Expiration Date**” and from time to time may change the Expiration Date to any later day; *provided* that no such change shall be effective unless notice of the proposed new Expiration Date is given to the Purchase Contract Agent in writing, and to each Holder in the manner set forth in Section 1.06, prior to or on the existing Expiration Date. If an Expiration Date is not designated with respect to any record date set pursuant to this Section, the Company shall be deemed to have initially designated the 180th day after such record date as the Expiration Date with respect thereto, subject to its right to change the Expiration Date as provided in this paragraph. Notwithstanding the foregoing, no Expiration Date shall be later than the 180th day after the applicable record date.

Section 1.05 *Notices*. All notices, requests, consents and other communications provided for herein (including, without limitation, any modifications of, or waivers or consents under, this Agreement) shall be given or made in writing (including, without limitation, by telecopy) delivered to the intended recipient at the “**Address for Notices**” specified below its name on the signature pages hereof or, as to any party, at such other address as shall be designated by such party in a notice to the other parties. Except as otherwise provided in this Agreement, all such communications shall be deemed to have been duly given when transmitted by telecopier or personally delivered or, in the case of a mailed notice, upon receipt, in each case given or addressed as aforesaid.

The Purchase Contract Agent shall send to the Indenture Trustee at the following address a copy of any notices in the form of Exhibits C, D, E, G, I or K it sends or receives:

The Bank of New York
101 Barclay Street, 8W
New York, NY 10286
Attention: Corporate Trust Division - Corporate Finance Unit
Fax: 212-815-5707

Section 1.06 *Notice to Holders; Waiver*. Where this Agreement provides for notice to Holders of any event, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to each Holder affected by such event, at its address as it appears in the Security Register, not later than the latest date, and not earlier than the earliest date, prescribed for the giving of such notice. In any case where notice to Holders is given by mail, neither the failure to mail such notice, nor any defect in any notice so mailed to any particular Holder shall affect the sufficiency of such notice with respect to other Holders. Where this Agreement provides for notice in any manner, such notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and such waiver shall be the equivalent of such notice. Waivers of notice by Holders shall be filed with the Purchase Contract Agent, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

In case by reason of the suspension of regular mail service or by reason of any other cause it shall be impracticable to give such notice by mail, then such notification as shall be made with the approval of the Purchase Contract Agent shall constitute a sufficient notification for every purpose hereunder.

Section 1.07 *Effect of Headings and Table of Contents*. The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof.

Section 1.08 *Successors and Assigns*. This Agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the Company, the Purchase Contract Agent, the Collateral Agent, the Custodial Agent and the Securities Intermediary, and the Holders from time to time of the Units, by their acceptance of the same, shall be deemed to have agreed to be bound by the provisions hereof and to have ratified the agreements of, and the grant of the Pledge hereunder by, the Purchase Contract Agent.

Section 1.09 *Separability Clause*. In case any provision in this Agreement or in the Units shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions hereof and thereof shall not in any way be affected or impaired thereby.

Section 1.10 *Benefits of Agreement*. Nothing contained in this Agreement or in the Units, express or implied, shall give to any Person, other than the parties hereto and their successors hereunder and, to the extent provided hereby, the Holders, any benefits or any legal or equitable right, remedy or claim under this Agreement. The Holders from time to time shall be beneficiaries of this Agreement and shall be bound by all of the terms and conditions hereof and of the Units evidenced by their Certificates by their acceptance of delivery of such Certificates.

Section 1.11 *Governing Law*. THIS AGREEMENT AND THE UNITS SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICTS OF LAW PROVISIONS THEREOF TO THE EXTENT A DIFFERENT LAW WOULD GOVERN AS A RESULT. The Company, the Collateral Agent, the Custodial Agent, the Securities Intermediary and the Holders from time to time of the Units, acting through the Purchase Contract Agent as their attorney-in-fact, hereby submit to the nonexclusive jurisdiction of the United States District Court for the Southern District of New York and of any New York state court sitting in New York City for the purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby. The Company, the Collateral Agent, the Custodial Agent, the Securities Intermediary and the Holders from time to time of the Units, acting through the Purchase Contract Agent as their attorney-in-fact, irrevocably waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the laying of the venue of any such proceeding brought in such a court and any claim that any such proceeding brought in such a court has been brought in an inconvenient forum.

Section 1.12 *Legal Holidays*. In any case where any Payment Date shall not be a Business Day (notwithstanding any other provision of this Agreement or the Units), and distributions shall not be paid on such date, but shall be paid on the next succeeding Business Day, with the same force and effect as if made on such scheduled Payment Date; *provided* that no interest shall accrue or be payable by the Company or to any Holder in respect of such delay.

In any case where the Purchase Contract Settlement Date or any Early Settlement Date or Cash Merger Early Settlement Date shall not be a Business Day (notwithstanding any other provision of this Agreement or the Units), Purchase Contracts shall not be performed and Early Settlement and Cash Merger Early Settlement shall not be effected on such date, but Purchase Contracts shall be performed or Early Settlement or Cash Merger Early Settlement shall be effected, as applicable, on the next succeeding Business Day with the same force and effect as if made on such Purchase Contract Settlement Date, Early Settlement Date or Cash Merger Early Settlement Date, as applicable.

Section 1.13 *Counterparts*. This Agreement may be executed in any number of counterparts by the parties hereto, each of which, when so executed and delivered, shall be deemed an original, but all such counterparts shall together constitute one and the same instrument.

Section 1.14 *Inspection of Agreement*. A copy of this Agreement shall be available at all reasonable times during normal business hours at the Corporate Trust Office for inspection by any Holder or Beneficial Owner.

Section 1.15 *Appointment of Financial Institution as Agent for the Company*. The Company may appoint a financial institution (which may be the Collateral Agent) to act as its agent in performing its obligations and in accepting and enforcing performance of the obligations of the Purchase Contract Agent and the Holders, under this Agreement and the Purchase Contracts, by giving notice of such appointment in the manner provided in Section 1.05 hereof. Any such appointment shall not relieve the Company in any way from its obligations hereunder.

Section 1.16 *No Waiver*. No failure on the part of the Company, the Purchase Contract Agent, the Collateral Agent, the Custodial Agent, the Securities Intermediary or any of their respective agents to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise by the Company, the Collateral Agent, the Custodial Agent, the Securities Intermediary or any of their respective agents of any right, power or remedy hereunder preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The remedies herein are cumulative and are not exclusive of any remedies provided by law.

ARTICLE 2

CERTIFICATE FORMS

Section 2.01 *Forms of Certificates Generally*. The Certificates (including the form of Purchase Contract forming part of each Unit evidenced thereby) shall be in substantially the form set forth in Exhibit A hereto (in the case of Corporate Units Certificates) or Exhibit B hereto (in the case of Treasury Units Certificates), with such letters, numbers or other marks of identification or designation and such legends or endorsements printed, lithographed or engraved thereon as may be required by the rules of any securities exchange on which the Units are listed or any depository therefor, or as may, consistently herewith, be determined by the officers of the Company executing such Certificates, as evidenced by their execution of the Certificates.

The definitive Certificates shall be produced in any manner as determined by the officers of the Company executing the Units evidenced by such Certificates, consistent with the provisions of this Agreement, as evidenced by their execution thereof.

Every Global Certificate authenticated, executed on behalf of the Holders and delivered hereunder shall bear a legend substantially in the form set forth in Exhibit A and Exhibit B for a Global Certificate.

Section 2.02 *Form of Purchase Contract Agent's Certificate of Authentication*. The form of the Purchase Contract Agent's certificate of authentication of the Units shall be in substantially the form set forth on the form of the applicable Certificates.

ARTICLE 3

THE UNITS

Section 3.01 *Amount; Form and Denominations*. The aggregate number of Units evidenced by Certificates authenticated, executed on behalf of the Holders and delivered hereunder is limited to 18,000,000, except for Certificates authenticated, executed and delivered upon registration of transfer of, in exchange for, or in lieu of, other Certificates pursuant to Section 3.04, Section 3.05, Section 3.10, Section 3.13, Section 3.14 or Section 8.05.

The Certificates shall be issuable only in registered form and only in denominations of a single Corporate Unit or Treasury Unit and any integral multiple thereof.

Section 3.02 *Rights and Obligations Evidenced by the Certificates*. Each Corporate Units Certificate shall evidence the number of Corporate Units specified therein, with each such Corporate Unit representing (1) the ownership by the Holder thereof of an Applicable Ownership Interest in Subordinated Notes or an Applicable Ownership Interest in the Treasury Portfolio, as the case may be, subject to the Pledge of such Applicable Ownership Interest in Subordinated Note or Applicable Ownership Interest in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as the case may be, by such Holder pursuant to this Agreement, and (2) the rights and obligations of the Holder thereof and the Company under one Purchase Contract. The Purchase Contract Agent is hereby authorized, as attorney-in-fact for, and on behalf of, the Holder of each Corporate Unit, to pledge, pursuant to Article 11 hereof, the Applicable Ownership Interest in Subordinated Notes, or the Applicable Ownership Interest in the Treasury Portfolio (as specified in clause (i) of the definition of such term) forming a part of such Corporate Unit, to the Collateral Agent for the benefit of the Company, and to grant to the Collateral Agent, for the benefit of the Company, a security interest in the right, title and interest of such Holder in such Applicable Ownership Interest in Subordinated Notes or Applicable Ownership Interest in the Treasury Portfolio (as specified in clause (i) of the definition of such term) to secure the obligation of the Holder under each Purchase Contract to purchase shares of Common Stock. To effect such Pledge and grant such security interest, the Purchase Contract Agent on behalf of the Holders of Corporate Units has, on the date hereof, delivered to the Collateral Agent the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes.

Upon the formation of a Treasury Unit pursuant to Section 3.13, each Treasury Unit Certificate shall evidence the number of Treasury Units specified therein, with each such Treasury Unit representing (1) the ownership by the Holder thereof of a 1/40 or 2.5% undivided beneficial interest in a Treasury Security with a principal amount equal to \$1,000, subject to the Pledge of such interest by such Holder pursuant to this Agreement, and (2) the rights and obligations of the Holder thereof and the Company under one Purchase Contract. The Purchase Contract Agent is hereby authorized, as attorney-in-fact for, and on behalf of, the Holder of each Treasury Unit, to pledge, pursuant to Article 11 hereof, such Holder's interest in the Treasury Security forming a part of such Treasury Unit to the Collateral Agent, for the benefit of the Company, and to grant to the Collateral Agent, for the benefit of the Company, a security interest in the right, title and interest of such Holder in such Treasury Security to secure the obligation of the Holder under each Purchase Contract to purchase shares of Common Stock.

Prior to the purchase of shares of Common Stock under each Purchase Contract, such Purchase Contract shall not entitle the Holder of a Unit to any of the rights of a holder of shares of Common Stock, including, without limitation, the right to vote or receive any dividends or other payments or to consent or to receive notice as a shareholder in respect of the meetings of shareholders or for the election of directors of the Company or for any other matter, or any other rights whatsoever as a shareholder of the Company.

Section 3.03 *Execution, Authentication, Delivery and Dating*. Subject to the provisions of Section 3.13 and Section 3.14 hereof, upon the execution and delivery of this Agreement, and at any time and from time to time thereafter, the Company may deliver Certificates executed by the Company to the Purchase Contract Agent for authentication, execution on behalf of the Holders and delivery, together with its Issuer Order for authentication of such Certificates, and the Purchase Contract Agent in accordance with such Issuer Order shall authenticate, execute on behalf of the Holders and deliver such Certificates.

The Certificates shall be executed on behalf of the Company by its Chairman of the Board of Directors, its Chief Executive Officer, its President, its Treasurer or one of its Vice Presidents. The signature of any of these officers on the Certificates may be manual or facsimile.

Certificates bearing the manual or facsimile signatures of individuals who were at any time the proper officers of the Company shall bind the Company, notwithstanding that such individuals or any of them have ceased to hold such offices prior to the authentication and delivery of such Certificates or did not hold such offices at the date of such Certificates.

No Purchase Contract evidenced by a Certificate shall be valid until such Certificate has been executed on behalf of the Holder by the manual signature of an authorized officer of the Purchase Contract Agent, as such Holder's attorney-in-fact. Such signature by an authorized officer of the Purchase Contract Agent shall be conclusive evidence that the Holder of such Certificate has entered into the Purchase Contracts evidenced by such Certificate.

Each Certificate shall be dated the date of its authentication.

No Certificate shall be entitled to any benefit under this Agreement or be valid or obligatory for any purpose unless there appears on such Certificate a certificate of authentication substantially in the form provided for herein executed by an authorized officer of the Purchase Contract Agent by manual signature, and such certificate of authentication upon any Certificate shall be conclusive evidence, and the only evidence, that such Certificate has been duly authenticated and delivered hereunder.

Section 3.04 *Temporary Certificates*. Pending the preparation of definitive Certificates, the Company may execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall authenticate, execute on behalf of the Holders, and deliver, in lieu of such definitive Certificates, temporary Certificates which are in substantially the form set forth in Exhibit A or Exhibit B hereto, as the case may be, with such letters, numbers or other marks of identification or designation and such legends or endorsements printed, lithographed or engraved thereon as may be required by the rules of any securities exchange on which the Corporate Units or Treasury Units, as the case may be, are listed, or as may, consistently herewith, be determined by the officers of the Company executing such Certificates, as evidenced by their execution of the Certificates.

If temporary Certificates are issued, the Company will cause definitive Certificates to be prepared without unreasonable delay. After the preparation of definitive Certificates, the temporary Certificates shall be exchangeable for definitive Certificates upon surrender of the temporary Certificates at the Corporate Trust Office, at the expense of the Company and without charge to the Holder. Upon surrender for cancellation of any one or more temporary Certificates, the Company shall execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall authenticate, execute on behalf of the Holder, and deliver in exchange therefor, one or more definitive Certificates of like tenor and denominations and evidencing a like number of Units as the temporary Certificate or Certificates so surrendered. Until so exchanged, the temporary Certificates shall in all respects evidence the same benefits and the same obligations with respect to the Units evidenced thereby as definitive Certificates.

Section 3.05 *Registration; Registration of Transfer and Exchange*. The Purchase Contract Agent shall keep at the Corporate Trust Office a register (the “**Security Register**”) in which, subject to such reasonable regulations as it may prescribe, the Purchase Contract Agent shall provide for the registration of Certificates and of transfers of Certificates (the Purchase Contract Agent, in such capacity, the “**Security Registrar**”). The Security Registrar shall record separately the registration and transfer of the Certificates evidencing Corporate Units and Treasury Units.

Upon surrender for registration of transfer of any Certificate at the Corporate Trust Office, the Company shall execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall authenticate, execute on behalf of the designated transferee or transferees, and deliver, in the name of the designated transferee or transferees, one or more new Certificates of any authorized denominations, of like tenor, and evidencing a like number of Corporate Units or Treasury Units, as the case may be.

At the option of the Holder, Certificates may be exchanged for other Certificates, of any authorized denominations and evidencing a like number of Corporate Units or Treasury Units, as the case may be, upon surrender of the Certificates to be exchanged at the Corporate Trust Office. Whenever any Certificates are so surrendered for exchange, the Company shall execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall authenticate, execute on behalf of the Holder, and deliver the Certificates which the Holder making the exchange is entitled to receive.

All Certificates issued upon any registration of transfer or exchange of a Certificate shall evidence the ownership of the same number of Corporate Units or Treasury Units, as the case may be, and be entitled to the same benefits and subject to the same obligations under this Agreement as the Corporate Units or Treasury Units, as the case may be, evidenced by the Certificate surrendered upon such registration of transfer or exchange.

Every Certificate presented or surrendered for registration of transfer or exchange shall (if so required by the Purchase Contract Agent) be duly endorsed, or be accompanied by a written instrument of transfer in form satisfactory to the Company and the Purchase Contract Agent duly executed by the Holder thereof or its attorney duly authorized in writing.

No service charge shall be made for any registration of transfer or exchange of a Certificate, but the Company and the Purchase Contract Agent may require payment from the Holder of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection with any registration of transfer or exchange of Certificates, other than any exchanges pursuant to Section 3.04, Section 3.05(ii) and Section 8.05 not involving any transfer.

Notwithstanding the foregoing, the Company shall not be obligated to execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall not be obligated to authenticate, execute on behalf of the Holder and deliver any Certificate in exchange for any other Certificate presented or surrendered for registration of transfer or for exchange on or after the Business Day immediately preceding the earliest to occur of any Early Settlement Date with respect to such Certificate, any Cash Merger Early Settlement Date with respect to such Certificate, the Purchase Contract Settlement Date or the Termination Date. In lieu of delivery of a new Certificate, upon satisfaction of the applicable conditions specified above in this Section and receipt of appropriate registration or transfer instructions from such Holder, the Purchase Contract Agent shall:

(i) if the Purchase Contract Settlement Date (including upon any Cash Settlement) or an Early Settlement Date or a Cash Merger Early Settlement Date with respect to such other Certificate (or portion thereof) has occurred, deliver the shares of Common Stock issuable in respect of the Purchase Contracts forming a part of the Units evidenced by such other Certificate (or portion thereof); or

(ii) if a Termination Event, Early Settlement, or Cash Merger Early Settlement shall have occurred prior to the Purchase Contract Settlement Date, or a Cash Settlement shall have occurred, transfer the Subordinated Notes, the Treasury Securities, or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, underlying such Certificate, in each case subject to the applicable conditions and in accordance with the applicable provisions of Section 3.15 and Article 5 hereof.

Section 3.06 *Book-entry Interests*. The Certificates will be issued in the form of one or more fully registered Global Certificates, to be delivered to the Depository or its custodian by, or on behalf of, the Company. The Company hereby designates DTC as the initial Depository. Such Global Certificates shall initially be registered on the Security Register in the name of Cede & Co., the nominee of the Depository, and no Beneficial Owner will receive a definitive Certificate representing such Beneficial Owner's interest in such Global Certificate, except as provided in Section 3.09. The Purchase Contract Agent shall enter into an agreement with the Depository if so requested by the Company. Following the issuance of such Global Certificates and unless and until definitive, and fully registered Certificates have been issued to Beneficial Owners pursuant to Section 3.09:

(i) the provisions of this Section 3.06 shall be in full force and effect;

(ii) the Company shall be entitled to deal with the Depository for all purposes of this Agreement as the Holder of the Units and the sole holder of the Global Certificates and shall have no obligation to the Beneficial Owners; *provided* that a Beneficial Owner may directly enforce against the Company, without any consent, proxy, waiver or involvement of the Depository of any kind, such Beneficial Owner's right to receive a definitive Certificate representing the Units beneficially owned by such Beneficial Owner, as set forth in Section 3.09;

(iii) to the extent that the provisions of this Section 3.06 conflict with any other provisions of this Agreement, the provisions of this Section 3.06 shall control; and

(iv) except as set forth in the proviso of clause (ii) of this Section 3.06, the rights of the Beneficial Owners shall be exercised only through the Depository and shall be limited to those established by law and agreements between such Beneficial Owners and the Depository or the Depository Participants. The Depository will make book-entry transfers among Depository Participants.

Transfers of securities evidenced by Global Certificates shall be made through the facilities of the Depository, and any cancellation of, or increase or decrease in the number of, such securities (including the creation of Treasury Units and the recreation of Corporate Units pursuant to Section 3.13 and Section 3.14 respectively) shall be accomplished by making appropriate annotations on the Schedule of Increases and Decreases set forth in such Global Certificate.

Section 3.07 *Notices to Holders*. Whenever a notice or other communication to the Holders is required to be given under this Agreement, the Company or the Company's agent shall give such notices and communications to the Holders and, with respect to any Units registered in the name of the Depository or the nominee of the Depository, the Company or the Company's agent shall, except as set forth herein, have no obligations to the Beneficial Owners.

Section 3.08 *Appointment of Successor Depository*. If the Depository elects to discontinue its services as securities depository with respect to the Units, the Company may, in its sole discretion, appoint a successor Depository with respect to the Units.

Section 3.09 *Definitive Certificates*.

If:

(i) the Depository notifies the Company that it is unwilling or unable to continue its services as securities depository with respect to the Units and no successor Depository has been appointed pursuant to Section 3.08 within 90 days after such notice;

(ii) the Depository ceases to be a “clearing agency” registered under Section 17A of the Exchange Act when the Depository is required to be so registered to act as the Depository and so notifies the Company, and no successor Depository has been appointed pursuant to Section 3.08 within 90 days after such notice;

(iii) to the extent permitted by the Depository, the Company determines at any time that the Units shall no longer be represented by Global Certificates and shall inform such Depository of such determination and participants in such Depository elect to withdraw their beneficial interests in the Units from such Depository, following notification by the Depository of their right to do so; or

(iv) a Beneficial Owner requests to exchange such Beneficial Owner’s interest in the Global Certificates for definitive Certificates in order to exercise or enforce such Beneficial Owner’s rights under the Units represented by such Global Certificates;

then (x) definitive Certificates shall be prepared by the Company with respect to such Units and delivered to the Purchase Contract Agent and (y) upon surrender of the Global Certificates representing the Units by the Depository, accompanied by registration instructions (other than in the case of clause (iv) above), the Company shall cause definitive Certificates to be delivered to Beneficial Owners in accordance with instructions provided by the Depository. The Company and the Purchase Contract Agent shall not be liable for any delay in delivery of such instructions and may conclusively rely on and shall be authorized and protected in relying on, such instructions. Each definitive Certificate so delivered shall evidence Units of the same kind and tenor as the Global Certificate so surrendered in respect thereof.

Section 3.10 *Mutilated, Destroyed, Lost and Stolen Certificates*. If any mutilated Certificate is surrendered to the Purchase Contract Agent, the Company shall execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall authenticate, execute on behalf of the Holder, and deliver in exchange therefor, a new Certificate, evidencing the same number of Corporate Units or Treasury Units, as the case may be, and bearing a Certificate number not contemporaneously outstanding.

If there shall be delivered to the Company and the Purchase Contract Agent (i) evidence to their satisfaction of the destruction, loss or theft of any Certificate, and (ii) such security or indemnity as may be required by them to hold each of them and any agent of any of them harmless, then, in the absence of notice to the Company or the Purchase Contract Agent that such Certificate has been acquired by a

protected purchaser, the Company shall execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall authenticate, execute on behalf of the Holder, and deliver to the Holder, in lieu of any such destroyed, lost or stolen Certificate, a new Certificate, evidencing the same number of Corporate Units or Treasury Units, as the case may be, and bearing a Certificate number not contemporaneously outstanding.

Notwithstanding the foregoing, the Company shall not be obligated to execute and deliver to the Purchase Contract Agent, and the Purchase Contract Agent shall not be obligated to authenticate, execute on behalf of the Holder, and deliver to the Holder, a Certificate on or after the Business Day immediately preceding the earliest of any Early Settlement Date with respect to such lost or mutilated Certificate, any Cash Merger Early Settlement Date with respect to such lost or mutilated Certificate, the Purchase Contract Settlement Date or the Termination Date. In lieu of delivery of a new Certificate, upon satisfaction of the applicable conditions specified above in this Section and receipt of appropriate registration or transfer instructions from such Holder, the Purchase Contract Agent shall:

(i) if the Purchase Contract Settlement Date (including upon any Cash Settlement) or an Early Settlement Date or a Cash Merger Early Settlement Date with respect to such lost, stolen, destroyed or mutilated Certificate has occurred, deliver the shares of Common Stock issuable in respect of the Purchase Contracts forming a part of the Units evidenced by such Certificate; and

(ii) if a Termination Event, Cash Merger Early Settlement or an Early Settlement with respect to such lost or mutilated Certificate shall have occurred prior to the Purchase Contract Settlement Date or a Cash Settlement shall have occurred, transfer the Subordinated Notes, the Treasury Securities or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, underlying such Certificate, in each case subject to the applicable conditions and in accordance with the applicable provisions of Section 3.15 and Article 5 hereof.

Upon the issuance of any new Certificate under this Section, the Company and the Purchase Contract Agent may require the payment by the Holder of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other fees and expenses (including, without limitation, the fees and expenses of the Purchase Contract Agent) connected therewith.

Every new Certificate issued pursuant to this Section in lieu of any destroyed, lost or stolen Certificate shall constitute an original additional contractual obligation of the Company and of the Holder in respect of the Units evidenced thereby, whether or not the destroyed, lost or stolen Certificate (and the Units evidenced thereby) shall be at any time enforceable by anyone, and shall be entitled to all the benefits and be subject to all the obligations of this Agreement equally and proportionately with any and all other Certificates delivered hereunder.

The provisions of this Section are exclusive and shall preclude, to the extent lawful, all other rights and remedies with respect to the replacement or payment of mutilated, destroyed, lost or stolen Certificates.

Section 3.11 *Persons Deemed Owners*. Prior to due presentment of a Certificate for registration of transfer, the Company and the Purchase Contract Agent, and any agent of the Company or the Purchase Contract Agent, may treat the Person in whose name such Certificate is registered as the owner of the Units evidenced thereby for purposes of (subject to any applicable record date) any payment or distribution with respect to the Applicable Ownership Interests in Subordinated Notes, or on the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (ii) of the definition of

such term), as applicable, and performance of the Purchase Contracts and for all other purposes whatsoever in connection with such Units, whether or not such payment, distribution, or performance shall be overdue and notwithstanding any notice to the contrary, and neither the Company nor the Purchase Contract Agent, nor any agent of the Company or the Purchase Contract Agent, shall be affected by notice to the contrary.

Notwithstanding the foregoing, with respect to any Global Certificate, nothing contained herein shall prevent the Company, the Purchase Contract Agent or any agent of the Company or the Purchase Contract Agent, from giving effect to any written certification, proxy or other authorization furnished by the Depository (or its nominee), as a Holder, with respect to such Global Certificate, or impair, as between such Depository and the related Beneficial Owner, the operation of customary practices governing the exercise of rights of the Depository (or its nominee) as Holder of such Global Certificate. None of the Company, the Purchase Contract Agent or any agent of the Company or the Purchase Contract Agent will have any responsibility or liability for any aspect of the records relating to or payments made on account of beneficial ownership interests of a Global Certificate or maintaining, supervising or reviewing any records relating to such beneficial ownership interests.

Section 3.12 *Cancellation*. All Certificates surrendered for delivery of shares of Common Stock on or after the Purchase Contract Settlement Date or in connection with an Early Settlement or a Cash Merger Early Settlement or for delivery of the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or Treasury Securities, as the case may be, after the occurrence of a Termination Event or pursuant to a Cash Settlement, an Early Settlement or a Cash Merger Early Settlement, a Collateral Substitution, or upon the registration of transfer or exchange of a Unit, shall, if surrendered to any Person other than the Purchase Contract Agent, be delivered to the Purchase Contract Agent along with appropriate written instructions regarding the cancellation thereof and, if not already cancelled, shall be promptly cancelled by it. The Company may at any time deliver to the Purchase Contract Agent for cancellation any Certificates previously authenticated, executed and delivered hereunder that the Company may have acquired in any manner whatsoever, and all Certificates so delivered shall, upon an Issuer Order, be promptly cancelled by the Purchase Contract Agent. No Certificates shall be authenticated, executed on behalf of the Holder and delivered in lieu of or in exchange for any Certificates cancelled as provided in this Section 3.12, except as expressly permitted by this Agreement. All cancelled Certificates held by the Purchase Contract Agent shall be disposed of in accordance with its customary practices.

If the Company or any Affiliate of the Company shall acquire any Certificate, such acquisition shall not operate as a cancellation of such Certificate unless and until such Certificate is delivered to the Purchase Contract Agent cancelled or for cancellation.

Section 3.13 *Creation of Treasury Units by Substitution of Treasury Securities*. (a) Unless Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, and subject to the conditions set forth in this Agreement, a Holder of Corporate Units may, at any time from and after the date of this Agreement and prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date, effect a Collateral Substitution and separate the Subordinated Notes underlying Applicable Ownership Interests in Subordinated Notes in respect of such Holder's Corporate Units by substituting for such Applicable Ownership Interests in Subordinated Notes, Treasury Securities in an aggregate principal amount at maturity equal to the aggregate principal amount of the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes; *provided* that Holders may make Collateral Substitutions only in integral multiples of 40 Corporate Units. To effect such substitution, the Holder must:

(1) Transfer to the Collateral Agent, for credit to the Collateral Account, Treasury Securities or security entitlements with respect thereto having a Value equal to the aggregate principal amount of the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes for which such Collateral Substitution is made; and

(2) Transfer the related Corporate Units to the Purchase Contract Agent accompanied by a notice to the Purchase Contract Agent, substantially in the form of Exhibit C hereto, whereupon the Purchase Contract Agent shall promptly provide an instruction to such effect to the Collateral Agent, substantially in the form of Exhibit G hereto.

Upon confirmation that the Treasury Securities described in clause (1) above or security entitlements with respect thereto have been credited to the Collateral Account and receipt of the instruction to the Collateral Agent described in clause (2) above, the Collateral Agent shall release such Pledged Applicable Ownership Interests in Subordinated Notes from the Pledge and instruct the Securities Intermediary by a notice, substantially in the form of Exhibit H hereto, to Transfer the Subordinated Notes underlying such Pledged Applicable Ownership Interests in Subordinated Notes to the Purchase Contract Agent for distribution to such Holder, free and clear of the Pledge created hereby.

Upon credit to the Collateral Account of Treasury Securities or security entitlements with respect thereto delivered by a Holder of Corporate Units and receipt of the related instruction from the Collateral Agent, the Securities Intermediary shall promptly Transfer the Subordinated Notes underlying the appropriate Pledged Applicable Ownership Interests in Subordinated Notes to the Purchase Contract Agent for distribution to such Holder, free and clear of the Pledge created hereby.

Upon receipt of the Subordinated Notes underlying such Pledged Applicable Ownership Interests in Subordinated Notes, the Purchase Contract Agent shall promptly:

(i) cancel the related Corporate Units;

(ii) Transfer the Subordinated Notes to the Holder; and

(iii) deliver Treasury Units in book-entry form, or if applicable, authenticate, execute on behalf of such Holder and deliver Treasury Units in the form of a Treasury Units Certificate executed by the Company in accordance with Section 3.03 evidencing the same number of Purchase Contracts as were evidenced by the cancelled Corporate Units.

Holders who elect to separate the Subordinated Notes by substituting Treasury Securities for Applicable Ownership Interest in Subordinated Notes shall be responsible for any fees or expenses (including, without limitation, fees and expenses payable to the Collateral Agent) in respect of the substitution, and neither the Company nor the Purchase Contract Agent shall be responsible for any such fees or expenses.

(b) If Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, and subject to the conditions set forth in this Agreement, a Holder of Corporate Units may, at any time from and after the date of this Agreement and prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date, substitute Treasury Securities for the Pledged Applicable Ownership Interests in the Treasury Portfolio included in such Corporate Units, but

only in integral multiples of 128,000 Corporate Units. In such an event, the Holder shall Transfer Treasury Securities having an aggregate principal amount at maturity equal to equal to the aggregate Stated Amount of the Purchase Contracts constituting a part of the Corporate Units for which Collateral Substitution is being made to the Securities Intermediary, for credit to the Collateral Account, and the Purchase Contract Agent, Collateral Agent and Securities Intermediary shall effect a Collateral Substitution for the appropriate Pledged Applicable Ownership Interests in the Treasury Portfolio in the manner set forth in clause (a) above.

(c) In the event a Holder making a Collateral Substitution pursuant to this Section 3.13 fails to effect a book-entry transfer of the Corporate Units or fails to deliver Corporate Units Certificates to the Purchase Contract Agent after depositing Treasury Securities with the Securities Intermediary, any distributions on the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes, or with respect to the Applicable Ownership Interests in the Treasury Portfolio, in each case constituting a part of such Corporate Units, shall be held in the name of the Purchase Contract Agent or its nominee in trust for the benefit of such Holder, until such Corporate Units are so transferred or the Corporate Units Certificate is so delivered, as the case may be, or such Holder provides evidence satisfactory to the Company and the Purchase Contract Agent that such Corporate Units Certificate has been destroyed, lost or stolen, together with any indemnity that may be required by the Purchase Contract Agent and the Company.

(d) Except as described in Section 5.02 or in this Section 3.13 or in connection with a Cash Settlement, an Early Settlement, a Cash Merger Early Settlement or a Termination Event, for so long as the Purchase Contract underlying a Corporate Unit remains in effect, such Corporate Units shall not be separable into its constituent parts, and the rights and obligations of the Holder in respect of the Applicable Ownership Interests in Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio, as the case may be, and the Purchase Contract comprising such Corporate Units may be acquired, and may be transferred and exchanged, only as a Corporate Unit.

Section 3.14 *Recreation of Corporate Units*. (a) Unless Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, and subject to the conditions set forth in this Agreement, a Holder of Treasury Units may recreate Corporate Units at any time from and after the date of this Agreement and prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date; *provided* that Holders of Treasury Units may only recreate Corporate Units in integral multiples of 40 Treasury Units. To recreate Corporate Units, the Holder must:

(1) Transfer to the Collateral Agent for credit to the Collateral Account Subordinated Notes or security entitlements with respect thereto having an aggregate principal amount equal to the Value of the Pledged Treasury Securities to be released; and

(2) Transfer the related Treasury Units to the Purchase Contract Agent accompanied by a notice to the Purchase Contract Agent, substantially in the form of Exhibit C hereto, whereupon the Purchase Contract Agent shall promptly provide an instruction to such effect to the Collateral Agent, substantially in the form of Exhibit I hereto.

Upon confirmation that the Subordinated Notes described in clause (1) above or security entitlements with respect thereto have been credited to the Collateral Account and receipt of the instruction from the Purchase Contract Agent described in clause (2) above, the Collateral Agent shall promptly release such Pledged Treasury Securities from the Pledge and shall promptly instruct the Securities Intermediary by a notice, substantially in the form of Exhibit J hereto, to Transfer such Pledged Treasury Securities to the Purchase Contract Agent for distribution to such Holder, free and clear of the Pledge created hereby.

Upon credit to the Collateral Account of Subordinated Notes or security entitlements with respect thereto delivered by a Holder of Treasury Units and receipt of the related instruction from the Collateral Agent, the Securities Intermediary shall promptly Transfer the Pledged Treasury Securities to the Purchase Contract Agent for distribution to such Holder, free and clear of the Pledge created hereby.

Upon receipt of such Treasury Securities, the Purchase Contract Agent shall promptly:

- (i) cancel the related Treasury Units;
- (ii) Transfer the Treasury Securities to the Holder; and

(iii) deliver Corporate Units in book-entry form or, if applicable, authenticate, execute on behalf of such Holder and deliver Corporate Units in the form of a Corporate Units Certificate executed by the Company in accordance with Section 3.03 evidencing the same number of Purchase Contracts as were evidenced by the cancelled Treasury Units.

Holders who elect to recreate Corporate Units shall be responsible for any fees or expenses (including, without limitation, fees and expenses payable to the Collateral Agent), in respect of the recreation, and neither the Company nor the Purchase Contract Agent shall be responsible for any such fees or expenses.

(b) If Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units and subject to the conditions set forth in this Agreement, a Holder of Treasury Units may at any time from and after the date of this Agreement and prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date substitute the Pledged Applicable Ownership Interests in the Treasury Portfolio for Treasury Securities included in such Treasury Units, but only in multiples of 128,000 Treasury Units. In such an event, the Holder shall Transfer Applicable Ownership Interests in the Treasury Portfolio having a Value equal to the aggregate Value of the Treasury Securities for which substitution is being made to the Securities Intermediary, for credit to the Collateral Account, and the Purchase Contract Agent, Collateral Agent and Securities Intermediary shall effect a Collateral Substitution and release the Pledged Applicable Ownership Interests in the Treasury Portfolio from the Pledge in the manner set forth in clause (a) above.

(c) Except as provided in Section 5.02 or in this Section 3.14 or in connection with a Cash Settlement, an Early Settlement, a Cash Merger Early Settlement or a Termination Event, for so long as the Purchase Contract underlying a Treasury Unit remains in effect, such Treasury Unit shall not be separable into its constituent parts and the rights and obligations of the Holder of such Treasury Unit in respect of the interest in the Treasury Security and the Purchase Contract comprising such Treasury Unit may be acquired, and may be transferred and exchanged, only as a Treasury Unit.

Section 3.15 *Transfer of Collateral Upon Occurrence of Termination Event.* (a) Upon receipt by the Collateral Agent of written notice pursuant to Section 5.06 hereof from the Company or the Purchase Contract Agent that a Termination Event has occurred, the Collateral Agent shall promptly release all Collateral from the Pledge and shall promptly instruct the Securities Intermediary to Transfer:

-
- (i) any Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes or security entitlements with respect thereto or Pledged Applicable Ownership Interests in the Treasury Portfolio;
 - (ii) any Pledged Treasury Securities;
 - (iii) any payments made by Holders (or the Permitted Investments of such payments) pursuant to Section 5.02 hereof; and
 - (iv) any Proceeds and all other payments the Collateral Agent receives in respect of the foregoing,

to the Purchase Contract Agent for the benefit of the Holders for distribution to such Holders, in accordance with their respective interests, free and clear of the Pledge created hereby; *provided, however*, if any Holder or Beneficial Owner shall be entitled to receive Subordinated Notes in an aggregate principal amount of less than \$1,000, or greater than \$1,000 but not in an integral multiple of \$1,000, the Purchase Contract Agent shall request, on behalf of such Holder or Beneficial Owner, pursuant to Section 2.03 of the Supplemental Indenture that the Company issue Subordinated Notes in denominations of \$25, or integral multiples thereof, in exchange for Subordinated Notes in denominations of \$1,000 or integral multiples thereof; and *provided further*, if any Holder shall be entitled to receive less than \$1,000 with respect to its Pledged Applicable Ownership Interests in the Treasury Portfolio or its Pledged Treasury Securities, the Purchase Contract Agent shall dispose of such Pledged Applicable Ownership Interests in the Treasury Portfolio or Pledged Treasury Securities for cash and deliver to such Holder cash in lieu of delivering the Pledged Applicable Ownership Interests in the Treasury Portfolio or Pledged Treasury Securities, as the case may be.

(b) Notwithstanding anything to the contrary in clause (a) of this Section 3.15, if such Termination Event shall result from the Company's becoming a debtor under the Bankruptcy Code, and if the Collateral Agent shall for any reason fail promptly to effectuate the release and Transfer of all Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, Pledged Applicable Ownership Interests in the Treasury Portfolio, Pledged Treasury Securities and payments by Holders (or the Permitted Investments of such payments) pursuant to Section 5.02 and Proceeds and all other payments received by the Collateral Agent in respect of the foregoing, as the case may be, as provided by this Section 3.15, the Purchase Contract Agent shall use its best efforts to obtain an opinion of a nationally recognized law firm to the effect that, notwithstanding the Company's being the debtor in such a bankruptcy case, the Collateral Agent will not be prohibited from releasing or Transferring the Collateral as provided in this Section 3.15, and shall deliver or cause to be delivered such opinion to the Collateral Agent within ten days after the occurrence of such Termination Event, and if (A) the Purchase Contract Agent shall be unable to obtain such opinion within ten days after the occurrence of such Termination Event or (B) the Collateral Agent shall continue, after delivery of such opinion, to refuse to effectuate the release and Transfer of all Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, Pledged Applicable Ownership Interests in the Treasury Portfolio, Pledged Treasury Securities and the payments by Holders (or the Permitted Investments of such payments) pursuant to Section 5.02 hereof and Proceeds and all other payments received by the Collateral Agent in respect of the foregoing, as the case may be, as provided in this Section 3.15, then the Purchase Contract Agent shall within fifteen days after the occurrence of such Termination Event commence an action or proceeding in the court having jurisdiction of the Company's case under the Bankruptcy Code seeking an order requiring the Collateral Agent to effectuate the release and transfer of all Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, Pledged Applicable Ownership Interest in the Treasury Portfolio, Pledged Treasury Securities and the payments by Holders (or the Permitted Investments of such payments) pursuant to Section 5.02 hereof and Proceeds and all other payments received by the Collateral Agent in respect of the foregoing, or as the case may be, as provided by this Section 3.15.

(c) Upon the occurrence of a Termination Event and the Transfer to the Purchase Contract Agent of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, the appropriate Pledged Applicable Ownership Interests in the Treasury Portfolio or the Pledged Treasury Securities, as the case may be, pursuant to Section 3.15, the Purchase Contract Agent shall request transfer instructions with respect to such Subordinated Notes, Applicable Ownership Interests in the Treasury Portfolio or Pledged Treasury Securities, as the case may be, from each Holder by written request, substantially in the form of Exhibit D hereto, mailed to such Holder at its address as it appears in the Security Register.

(d) Upon book-entry transfer of the Corporate Units or the Treasury Units or delivery of a Corporate Units Certificate or Treasury Units Certificate to the Purchase Contract Agent with such transfer instructions, the Purchase Contract Agent shall transfer the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Applicable Ownership Interests in the Treasury Portfolio or Pledged Treasury Securities, as the case may be, underlying such Corporate Units or Treasury Units, as the case may be, to such Holder by book-entry transfer, or other appropriate procedures, in accordance with such instructions and, in the case of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, in accordance with the terms of the Supplemental Indenture. In the event a Holder of Corporate Units or Treasury Units fails to effect such transfer or delivery, the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Applicable Ownership Interests in the Treasury Portfolio or Pledged Treasury Securities, as the case may be, underlying such Corporate Units or Treasury Units, as the case may be, and any distributions thereon, shall be held in the name of the Purchase Contract Agent or its nominee in trust for the benefit of such Holder, until the earlier to occur of:

(i) the transfer of such Corporate Units or Treasury Units or surrender of the Corporate Units Certificate or Treasury Units Certificate or the receipt by the Company and the Purchase Contract Agent from such Holder of satisfactory evidence that such Corporate Units Certificate or Treasury Units Certificate has been destroyed, lost or stolen, together with any indemnity that may be required by the Purchase Contract Agent and the Company; and

(ii) the expiration of the time period specified by the applicable law governing abandoned property in the state in which the Purchase Contract Agent holds such property.

Section 3.16 *No Consent to Assumption*. Each Holder of a Unit, by acceptance thereof, shall be deemed expressly to have withheld any consent to the assumption under Section 365 of the Bankruptcy Code or otherwise, of the Purchase Contract by the Company or its trustee, receiver, liquidator or a person or entity performing similar functions in the event that the Company becomes a debtor under the Bankruptcy Code or subject to other similar state or Federal law providing for reorganization or liquidation.

Section 3.17 *Substitutions*. Whenever a Holder has the right to substitute Treasury Securities, Subordinated Notes underlying Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio (as defined in clause (i) of the definition of such term), as the case may be, or security entitlements for any of them for financial assets held in the Collateral Account, such substitution shall not constitute a novation of the security interest created hereby.

ARTICLE 4

THE SUBORDINATED NOTES

Section 4.01 *Interest Payments; Rights to Interest Payments Preserved.* (a) The Collateral Agent (if the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes are in the name of the Collateral Agent) shall transfer all income and distributions received by it on account of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Applicable Ownership Interests in the Treasury Portfolio or Permitted Investments from time to time held in the Collateral Account (ABA No. 021000018, Account No. 109208, Re: E*TRADE Equity Units) to the Purchase Contract Agent for distribution to the applicable Holders as provided in this Agreement and the Purchase Contracts.

(b) Any payment on any Subordinated Note underlying Applicable Ownership Interests in Subordinated Notes or any distribution on any Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (ii) of the definition of such term), as the case may be, which is paid on any Payment Date shall, subject to receipt thereof by the Purchase Contract Agent from the Company or from the Collateral Agent as provided in Section 4.01(a) above, be paid to the Person in whose name the Corporate Units Certificate (or one or more Predecessor Corporate Units Certificates) of which such Applicable Ownership Interest in Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio, as the case may be, forms a part is registered at the close of business on the Record Date for such Payment Date.

(c) Each Corporate Units Certificate evidencing Applicable Ownership Interests in Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio delivered under this Agreement upon registration of transfer of or in exchange for or in lieu of any other Corporate Units Certificate shall carry the right to accrued and unpaid interest or distributions, and to accrued interest or distributions, which were carried by Applicable Ownership Interests in Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio underlying such other Corporate Units Certificate.

(d) In the case of any Corporate Unit with respect to which (1) Cash Settlement of the underlying Purchase Contract is properly effected pursuant to Section 5.02(a) hereof, (2) Early Settlement of the underlying Purchase Contract is properly effected pursuant to Section 5.07 hereof, (3) Cash Merger Early Settlement of the underlying Purchase Contract is properly effected pursuant to Section 5.04(b)(ii) hereof or (4) a Collateral Substitution is properly effected pursuant to Section 3.13, in each case on a date that is after any Record Date and prior to or on the next succeeding Payment Date, interest in respect of the Subordinated Notes underlying Applicable Ownership Interests in Subordinated Notes or distributions on Applicable Ownership Interests in the Treasury Portfolio, as the case may be, underlying such Corporate Unit otherwise payable on such Payment Date shall be payable on such Payment Date notwithstanding such Cash Settlement, Early Settlement, Cash Merger Early Settlement or Collateral Substitution, and such payment or distributions shall, subject to receipt thereof by the Purchase Contract Agent, be payable to the Person in whose name the Corporate Units Certificate (or one or more Predecessor Corporate Units Certificates) was registered at the close of business on the Record Date.

(e) Except as otherwise expressly provided in Section 4.01(d) hereof, in the case of any Corporate Unit with respect to which Cash Settlement, Early Settlement or Cash Merger Early Settlement of the component Purchase Contract is properly effected, or with respect to which a Collateral Substitution has been effected, payments attributable to the Subordinated Notes underlying Applicable Ownership Interests in Subordinated Notes or distributions on Applicable Ownership Interests in the Treasury Portfolio, as the case may be, that would otherwise be payable or made after the Purchase Contract Settlement Date, Early Settlement Date, Cash Merger Early Settlement Date or the date of the

Collateral Substitution, as the case may be, shall not be payable hereunder to the Holder of such Corporate Units; *provided, however*, that to the extent that such Holder continues to hold Separate Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio that formerly comprised a part of such Holder's Corporate Units, such Holder shall be entitled to receive interest on such Separate Subordinated Notes or distributions on such Applicable Ownership Interests in the Treasury Portfolio.

Section 4.02 *Payments Prior to or on Purchase Contract Settlement Date*. (a) Subject to the provisions of Section 5.02(a), Section 5.04(b)(ii) and Section 5.07, and except as provided in Section 4.02(b) below, if no Termination Event shall have occurred, all payments received by the Securities Intermediary in respect of (1) the principal amount of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, (2) the Pledged Applicable Ownership Interests in the Treasury Portfolio and (3) the Pledged Treasury Securities, shall be credited to the Collateral Account, to be invested in Permitted Investments until the Purchase Contract Settlement Date, and transferred to the Company on the Purchase Contract Settlement Date as provided in Section 5.02 hereof. Any balance remaining in the Collateral Account shall be released from the Pledge and transferred to the Purchase Contract Agent for the benefit of the applicable Holders for distribution to such Holders in accordance with their respective interests, free and clear of the Pledge created hereby. The Company shall instruct the Collateral Agent in writing as to the specific Permitted Investments in which any payments made under this Section 4.02 shall be invested, *provided, however*, that if the Company fails to deliver such instructions by 10:30 a.m. (New York City time) on the day such payments are received by the Securities Intermediary, the Collateral Agent shall instruct the Securities Intermediary to invest such payments in the Permitted Investments described in clause (6) of the definition of Permitted Investments. In no event shall the Collateral Agent be liable for the selection of Permitted Investments or for investment losses incurred thereon. The Collateral Agent shall have no liability in respect of losses incurred as a result of the failure of the Company to provide timely written investment direction.

(b) All payments received by the Securities Intermediary in respect of (1) the Subordinated Notes, (2) the Applicable Ownership Interests in the Treasury Portfolio and (3) the Treasury Securities or security entitlements with respect thereto, that, in each case, have been released from the Pledge hereunder shall be transferred to the Purchase Contract Agent for the benefit of the applicable Holders for distribution to such Holders in accordance with their respective interests.

Section 4.03 *Notice and Voting*. (a) Subject to Section 4.03(b) hereof, the Purchase Contract Agent may exercise, or refrain from exercising, any and all voting and other consensual rights pertaining to the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes or any part thereof for any purpose not inconsistent with the terms of this Agreement; *provided* that the Purchase Contract Agent shall not exercise or shall not refrain from exercising such right, as the case may be, if, in the judgment of the Purchase Contract Agent, such action would impair or otherwise have a material adverse effect on the value of all or any of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes; and *provided further* that the Purchase Contract Agent shall give the Company and the Collateral Agent at least five Business Days' prior written notice of the manner in which it intends to exercise, or its reasons for refraining from exercising, any such right. Upon receipt of any notices and other communications in respect of any Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, including either notice of any meeting at which holders of the Subordinated Notes are entitled to vote or the solicitation of consents, waivers or proxies of holders of the Subordinated Notes, the Collateral Agent shall use reasonable efforts to send promptly to the Purchase Contract Agent such notice or communication, and as soon as reasonably practicable after receipt of a written request therefor from the Purchase Contract Agent, to execute and deliver to the Purchase Contract Agent such proxies and other instruments in respect of such Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes (in form and substance satisfactory to the Collateral Agent) as are prepared by the Company and delivered to the Purchase Contract Agent with respect to the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes.

(b) Upon receipt of notice of any meeting at which holders of Subordinated Notes are entitled to vote or upon any solicitation of consents, waivers or proxies of holders of Subordinated Notes, the Purchase Contract Agent shall, as soon as practicable thereafter, mail, first class, postage pre-paid, to the Holders of Corporate Units a notice:

(i) containing such information as is contained in the notice or solicitation;

(ii) stating that each Holder on the record date set by the Purchase Contract Agent therefor (which, to the extent possible, shall be the same date as the record date set by the Company for determining the holders of Subordinated Notes entitled to vote) shall be entitled to instruct the Purchase Contract Agent as to the exercise of the voting rights pertaining to the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes that are a component of their Corporate Units; and

(iii) stating the manner in which such instructions may be given.

Upon the written request of the Holders of Corporate Units on such record date received by the Purchase Contract Agent at least six days prior to such meeting, the Purchase Contract Agent shall endeavor insofar as practicable to vote or cause to be voted, in accordance with the instructions set forth in such requests, the maximum aggregate principal amount of Subordinated Notes (rounded down to the nearest integral multiple of \$1,000) as to which any particular voting instructions are received. In the absence of specific instructions from the Holder of Corporate Units, the Purchase Contract Agent shall abstain from voting the Subordinated Notes underlying Applicable Ownership Interests in Subordinated Notes that are a component of such Corporate Units. The Company hereby agrees, if applicable, to solicit Holders of Corporate Units to timely instruct the Purchase Contract Agent as to the exercise of such voting rights in order to enable the Purchase Contract Agent to vote such Subordinated Notes.

(c) The Holders of Corporate Units and the Holders of Treasury Units shall have no voting or other rights in respect of Common Stock.

Section 4.04 *Special Event Redemption*. (a) If the Company elects to redeem the Subordinated Notes following the occurrence of a Special Event as permitted by the Indenture, it shall notify the Collateral Agent in writing that a Special Event has occurred and that it intends to redeem the Subordinated Notes on the Special Event Redemption Date. Upon the occurrence of such Special Event Redemption while Subordinated Notes are still credited to the Collateral Account, the Collateral Agent shall, and is hereby authorized to, instruct the Securities Intermediary to present the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes for payment as may be required by their respective terms and to direct the Indenture Trustee to remit the Redemption Price to the Securities Intermediary for credit to the Collateral Account, on or prior to 12:30 p.m., New York City time, on such Special Event Redemption Date, by federal funds check or wire transfer of immediately available funds. Upon receipt of such funds by the Securities Intermediary and the credit thereof to the Collateral Account, the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes shall be released from the Collateral Account and promptly transferred to the Company. Upon the crediting of such funds to the Collateral Account, the Collateral Agent, at the written direction of the Company, shall instruct the Securities Intermediary to (i) apply an amount equal to the Redemption Amount of such funds to purchase the Treasury Portfolio from the Quotation Agent, (ii)

credit to the Collateral Account the Applicable Ownership Interests in the Treasury Portfolio and (iii) promptly remit the remaining portion of such funds to the Purchase Contract Agent for payment to the Holders of Corporate Units, in accordance with their respective interests.

(b) Upon the occurrence of a Special Event Redemption, (i) the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) will be substituted as Collateral for the Pledged Applicable Ownership Interests in Subordinated Notes and will be held by the Collateral Agent in accordance with the terms hereof to secure the Obligation of each Holder of Corporate Units, (ii) the Holders of Corporate Units and the Collateral Agent shall have such rights and obligations, and the Collateral Agent shall have such security interest, with respect to such Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) as the Holders of Corporate Units and the Collateral Agent had in respect of the Pledged Applicable Ownership Interests in Subordinated Notes, subject to the Pledge thereof, and (iii) any reference in this Agreement to Applicable Ownership Interests in Subordinated Notes shall be deemed to be a reference to such Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term). The Company may cause to be made in any Corporate Units Certificates thereafter to be issued such change in phraseology and form (but not in substance) as may be appropriate to reflect the substitution of the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) for Applicable Ownership Interests in Subordinated Notes as Collateral.

Section 4.05 *Payments to Purchase Contract Agent*. The Securities Intermediary shall use commercially reasonable efforts to deliver any payments required to be made by it to the Purchase Contract Agent hereunder to the account designated by the Purchase Contract Agent for such purpose not later than 12:00 p.m. (New York City time) on the Business Day such payment is received by the Securities Intermediary; *provided, however*, that if such payment is received on a day that is not a Business Day or after 11:00 a.m. (New York City time) on a Business Day, then the Securities Intermediary shall use commercially reasonable efforts to deliver such payment to the Purchase Contract Agent no later than 10:30 a.m. (New York City time) on the next succeeding Business Day.

Section 4.06 *Payments Held in Trust*. If the Purchase Contract Agent or any Holder shall receive any payments on account of financial assets credited to the Collateral Account (other than interest on the Subordinated Notes or distributions on the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (ii) of the definition thereof)) and not released therefrom in accordance with this Agreement, the Purchase Contract Agent or such Holder shall hold such payments as trustee of an express trust for the benefit of the Company and, upon receipt of an Officers' Certificate of the Company so directing, promptly deliver such payments to the Securities Intermediary for credit to the Collateral Account or to the Company for application to the Obligations of the applicable Holder or Holders, and the Purchase Contract Agent and Holders shall acquire no right, title or interest in any such payments of principal amounts so received. The Purchase Contract Agent shall have no liability under this Section 4.06 unless and until it has been notified in writing that such payment was delivered to it erroneously and shall have no liability for any action taken, suffered or omitted to be taken prior to its receipt of such notice.

ARTICLE 5

THE PURCHASE CONTRACTS

Section 5.01 *Purchase of Shares of Common Stock*. (a) Each Purchase Contract shall obligate the Holder of the related Unit to purchase, and the Company to sell, on the Purchase Contract Settlement Date at a price equal to the Stated Amount (the "**Purchase Price**"), a number of newly issued shares of

Common Stock (subject to Section 5.08) equal to the Settlement Rate unless an Early Settlement, a Cash Merger Early Settlement or a Termination Event with respect to the Units of which such Purchase Contract is a part shall have occurred. The “**Settlement Rate**” is equal to:

(i) If the Applicable Market Value is greater than or equal to \$21.8160 (the “**Threshold Appreciation Price**”), 1.1459 shares of Common Stock per Purchase Contract (the “**Minimum Settlement Rate**”);

(ii) if the Applicable Market Value is less than the Threshold Appreciation Price but greater than \$18.00 (the “**Reference Price**”), the number of shares of Common Stock per Purchase Contract having a value (based on the Applicable Market Value) equal to the Stated Amount;

(iii) if the Applicable Market Value is less than or equal to the Reference Price, 1.3889 shares of Common Stock per Purchase Contract (the “**Maximum Settlement Rate**”);

in each case subject to adjustment as provided in Section 5.04 (and in each case rounded upward or downward to the nearest 1/10,000th of a share).

The “**Applicable Market Value**” means the average of the Closing Price per share of Common Stock on each of the 20 consecutive Trading Days ending on the third Trading Day immediately preceding the Purchase Contract Settlement Date, subject to adjustment as set forth under Section 5.04 hereof.

The “**Closing Price**” per share of Common Stock on any date of determination means:

(i) the closing sale price as of the close of the principal trading session (or, if no closing sale price is reported, the reported last sale price) per share on the New York Stock Exchange, Inc. (the “**NYSE**”) on such date; or

(ii) if the Common Stock is not listed for trading on the NYSE on any such date, the closing sale price (or, if no closing sale price is reported, the reported last sale price) per share as reported in the composite transactions for the principal United States securities exchange on which the Common Stock is so listed; or

(iii) if the Common Stock is not so listed on a United States national or regional securities exchange, the closing sale price (or, if no closing sale price is reported, the reported last sale price) per share as reported by The Nasdaq National Market; or

(iv) if the Common Stock is not so reported by the Nasdaq National Market, the last quoted bid price for the Common Stock in the over-the-counter market as reported by the National Quotation Bureau or similar organization; or

(v) if the bid price referred to in clause (iv) above is not available, the average of the mid-point of the last bid and ask prices of the Common Stock on such date from at least three nationally recognized independent investment banking firms retained by the Company for purposes of determining the Closing Price.

A “**Trading Day**” means a day on which the Common Stock (i) is not suspended from trading on any national or regional securities exchange or association or over-the-counter market at the close of business and (ii) has traded at least once on the national or regional securities exchange or association or over-the-counter market that is the primary market for the trading of the Common Stock.

(b) Each Holder of a Corporate Unit or a Treasury Unit, by its acceptance of such Unit:

(i) irrevocably authorizes the Purchase Contract Agent to enter into and perform the related Purchase Contract on its behalf and in its name as its attorney-in-fact (including, without limitation, the execution of Certificates on behalf of such Holder);

(ii) agrees to be bound by the terms and provisions of such Unit, including but not limited to the terms and provisions of the Purchase Contract;

(iii) covenants and agrees to perform its obligations under this Agreement and such Purchase Contract for so long as such Holder remains a Holder of a Corporate Unit or a Treasury Unit;

(iv) consents to the provisions hereof;

(v) irrevocably authorizes the Purchase Contract Agent to enter into and perform this Agreement on its behalf and in its name as its attorney-in-fact; and

(vi) consents to, and agrees to be bound by, the Pledge of such Holder’s right, title and interest in and to the Collateral, including the Applicable Ownership Interests in Subordinated Notes and the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) or the Treasury Securities pursuant to this Agreement, and the delivery of the Subordinated Notes underlying such Applicable Ownership Interests in Subordinated Notes by the Purchase Contract Agent to the Collateral Agent;

provided that upon a Termination Event, the rights of the Holder of such Units under the Purchase Contract may be enforced without regard to any other rights or obligations.

(c) Each Holder of a Corporate Unit or a Treasury Unit, by its acceptance thereof, further covenants and agrees that to the extent and in the manner provided in Section 5.02 hereof, but subject to the terms thereof, on the Purchase Contract Settlement Date, Proceeds of the Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Applicable Ownership Interests in the Treasury Portfolio or the Pledged Treasury Securities, as applicable, equal to the Purchase Price shall be paid by the Collateral Agent to the Company in satisfaction of such Holder’s obligations under such Purchase Contract and such Holder shall acquire no right, title or interest in such Proceeds.

(d) Upon registration of transfer of a Certificate, the transferee shall be bound (without the necessity of any other action on the part of such transferee) by the terms of this Agreement and the Purchase Contracts underlying such Certificate and the transferor shall be released from the obligations under this Agreement and the Purchase Contracts underlying the Certificate so transferred. The Company covenants and agrees, and each Holder of a Certificate, by its acceptance thereof, likewise covenants and agrees, to be bound by the provisions of this paragraph.

(e) Promptly after the calculation of the Settlement Rate and the Applicable Market Value, the Company shall give the Purchase Contract Agent notice thereof. All calculations and determinations of the Settlement Rate and the Applicable Market Value shall be made by the Company or its agent based on their good faith calculations, and the Purchase Contract Agent shall have no responsibility with respect thereto.

Section 5.02 *Cash Settlement; Remarketing; Payment of Purchase Price.* (a) *Cash Settlement.* (i) Unless (1) a Termination Event has occurred, (2) a Holder effects an Early Settlement or a Cash Merger Early Settlement of the underlying Purchase Contract or (3) a Special Event Redemption has occurred prior to the seventh Business Day immediately preceding the Purchase Contract Settlement Date, each Holder of Corporate Units shall have the right to satisfy such Holder's Obligations on the Purchase Contract Settlement Date in cash. Each Holder of Corporate Units who intends to pay in cash to satisfy such Holder's Obligations under the Purchase Contract on the Purchase Contract Settlement Date shall notify the Purchase Contract Agent by use of a notice in substantially the form of Exhibit E hereto of his intention to pay in cash (a "**Cash Settlement**") the Purchase Price for the Common Stock to be purchased pursuant to the related Purchase Contract. Such notice shall be given prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date. Corporate Units Holders may only effect such a Cash Settlement pursuant to this Section 5.02(a) in integral multiples of 40 Corporate Units.

(ii) A Holder of a Corporate Unit who has so notified the Purchase Contract Agent of his intention to effect a Cash Settlement in accordance with Section 5.02(a)(i) above shall pay the Purchase Price to the Securities Intermediary for deposit in the Collateral Account prior to 5:00 p.m. (New York City time) on the sixth Business Day immediately preceding the Purchase Contract Settlement Date, in lawful money of the United States by certified or cashiers check or wire transfer in immediately available funds payable to or upon the order of the Securities Intermediary.

(iii) If a Holder of a Corporate Unit fails to notify the Purchase Contract Agent of its intention to make a Cash Settlement in accordance with Section 5.02(a)(i), or does notify the Purchase Contract Agent as provided in Section 5.02(a)(i) of its intention to pay the Purchase Price in cash, but fails to make such payment as required by Section 5.02(a)(ii), such Holder shall be deemed to have consented to the disposition of the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes pursuant to each Remarketing as described in Section 5.02(b) below.

(iv) Promptly after 5:00 p.m. (New York City time) on the sixth Business Day preceding the Purchase Contract Settlement Date, the Purchase Contract Agent, based on notices received by the Purchase Contract Agent pursuant to Section 5.02(a)(i) hereof and notice from the Securities Intermediary regarding cash received by it prior to such time, shall notify the Collateral Agent of the aggregate number of Subordinated Notes to be remarketed in each Remarketing in a notice substantially in the form of Exhibit K hereto.

(v) Upon (1) receipt by the Collateral Agent of a notice from the Purchase Contract Agent promptly after the receipt by the Purchase Contract Agent of a notice from a Holder of Corporate Units that such Holder has elected, in accordance with Section 5.02(a)(i) to effect a Cash Settlement and (2) the payment by such Holder of the Purchase Price in accordance with Section 5.02(a)(ii) above then the Collateral Agent shall:

(A) instruct the Securities Intermediary promptly to invest any such Cash in Permitted Investments consistent with the instructions of the Company as provided for below in this Section 5.02(a)(v);

(B) release from the Pledge the Subordinated Notes underlying the Applicable Ownership Interest in Subordinated Notes related to the Corporate Units as to which such Holder has effected a Cash Settlement; and

(C) instruct the Securities Intermediary to Transfer all such Subordinated Notes to the Purchase Contract Agent for distribution to such Holder, in each case free and clear of the Pledge created hereby, whereupon the Purchase Contract Agent shall Transfer such Subordinated Notes in accordance with written instructions provided by the Holder thereof or, if no such instructions are given to the Purchase Contract Agent by the Holder, the Purchase Contract Agent shall hold such Subordinated Notes, and any interest payment thereon, in the name of the Purchase Contract Agent or its nominee in trust for the benefit of such Holder until the expiration of the time period specified in the relevant abandoned property laws of the state where such Subordinated Notes and interest payments thereon, if any, are held.

The Company shall instruct the Collateral Agent in writing as to the type of Permitted Investments in which any such Cash shall be invested; *provided, however,* that if the Company fails to deliver such written instructions by 10:30 a.m. (New York City time) on the day such Cash is received by the Collateral Agent or to be reinvested by the Securities Intermediary, the Collateral Agent shall instruct the Securities Intermediary to invest such Cash in the Permitted Investments described in clause (6) of the definition of Permitted Investments. In no event shall the Collateral Agent or Securities Intermediary be liable for the selection of Permitted Investments or for investment losses incurred thereon. The Collateral Agent and Securities Intermediary shall have no liability in respect of losses incurred as a result of the failure of the Company to provide timely written investment direction.

Upon maturity of the Permitted Investments on the Purchase Contract Settlement Date, the Collateral Agent shall, and is hereby authorized to, (A) instruct the Securities Intermediary to remit to the Company on the Purchase Contract Settlement Date such portion of the proceeds of such Permitted Investments as is equal to the aggregate Purchase Price under all Purchase Contracts in respect of which Cash Settlement has been effected as provided in this Section 5.02 to the Company on the Purchase Contract Settlement Date, and (B) release any amounts in excess of such amount earned from such Permitted Investments to the Purchase Contract Agent for distribution to the Holders who have effected Cash Settlement pro-rata in proportion to the amount paid by such Holders under Section 5.02(a)(ii) above.

(b) *Remarketing.* (i) Unless a Special Event Redemption or a Termination Event has occurred prior to the Initial Remarketing Date, in order to dispose of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes of any Holders of Corporate Units who have not notified the Purchase Contract Agent of their intention to effect a Cash Settlement as provided in Section 5.02(a)(i) above, or who have so notified the Purchase Contract Agent but failed to make such payment as required by Section 5.02(a)(ii) above, the Company shall engage the Remarketing

Agent pursuant to the Remarketing Agreement to sell such Subordinated Notes. The Purchase Contract Agent, based on the notices specified pursuant to Section 5.02(a)(iv), shall notify the Remarketing Agent, promptly after 5:00 p.m. (New York City time) on the sixth Business Day immediately preceding the Purchase Contract Settlement Date, of the aggregate principal amount of Subordinated Notes attributable to the Pledged Applicable Ownership Interests in Subordinated Notes that are to be remarketed. Concurrently, the Custodial Agent, based on the notices specified in clause (ii) below of this Section 5.02(b), will present for Remarketing the Separate Subordinated Notes to the Remarketing Agent.

(ii) Prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date, but no earlier than the Payment Date immediately preceding such date, holders of Separate Subordinated Notes may elect to have their Separate Subordinated Notes remarketed in all Remarketings under the Remarketing Agreement by delivering their Separate Subordinated Notes, along with a notice of such election, substantially in the form of Exhibit L attached hereto, to the Custodial Agent. After such time, such election shall become an irrevocable election to have such Separate Subordinated Notes remarketed in all Remarketings. The Custodial Agent shall hold the Separate Subordinated Notes in an account separate from the Collateral Account in which the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes shall be held. Holders of Separate Subordinated Notes electing to have their Separate Subordinated Notes remarketed will also have the right to withdraw that election by written notice to the Custodial Agent, substantially in the form of Exhibit M hereto, on or prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date, and following such notice the Custodial Agent shall return such Separate Subordinated Notes to such holder.

(iii) Upon receipt of notice from the Purchase Contract Agent as set forth in Section 5.02(b)(i) above and receipt of the Separate Subordinated Notes (if any) from the Custodial Agent, the Remarketing Agent shall, on the Initial Remarketing Date, use reasonable efforts to remarket such Subordinated Notes and such Separate Subordinated Notes at a price (the “**Remarketing Price**”) equal to 100% of the aggregate principal amount of such Subordinated Notes and such Separate Subordinated Notes being remarketed, as provided in the Remarketing Agreement, for settlement on the Purchase Contract Settlement Date. If, in spite of using its reasonable efforts, the Remarketing Agent cannot remarket such Subordinated Notes and such Separate Subordinated Notes at the Remarketing Price (other than to the Company) for any reason, or the remarketing has not occurred because a condition precedent to the remarketing has not been fulfilled (in each case, a “**Failed Remarketing**”) on the Initial Remarketing Date, the Remarketing Agent shall, on the Second Remarketing Date, use its reasonable efforts to remarket such Subordinated Notes and such Separate Subordinated Notes at the Remarketing Price for settlement on the Purchase Contract Settlement Date. If, in spite of the Remarketing Agent’s reasonable efforts, a Failed Remarketing shall have occurred on the Second Remarketing Date, the Remarketing Agent shall, on the Final Remarketing Date, use reasonable efforts to remarket such Subordinated Notes and such Separate Subordinated Notes at the Remarketing Price for settlement on the Purchase Contract Settlement Date.

(iv) If the Remarketing Agent is able to remarket such Subordinated Notes and such Separate Subordinated Notes (if any) in any Remarketing (to parties other than the Company) in accordance with the Remarketing Agreement (a “**Successful Remarketing**”), the Collateral Agent shall:

(A) on the Purchase Contract Settlement Date, instruct the Securities Intermediary to Transfer the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes to the Remarketing Agent upon confirmation of deposit by the Remarketing Agent of the Proceeds of such Remarketing attributable to such Subordinated Notes in the Collateral Account; and

(B) on the Purchase Contract Settlement Date, in consultation with the Purchase Contract Agent, instruct the Securities Intermediary to remit a portion of such Proceeds equal to the aggregate principal amount of such Subordinated Notes to satisfy in full the Obligations of Holders of Corporate Units to pay the Purchase Price for the shares of Common Stock under the related Purchase Contracts, and to remit the balance of such Proceeds, if any, to the Purchase Contract Agent for distribution to Holders.

On the Purchase Contract Settlement Date, the Company shall pay the Remarketing Fee to the Remarketing Agent in accordance with the Remarketing Agreement. With respect to the remarketed Separate Subordinated Notes, upon a Successful Remarketing, any proceeds of the Successful Remarketing attributable to the Separate Subordinated Notes will be remitted to the Custodial Agent for payment on the Purchase Contract Settlement Date to the holders of Separate Subordinated Notes who submitted such Separate Subordinated Notes for remarketing pursuant hereto.

(v) Following a Failed Remarketing on the Final Remarketing Date (a “**Failed Final Remarketing**”), as of the Purchase Contract Settlement Date, each Holder of any Pledged Applicable Ownership Interests in Subordinated Notes, unless such Holder has delivered the Purchase Price to the Securities Intermediary for deposit in the Collateral Account prior to 5:00 p.m. (New York City time) on the second Business Day immediately preceding the Purchase Contract Settlement Date in lawful money of the United States by certified or cashiers check or wire transfer in immediately available funds payable to or upon the order of the Securities Intermediary, shall be deemed to have exercised such Holder’s Put Right with respect to the Subordinated Notes underlying such Pledged Applicable Ownership Interests in Subordinated Notes and to have elected to have the Proceeds of the Put Right set-off against such Holder’s obligation to pay the aggregate Purchase Price for the shares of Common Stock to be issued under the related Purchase Contracts in full satisfaction of such Holders’ obligations under such Purchase Contracts. Following such set-off, each such Holder’s obligations to pay the Purchase Price for the shares of Common Stock will be deemed to be satisfied in full, and the Collateral Agent shall cause the Securities Intermediary to release the Subordinated Notes underlying such Pledged Applicable Interests in Subordinated Notes from the Collateral Account and shall promptly transfer such Subordinated Notes to the Company.

(vi) Not later than 20 Business Days prior to the Initial Remarketing Date, the Company shall request the Depository or its nominee to notify the Beneficial Owners or Depository Participants holding Units and Separate Subordinated Notes of the procedures to be followed in each Remarketing including, in the case of a Failed Final Remarketing, the procedures that must be followed by a holder of Separate Subordinated Notes if such Holder wishes to exercise its Put Right or by a Holder if such Holder elects not to exercise its Put Right.

(vii) The Company agrees to use its commercially reasonable efforts to ensure that, if required by applicable law, (x) a registration statement, including a prospectus, under the Securities Act with regard to the full amount of the Subordinated Notes to be remarketed in each Remarketing in each case in a form that may be used by the Remarketing Agent in connection with such Remarketing shall be effective with the Securities and Exchange Commission and (y) to make available copies of such prospectus.

(viii) The Company shall issue a press release and cause a notice of any Failed Final Remarketing to be published on its website (with a copy of such notice to be provided to the Purchase Contract Agent) before 9:00 a.m. New York City time on the Business Day immediately following such Failed Final Remarketing. The press release to be issued under this subsection shall be published by making a timely release to an appropriate news agency such as Bloomberg Business News or the Dow Jones News Service.

(c) In the case of a Treasury Unit or a Corporate Unit (if Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of such Corporate Unit), upon the maturity of the Pledged Treasury Securities or the appropriate Pledged Applicable Ownership Interests in the Treasury Portfolio held by the Securities Intermediary on or prior to the Business Day immediately preceding the Purchase Contract Settlement Date, the principal amount of the Treasury Securities or the appropriate Pledged Applicable Ownership Interests in the Treasury Portfolio received by the Securities Intermediary shall be invested promptly in Permitted Investments. On the Purchase Contract Settlement Date, an amount equal to the Purchase Price for all related Purchase Contracts shall be remitted to the Company as payment of such Holder's Obligations under such Purchase Contracts without receiving any instructions from the Holder. In the event the sum of the Proceeds from either the related Pledged Treasury Securities or the related Pledged Applicable Ownership Interests in the Treasury Portfolio and the Proceeds from such Permitted Investments is in excess of the aggregate Purchase Price, the Collateral Agent shall cause the Securities Intermediary to distribute such excess, when received by the Securities Intermediary, to the Purchase Contract Agent for the benefit of the Holder of the related Treasury Units or Corporate Units, as applicable.

(d) The obligations of the Holders to pay the Purchase Price are non-recourse obligations and, except to the extent satisfied by Early Settlement, Cash Merger Early Settlement or Cash Settlement or terminated upon a Termination Event, are payable solely out of the proceeds of any Collateral pledged to secure the obligations of the Holders, and in no event will Holders be liable for any deficiency between the proceeds of the disposition of Collateral and the Purchase Price.

(e) The Company shall not be obligated to issue any shares of Common Stock in respect of a Purchase Contract or deliver any certificates thereof to the Holder of the related Units unless the Company shall have received payment for the Common Stock to be purchased thereunder in the manner herein set forth.

Section 5.03 *Issuance of Shares of Common Stock*. Unless a Termination Event, an Early Settlement or a Cash Merger Early Settlement shall have occurred, subject to Section 5.04(b), on the Purchase Contract Settlement Date upon receipt of the aggregate Purchase Price payable on all Outstanding Units in accordance with Section 5.02 above, the Company shall issue and deposit with the

Purchase Contract Agent, for the benefit of the Holders of the Outstanding Units, one or more certificates representing newly issued shares of Common Stock registered in the name of the Purchase Contract Agent (or its nominee) as custodian for the Holders (such certificates for shares of Common Stock, together with any dividends or distributions for which a record date and payment date for such dividend or distribution has occurred after the Purchase Contract Settlement Date, being hereinafter referred to as the “**Purchase Contract Settlement Fund**”) to which the Holders are entitled hereunder.

Subject to the foregoing, upon surrender of a Certificate to the Purchase Contract Agent on or after the Purchase Contract Settlement Date, Early Settlement Date or Cash Merger Early Settlement Date, as the case may be, together with settlement instructions thereon duly completed and executed, the Holder of such Certificate shall be entitled to receive forthwith in exchange therefor a certificate representing that number of newly issued whole shares of Common Stock which such Holder is entitled to receive pursuant to the provisions of this Article 5 (after taking into account all Units then held by such Holder), together with cash in lieu of fractional shares as provided in Section 5.08 and any dividends or distributions with respect to such shares constituting part of the Purchase Contract Settlement Fund, but without any interest thereon, and the Certificate so surrendered shall forthwith be cancelled. Such shares shall be registered in the name of the Holder or the Holder’s designee as specified in the settlement instructions provided by the Holder to the Purchase Contract Agent. If any shares of Common Stock issued in respect of a Purchase Contract are to be registered in the name of a Person other than the Person in whose name the Certificate evidencing such Purchase Contract is registered (but excluding any Depositary or nominee thereof), no such registration shall be made unless and until the Person requesting such registration has paid any transfer and other taxes (including any applicable stamp taxes) required by reason of such registration in a name other than that of the registered Holder of the Certificate evidencing such Purchase Contract or has established to the satisfaction of the Company that such tax either has been paid or is not payable.

Section 5.04 *Adjustment of each Fixed Settlement Rate.* (a) Adjustments for Dividends, Distributions, Stock Splits, Etc.

(i) In case the Company shall pay or make a dividend or other distribution on Common Stock in Common Stock, each Fixed Settlement Rate in effect at the close of business on the date fixed for the determination of shareholders entitled to receive such dividend or other distribution shall be increased by multiplying each Fixed Settlement Rate by a fraction of which:

(A) the numerator shall be the sum of the number of shares of Common Stock outstanding at the close of business on the date fixed for such determination and the total number of shares constituting such dividend or other distribution; and

(B) the denominator shall be the number of shares of Common Stock outstanding at the close of business on the date fixed for such determination,

such increase in each Fixed Settlement Rate to become effective immediately at the opening of business on the Business Day following the date fixed for such determination. For the purposes of this paragraph (i), the number of shares of Common Stock at any time outstanding shall not include shares held in the treasury of the Company but shall include any shares issuable in respect of any scrip certificates issued in lieu of fractions of shares of Common Stock. The Company agrees that it shall not pay any dividend or make any distribution on shares of Common Stock held in the treasury of the Company.

(ii) In case the Company shall issue rights, warrants or options, other than pursuant to any dividend reinvestment plans or share purchase plans, to all holders of its Common Stock entitling them, for a period expiring within 45 days after the record date for the determination of shareholders entitled to receive such rights, warrants or options, to subscribe for or purchase shares of Common Stock at a price per share less than the Current Market Price per share of Common Stock on the date of announcement of such issuance, each Fixed Settlement Rate in effect at the close of business on the date of such announcement shall be increased by multiplying such Fixed Settlement Rate by a fraction of which:

(A) the numerator shall be the number of shares of Common Stock outstanding at the close of business on the date of such announcement *plus* the number of shares of Common Stock so offered for subscription or purchase; and

(B) the denominator shall be the number of shares of Common Stock outstanding at the close of business on the date of such announcement *plus* the number of shares of Common Stock that the aggregate offering price of the total number of shares of Common Stock so offered for subscription or purchase in the manner described in this Section 5.04(a)(ii) would purchase at the Current Market Price on the date of such announcement,

such increase in each Fixed Settlement Rate to become effective immediately after the opening of business on the Business Day following the date of such announcement. The Company agrees that it shall notify the Purchase Contract Agent if any issuance of such rights, warrants or options is cancelled or not completed following the announcement thereof and each Fixed Settlement Rate shall thereupon immediately be readjusted to the Fixed Settlement Rate that would then be in effect if such issuance had not been declared. For the purposes of this clause (ii), the number of shares of Common Stock at any time outstanding shall not include shares held in the treasury of the Company but shall include any shares issuable in respect of any scrip certificates issued in lieu of fractions of shares of Common Stock. The Company agrees that it shall not issue any such rights, warrants or options in respect of shares of Common Stock held in the treasury of the Company.

(iii) In case outstanding shares of Common Stock shall be subdivided or split into a greater number of shares of Common Stock, each Fixed Settlement Rate in effect at the close of business on the day preceding the day upon which such subdivision or split becomes effective shall be proportionately increased, and, conversely, in case outstanding shares of Common Stock shall each be combined into a smaller number of shares of Common Stock, each Fixed Settlement Rate in effect at the close of business on the day preceding the day upon which such combination becomes effective shall be proportionately decreased, such increase or decrease, as the case may be, to become effective immediately at the opening of business on the Business Day following the day upon which such subdivision, split or combination becomes effective.

(iv) (w) In case the Company shall, by dividend or otherwise, distribute to all holders of its Common Stock evidences of its indebtedness or assets (including shares of capital stock, securities, cash and property but excluding any rights, warrants or options referred to in Section 5.04(a)(ii) above, any dividend or distribution paid exclusively in cash and any dividend or distribution referred to in Section 5.04(a)(i)

above) (any of the foregoing hereinafter in this Section 5.04(a)(iv) called the “**Distributed Property**”), each Fixed Settlement Rate in effect at the close of business on the date fixed for the determination of shareholders entitled to receive such distribution shall be adjusted by multiplying each Fixed Settlement Rate by a fraction of which:

(A) the numerator shall be such Current Market Price per share of Common Stock; and

(B) the denominator shall be the Current Market Price per share of Common Stock on the date fixed for such determination less the then fair market value of the portion of the assets or evidences of indebtedness so distributed applicable to one share of Common Stock (as determined by the Board of Directors, whose determination shall be conclusive and the basis for which shall be described in a Board Resolution),

such adjustment to each Fixed Settlement Rate to become effective at the opening of business on the Business Day following the date fixed for the determination of shareholders entitled to receive such distribution; *provided* that if the fair market value of the Distributed Property applicable to one share of Common Stock is equal to or greater than the Current Market Price on the date fixed for the determination of stockholders entitled to receive such distribution, in lieu of the foregoing adjustment, adequate provision shall be made so that each Holder shall have the right to receive upon settlement the amount of Distributed Property such Holder would have received had such Holder settled each Purchase Contract on the date fixed for such determination as if the Purchase Contract Settlement Date were such date fixed for such determination. In any case in which this Section 5.04(a)(iv) is applicable, Section 5.04(a)(ii) shall not be applicable. In the event that such dividend or distribution is not so paid or made, each Fixed Settlement Rate shall again be adjusted to be the Fixed Settlement Rate that would then be in effect if such dividend or distribution had not been declared.

(x) Notwithstanding the foregoing, if the Distributed Property distributed by the Company to all holders of its Common Stock consist of capital stock of, or similar equity interests in, a Subsidiary or other business unit of the Company, clause (w) above shall not apply and instead each Fixed Settlement Rate shall be increased so that each Fixed Settlement Rate shall be equal to the rate determined by multiplying each such rate in effect immediately prior to the close of business on the record date with respect to such distribution by a fraction of which,

(C) the numerator shall be the sum of (A) the average of the Closing Prices of the Common Stock for the ten (10) consecutive Trading Days commencing on and including the fifth Trading Day after the date on which “ex-dividend trading” commences for such dividend or distribution on the New York Stock Exchange, the Nasdaq National Market or such other national or regional exchange or market on which such securities are then listed or quoted (the “**Ex-Dividend Date**”) *plus* (B) the average Closing Prices of the securities distributed in respect of each share of Common Stock for the ten (10) consecutive Trading Days commencing on and including the fifth Trading Day after the Ex-Dividend Date; and

(D) the denominator shall be the average of the Closing Prices of the Common Stock for the ten (10) consecutive Trading Days commencing on and including the fifth Trading Day after the Ex-Dividend Date,

such adjustment to each Fixed Settlement Rate to become effective immediately prior to the opening of business on the Business Day following the record date with respect to such distribution. In any case in which this paragraph (x) is applicable, Section 5.02(a)(i), Section 5.02(a)(ii) and paragraph (w) of this Section 5.04(a)(iv) shall not be applicable.

(y) Notwithstanding anything to the contrary contained in this Section 5.04(a), rights or warrants distributed by the Company to all holders of Common Stock entitling the holders thereof to subscribe for or purchase shares of the Company's capital stock (either initially or under certain circumstances), which rights, options or warrants, until the occurrence of a specified event or events ("**Trigger Event**") (i) are deemed to be transferred with such shares of Common Stock; (ii) are not exercisable; and (iii) are also issued in respect of future issuances of Common Stock, shall be deemed not to have been distributed for purposes of this Section 5.04(a) (and no adjustment to each Fixed Settlement Rate under this Section 5.04(a) will be required) until the occurrence of the earliest Trigger Event, whereupon such rights, options and warrants shall be deemed to have been distributed and an appropriate adjustment (if any is required) to each Fixed Settlement Rate shall be made under this Section 5.04(a)(iv). In addition, in the event of any distribution of rights, options or warrants, or any Trigger Event with respect thereto that was counted for purposes of calculating a distribution amount for which an adjustment to each Fixed Settlement Rate under this Section 5.04(a) was made, (1) in the case of any such rights, options or warrants that shall all have been redeemed or repurchased without exercise by any holders thereof, each Fixed Settlement Rate shall be readjusted upon such final redemption or repurchase to give effect to such distribution or Trigger Event, as the case may be, as though it were a cash distribution, equal to the per share redemption or repurchase price received by a holder or holders of Common Stock with respect to such rights, options or warrants (assuming such holder had retained such rights, options or warrants), made to all holders of Common Stock as of the date of such redemption or repurchase, and (2) in the case of such rights, options or warrants that shall have expired or been terminated without exercise by any holders thereof, each Fixed Settlement Rate shall be readjusted as if such rights, options and warrants had not been issued.

(z) For purposes of this Section 5.04(a)(iv) and Section 5.02(a)(i) and Section 5.04(a)(ii), any dividend or distribution to which this Section 5.04(a)(iv) is applicable that also includes shares of Common Stock, or rights, options or warrants to subscribe for or purchase shares of Common Stock (or both), shall be deemed instead to be (1) a dividend or distribution of the evidences of indebtedness, assets or shares of capital stock other than such shares of Common Stock or rights, options or warrants (and any Settlement Rate adjustment required by this Section 5.04(a)(iv) with respect to such dividend or distribution shall then be made) immediately followed by (2) a dividend or distribution of such shares of Common Stock or such rights, options or warrants (and any further Settlement Rate adjustment required by Section 5.04(a)(i) and Section 5.04(a)(ii) with respect to such dividend or distribution shall then be made), except (A) the record date of such dividend or distribution shall be deemed to be "the date fixed for the determination of shareholders entitled to receive such dividend or other distribution", "the date fixed for the determination of shareholders entitled to receive such rights, options or warrants" and "the date fixed for such determination" within the meaning of Section 5.04(a)(i) and Section 5.04(a)(ii) and (B) any shares of Common Stock included in such dividend or distribution shall not be deemed "outstanding at the close of business on the date fixed for the determination of shareholders entitled to receive such dividend or other distribution" or "outstanding at the close of business on the date fixed for such determination" within the meaning of Section 5.04(a)(i).

(v) In case the Company shall make any dividend or distribution consisting exclusively of cash to all holders of outstanding shares of Common Stock

(excluding any dividend or distribution in connection with the liquidation, dissolution or termination of the Company), then each Fixed Settlement Rate will be adjusted by multiplying each Fixed Settlement Rate in effect immediately prior to the close of business on the record date with respect to such dividend or distribution by a fraction of which,

(A) the numerator is the Current Market Price on the date fixed for the determination of stockholders entitled to receive such distribution; and

(B) the denominator is such Current Market Price, *minus* the amount per share of such dividend or distribution,

such adjustment to each Fixed Settlement Rate to be effective immediately prior to the opening of business on the Business Day following the date fixed for the determination of stockholders entitled to receive such distribution; and *provided further* that if the portion of the cash so distributed applicable to one share of Common Stock is equal to or greater than the Current Market Price on the date fixed for the determination of stockholders entitled to receive such distribution, in lieu of the foregoing adjustment, adequate provision shall be made so that each Holder shall have the right to receive upon settlement the amount of cash such Holder would have received had such Holder settled each Purchase Contract on the date fixed for such determination as if the Purchase Contract Settlement Date were such date fixed for such determination.

(vi) In case a tender or exchange offer made by the Company or any subsidiary of the Company for all or any portion of the Common Stock shall expire and such tender or exchange offer (as amended upon the expiration thereof) shall require the payment to stockholders of consideration per share of Common Stock having a fair market value (as determined by the Board of Directors, whose determination shall be conclusive and described in a resolution of the Board of Directors) that as of the last time at which tenders or exchanges may be made pursuant to such tender or exchange offer (as it may be amended) (the “**Expiration Time**”) exceeds the Closing Price of a share of Common Stock on the Trading Day next succeeding the Expiration Time, each Fixed Settlement Rate shall be increased so that the same shall equal the rate determined by multiplying each Fixed Settlement Rate in effect immediately prior to the Expiration Time by a fraction of which,

(A) the numerator shall be equal to the sum of (1) the fair market value, as determined by the Board of Directors (as described above in this Section 5.04(a)(vi)), of the aggregate consideration payable for all shares of Common Stock that the Company or a subsidiary of the Company, as the case may be, purchased in such tender or exchange offer (the “**Purchased Shares**”) and (2) the product of the number of shares of Common Stock outstanding, less any Purchased Shares, and the Closing Price of the Common Stock on the Trading Day next succeeding the Expiration Time, and

(B) the denominator shall be equal to the product of the number of shares of Common Stock outstanding, including the Purchased Shares, and the Closing Price of the Common Stock on the Trading Day next succeeding the Expiration Time,

such adjustment to each Fixed Settlement Rate to become effective immediately prior to the opening of business on the Business Day following the Expiration Time. If the Company is obligated to purchase shares pursuant to any such tender or exchange offer, but the Company is permanently prevented by applicable law from effecting any such purchases or all such purchases are rescinded, each Fixed Settlement Rate shall again be adjusted to be the Fixed Settlement Rate that would then be in effect if such tender or exchange offer had not been made.

(vii) The reclassification of Common Stock into securities including securities other than Common Stock (other than any reclassification upon a Reorganization Event to which Section 5.04(b) applies) shall be deemed to involve:

(A) a distribution of such securities other than Common Stock to all holders of Common Stock (and the effective date of such reclassification shall be deemed to be “the date fixed for the determination of shareholders entitled to receive such distribution” and the “date fixed for such determination” within the meaning of paragraph (iv) of this Section); and

(B) a subdivision, split or combination, as the case may be, of the number of shares of Common Stock outstanding immediately prior to such reclassification into the number of shares of Common Stock outstanding immediately thereafter (and the effective date of such reclassification shall be deemed to be “the day upon which such subdivision or split becomes effective” or “the day upon which such combination becomes effective”, as the case may be, and “the day upon which such subdivision, split or combination becomes effective” within the meaning of this Section 5.04(a)(iii).

(viii) [Reserved.]

(ix) All adjustments to each Fixed Settlement Rate shall be calculated to the nearest 1/10,000th of a share of Common Stock (or if there is not a nearest 1/10,000th of a share, to the next lower 1/10,000th of a share). If any adjustments are made to each Fixed Settlement Rate pursuant to this Section 5.04(a), an adjustment shall also be made to the Applicable Market Value solely to determine which of clauses (i), (ii) or (iii) of the definition of Settlement Rate in Section 5.01(a) will apply on the Purchase Contract Settlement Date or any Cash Merger Early Settlement Date. Such adjustment shall be made by multiplying the Applicable Market Value by the Adjustment Factor. The “Adjustment Factor” means, initially, a fraction the numerator of which shall be the Maximum Settlement Rate immediately after the first adjustment to each Fixed Settlement Rate pursuant to this Section 5.04(a) and the denominator of which shall be the Maximum Settlement Rate immediately prior to such adjustment. Each time an adjustment is required to be made to each Fixed Settlement Rate pursuant to this Section 5.04(a), the Adjustment Factor shall be multiplied by a fraction the numerator of which shall be the Maximum Settlement Rate immediately after such adjustment to each Fixed Settlement Rate pursuant to this Section 5.04(a) and the denominator of which shall be

the Maximum Settlement Rate immediately prior to such adjustment. Notwithstanding the foregoing, if any adjustment to each Fixed Settlement Rate is required to be made pursuant to the occurrence of any of the events contemplated by this Section 5.04(a) during the period taken into consideration for determining the Applicable Market Value, the 20 individual Closing Prices used to determine the Applicable Market Value shall be adjusted rather than the Applicable Market Value and the Applicable Market Value shall be determined by (A) multiplying the Closing Prices for Trading Days prior to such adjustment to each Fixed Settlement Rate by the Adjustment Factor in effect prior to such adjustment, (B) multiplying the Closing Prices for Trading Days following such adjustment by the Adjustment Factor reflecting such adjustment, and (C) dividing the sum of all such adjusted Closing Prices by 20.

(x) The Company may, but shall not be required to, make such increases in each Fixed Settlement Rate, in addition to those required by this Section 5.04(a), as the Board of Directors considers to be advisable. The Company may make such a discretionary adjustment only if it makes the same proportionate adjustment to each Fixed Settlement Rate.

(xi) With respect to any existing or future stockholder rights plan of the Company involving the issuance of preference share purchase rights or other similar rights (the “**Rights**”) to all holders of the Common Stock, a Holder shall be entitled to receive upon settlement of any Purchase Contract, in addition to the shares of Common Stock issuable upon settlement of such Purchase Contract, the related Rights for the Common Stock, unless such Rights under the future stockholder rights plan have separated from the Common Stock at the time of conversion, in which case each Fixed Settlement Rate shall be adjusted as provided in Section 5.04(a)(iv) on the date such Rights separate from the Common Stock.

(b) Adjustment for Consolidation, Merger or Other Reorganization Event.

(i) In the event of:

(A) any consolidation or merger of the Company with or into another Person (other than a merger or consolidation in which the Company is the continuing corporation and in which the shares of Common Stock outstanding immediately prior to the merger or consolidation are not exchanged for cash, securities or other property of the Company or another corporation);

(B) any sale, transfer, lease or conveyance to another Person of the property of the Company as an entirety or substantially as an entirety;

(C) any statutory share exchange of the Company with another Person (other than in connection with a merger or acquisition); or

(D) any liquidation, dissolution or termination of the Company other than as a result of or after the occurrence of a Termination Event (any event described in clauses (A), (B), (C) and (D), a “**Reorganization Event**”),

each Holder will receive, in lieu of shares of Common Stock, on the Purchase Contract Settlement Date or any Early Settlement Date with respect to each Purchase Contract forming a part thereof, the kind and amount of securities, cash and other property receivable upon such Reorganization Event (without any interest thereon, and without any right to dividends or distribution thereon if such dividends or distributions have a record date that is prior to the Purchase Contract Settlement Date) by a Holder of one share of Common Stock (the “**Exchange Property**”), multiplied by the applicable Settlement Rate. The kind and amount of Exchange Property will be determined assuming such holder of one Share of Common Stock is not a Person with which the Company consolidated or into which the Company merged or which merged into the Company or to which such sale or transfer was made, as the case may be (any such Person, a “**Constituent Person**”), or an Affiliate of a Constituent Person to the extent such Reorganization Event provides for different treatment of Common Stock held by Affiliates of the Company and non-affiliates and such Holder failed to exercise its rights of election, if any, as to the kind or amount of securities, cash and other property receivable upon such Reorganization Event (*provided* that if the kind or amount of securities, cash and other property receivable upon such Reorganization Event is not the same for each share of Common Stock held immediately prior to such Reorganization Event by a Person other than a Constituent Person or an Affiliate thereof and in respect of which rights of election shall not have been exercised (“**non-electing share**”), then for the purpose of this Section 5.04(b)(i) the kind and amount of securities, cash and other property receivable upon such Reorganization Event shall be deemed to be the kind and amount so receivable per share by a plurality of the non-electing shares).

For purposes of determining the applicable Settlement Rate under this Section 5.04(b)(i) and Section 5.04(b)(ii), the term “Applicable Market Value” shall be deemed to refer to the “Applicable Market Value” of the Exchange Property, and such value shall be determined (A) with respect to any publicly traded securities that compose all or part of the Exchange Property, based on the Closing Price of such securities, (B) in the case of any cash that composes all or part of the Exchange Property, based on the amount of such cash and (C) in the case of any other property that composes all or part of the Exchange Property, based on the value of such property, as determined by a nationally recognized independent investment banking firm retained by the Company for this purpose; *provided* that prior to the separation of the Rights or any similar stockholder rights from the Common Stock, such Rights or similar stockholder rights shall be deemed to have no value. For the purposes of this paragraph only, the term “Closing Price” shall be deemed to refer to the closing sale price, last quoted bid price or mid-point of the last bid and ask prices, as the case may be, of any publicly traded securities that comprise all or part of the Exchange Property and the term “Trading Day” shall be deemed to refer to any publicly traded securities that comprise all or part of the Exchange Property.

In the event of such a Reorganization Event, the Person formed by such consolidation, merger or exchange or the Person that acquires the assets of the Company or, in the event of a liquidation, dissolution or termination of the Company, the Company or a liquidating trust created in connection therewith, shall execute and deliver to the Purchase Contract Agent an agreement supplemental hereto providing that each Holder of an Outstanding Unit shall have the rights provided by this Section 5.04(b)(i). Such supplemental agreement shall provide for adjustments which, for events subsequent to the effective date of such supplemental agreement, shall be, in the sole judgment of the parties executing such agreement, as nearly equivalent as may be practicable to the adjustments provided for in this Section 5.04. The above provisions of this Section 5.04 shall similarly apply to successive Reorganization Events.

(ii) In the event, prior to the Purchase Contract Settlement Date, of a consolidation or merger of the Company with or into another Person, any merger of

another Person into the Company (other than a merger that does not result in any reclassification, conversion, exchange or cancellation of outstanding shares of Common Stock), or the sale by the Company of all or substantially all of its assets, in each case in which 30% or more of the total consideration paid to the Company's shareholders consists of cash or cash equivalents (a "**Cash Merger**"), then a Holder of a Unit may settle ("**Cash Merger Early Settlement**") its Purchase Contract, upon the conditions set forth below, at the Settlement Rate in effect immediately prior to the closing of the Cash Merger; *provided* that no Cash Merger Early Settlement will be permitted pursuant to this Section 5.04(b)(ii) unless, at the time such Cash Merger Early Settlement is effected, there is an effective Registration Statement with respect to any securities to be issued and delivered in connection with such Cash Merger Early Settlement, if such a Registration Statement is required (in the view of counsel, which need not be in the form of a written opinion, for the Company) under the Securities Act. If such a Registration Statement is so required, the Company covenants and agrees to use its commercially reasonable efforts to (x) have in effect a Registration Statement covering any securities to be delivered in respect of the Purchase Contracts being settled and (y) provide a Prospectus in connection therewith, in each case in a form that may be used in connection with such Cash Merger Early Settlement. The Company shall pay such amount as a credit against the amount otherwise payable by such Holder to effect such Cash Merger Early Settlement.

Within five Business Days of the completion of a Cash Merger, the Company shall provide written notice to Holders of such completion of a Cash Merger, which shall specify the deadline for submitting the notice to settle early in cash pursuant to this Section 5.04(b)(ii), the date on which such Cash Merger Early Settlement shall occur (which date shall be at least five days after the date of such written notice by the Company, but which shall in no event be later than the earlier of 20 days after the date of such written notice by the Company and the fifth Business Day immediately preceding the Purchase Contract Settlement Date) (the "**Cash Merger Early Settlement Date**"), the applicable Settlement Rate and the amount (per share of Common Stock) of cash, securities and other consideration receivable by the Holder upon settlement.

Corporate Units Holders (unless Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units) and Treasury Units Holders may only effect Cash Merger Early Settlement pursuant to this Section 5.04(b)(ii) in integral multiples of 40 Corporate Units or Treasury Units, as the case may be. If Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, Corporate Units Holders may only effect Cash Merger Early Settlement pursuant to this Section 5.04(b)(ii) in multiples of 128,000 Corporate Units. Other than the provisions relating to timing of notice and settlement, which shall be as set forth in the immediately preceding paragraph, the provisions of Section 5.01 shall apply with respect to a Cash Merger Early Settlement pursuant to this Section 5.04(b)(ii).

In order to exercise the right to effect Cash Merger Early Settlement with respect to any Purchase Contracts, the Holder of the Certificate evidencing Units shall deliver, no later than 5:00 p.m. (New York City time) on the third Business Day immediately preceding the Cash Merger Early Settlement Date, such Certificate to the Purchase Contract Agent at the Corporate Trust Office duly endorsed for transfer to the Company or in blank with the form of Election to Settle Early on the reverse thereof duly completed and accompanied by payment (payable to the Company in immediately available funds) in an amount equal to the product of (A) the Stated Amount times (B) the number of Purchase Contracts with respect to which the Holder has elected to effect Cash Merger Early Settlement

Upon receipt of such Certificate and payment of such funds, the Purchase Contract Agent shall pay the Company from such funds the related Purchase Price pursuant to the terms of the related Purchase Contracts, and notify the Collateral Agent that all the conditions necessary for a Cash Merger Early Settlement by a Holder have been satisfied pursuant to which the Purchase Contract Agent has received from such Holder, and paid to the Company as confirmed in writing by the Company, the related Purchase Price.

Upon receipt by the Collateral Agent of the notice from the Purchase Contract Agent set forth in the immediately preceding paragraph, the Collateral Agent shall release from the Pledge, (1) the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes or the Pledged Applicable Ownership Interests in the Treasury Portfolio, in the case of a Holder of Corporate Units or (2) the Pledged Treasury Securities, in the case of a Holder of Treasury Units, in each case with a Value equal to the product of (x) the Stated Amount and (y) the number of Purchase Contracts as to which such Holder has elected to effect Cash Merger Early Settlement, and shall instruct the Securities Intermediary to Transfer all such Pledged Applicable Ownership Interests in the Treasury Portfolio or Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes or Pledged Treasury Securities, as the case may be, to the Purchase Contract Agent for distribution to such Holder, in each case free and clear of the Pledge created hereby.

If a Holder properly effects an effective Cash Merger Early Settlement in accordance with the provisions of this Section 5.04(b)(ii), the Company will deliver (or will cause the Collateral Agent to deliver) to the Holder on the Cash Merger Early Settlement Date:

(A) the kind and amount of securities, cash and other property receivable upon such Cash Merger by a Holder of the number of shares of Common Stock issuable on account of each Purchase Contract if the Purchase Contract Settlement Date had occurred immediately prior to such Cash Merger (based on the Settlement Rate in effect at such time), assuming such Holder of Common Stock is not a Constituent Person or an Affiliate of a Constituent Person to the extent such Cash Merger provides for different treatment of Common Stock held by Affiliates of the Company and non-affiliates and such Holder failed to exercise its rights of election, if any, as to the kind or amount of securities, cash and other property receivable upon such Cash Merger (*provided* that if the kind or amount of securities, cash and other property receivable upon such Cash Merger is not the same for each non-electing share, then for the purpose of this Section 5.04(b)(ii), the kind and amount of securities, cash and other property receivable upon such Cash Merger by each non-electing share shall be deemed to be the kind and amount so receivable per share by a plurality of the non-electing shares). For the avoidance of doubt, for the purposes of determining the Applicable Market Value (in connection with determining the appropriate Settlement Rate to be applied in the foregoing sentence), the date of the closing of the Cash Merger shall be deemed to be the Purchase Contract Settlement Date;

(B) the Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or

Treasury Securities, as the case may be, related to the Purchase Contracts with respect to which the Holder is effecting a Cash Merger Early Settlement; and

(C) if so required under the Securities Act, a Prospectus as contemplated by this Section 5.04(b)(ii).

The Corporate Units or the Treasury Units of the Holders who do not elect Cash Merger Early Settlement in accordance with the foregoing will continue to remain outstanding and be subject to settlement on the Purchase Contract Settlement Date in accordance with the terms hereof.

(c) All calculations and determinations pursuant to this Section 5.04 shall be made by the Company or its agent and the Purchase Contract Agent shall have no responsibility with respect to this Agreement.

Section 5.05 *Notice of Adjustments and Certain Other Events.* (a) Whenever the Fixed Settlement Rates are adjusted as herein provided, the Company shall within 10 Business Days following the occurrence of an event that requires an adjustment to each Fixed Settlement Rate pursuant to Section 5.04 (or if the Company is not aware of such occurrence, as soon as practicable after becoming so aware):

(i) compute each adjusted Fixed Settlement Rate in accordance with Section 5.04 and prepare and transmit to the Purchase Contract Agent an Officers' Certificate setting forth each Fixed Settlement Rate, the method of calculation thereof in reasonable detail, and the facts requiring such adjustment and upon which such adjustment is based; and

(ii) provide a written notice to the Holders of the Units of the occurrence of such event and a statement in reasonable detail setting forth the method by which the adjustment to each Fixed Settlement Rate was determined and setting forth each adjusted Fixed Settlement Rate.

(b) The Purchase Contract Agent shall not at any time be under any duty or responsibility to any Holder to determine whether any facts exist which may require any adjustment of each Fixed Settlement Rate, or with respect to the nature or extent or calculation of any such adjustment when made, or with respect to the method employed in making the same. The Purchase Contract Agent shall be fully authorized and protected in relying on any Officers' Certificate delivered pursuant to Section 5.05(a)(i) and any adjustment contained therein and the Purchase Contract Agent shall not be deemed to have knowledge of any adjustment unless and until it has received such certificate. The Purchase Contract Agent shall not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock, or of any securities or property, which may at the time be issued or delivered with respect to any Purchase Contract; and the Purchase Contract Agent makes no representation with respect thereto. The Purchase Contract Agent shall not be responsible for any failure of the Company to issue, transfer or deliver any shares of Common Stock pursuant to a Purchase Contract or to comply with any of the duties, responsibilities or covenants of the Company contained in this Article 5.

Section 5.06 *Termination Event; Notice.*

The Purchase Contracts and all obligations and rights of the Company and the Holders thereunder and the rights and obligations of Holders to purchase Common Stock, shall immediately and automatically terminate, without the necessity of any notice or action by any Holder, the Purchase Contract Agent or the Company, if, prior to or on the Purchase Contract Settlement Date, a Termination Event shall have occurred.

Upon and after the occurrence of a Termination Event, the Units shall thereafter represent the right to receive the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes, the Treasury Securities or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, forming part of such Units, in accordance with the provisions of Section 3.15 hereof. Upon the occurrence of a Termination Event, the Company shall promptly but in no event later than two Business Days thereafter give written notice to the Purchase Contract Agent, the Collateral Agent and the Holders, at their addresses as they appear in the Security Register.

Section 5.07 *Early Settlement*. (a) Subject to and upon compliance with the provisions of this Section 5.07, at the option of the Holder thereof, Purchase Contracts underlying Units may be settled early (“**Early Settlement**”) at any time prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date (in the case of Corporate Units, unless a Special Event Redemption has occurred) or the second Business Day immediately preceding the Purchase Contract Settlement Date (in the case of Treasury Units or Corporate Units after the occurrence of a Special Event Redemption); *provided* that no Early Settlement will be permitted pursuant to this Section 5.07 unless, at the time such Early Settlement is effected, there is an effective Registration Statement with respect to any securities to be issued and delivered in connection with such Early Settlement, if such a Registration Statement is required (in the view of counsel, which need not be in the form of a written opinion, for the Company) under the Securities Act. If such a Registration Statement is so required, the Company covenants and agrees to use its commercially reasonable efforts to (i) have in effect a Registration Statement covering any securities to be delivered in respect of the Purchase Contracts being settled and (ii) provide a Prospectus in connection therewith, in each case in a form that may be used in connection with such Early Settlement (it being understood that if there is a material business transaction or development that has not yet been publicly disclosed, the Company will not be required to provide such a Prospectus, and the right to effect Early Settlement will not be available, until the Company has publicly disclosed such transaction or development, provided that the Company will use its commercially reasonable efforts to make such disclosure as soon as it is commercially reasonable to do so).

(b) In order to exercise the right to effect Early Settlement with respect to any Purchase Contracts, the Holder of the Certificate evidencing Units (in the case of Certificates in definitive certificated form) shall deliver, at any time prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date (in the case of Corporate Units, unless a Special Event Redemption has occurred) or the second Business Day immediately preceding the Purchase Contract Settlement Date (in the case of Treasury Units or Corporate Units after the occurrence of a Special Event Redemption), such Certificate to the Purchase Contract Agent at the Corporate Trust Office duly endorsed for transfer to the Company or in blank with the form of Election to Settle Early on the reverse thereof duly completed and accompanied by payment (payable to the Company in immediately available funds) in an amount (the “**Early Settlement Amount**”) equal to the product of (A) the Stated Amount and (B) the number of Purchase Contracts with respect to which the Holder has elected to effect Early Settlement

In the case of Book-Entry Interests, each Beneficial Owner electing Early Settlement must deliver the Early Settlement Amount to the Purchase Contract Agent along with a facsimile of the Election to Settle Early form duly completed, make book-entry transfer of such Book-Entry Interests and comply with the applicable procedures of the Depository.

If the foregoing requirements are first satisfied with respect to Purchase Contracts underlying any Units at or prior to 5:00 p.m. (New York City time) on a Business Day, such day shall be the “**Early Settlement Date**” with respect to such Units and if such requirements are first satisfied after 5:00 p.m. (New York City time) on a Business Day or on a day that is not a Business Day, the Early Settlement Date with respect to such Units shall be the next succeeding Business Day.

Upon the receipt of such Certificate and Early Settlement Amount from the Holder, the Purchase Contract Agent shall pay to the Company such Early Settlement Amount, the receipt of which payment the Company shall confirm in writing. The Purchase Contract Agent shall then notify the Collateral Agent that (A) such Holder has elected to effect an Early Settlement, which notice shall set forth the number of such Purchase Contracts as to which such Holder has elected to effect Early Settlement, (B) the Purchase Contract Agent has received from such Holder, and paid to the Company as confirmed in writing by the Company, the related Early Settlement Amount and (C) all conditions to such Early Settlement have been satisfied.

Upon receipt by the Collateral Agent of the notice from the Purchase Contract Agent set forth in the preceding paragraph, the Collateral Agent shall release from the Pledge, (1) in the case of a Holder of Corporate Units, the Subordinated Notes underlying the Pledged Applicable Ownership Interest in Subordinated Notes, or the Pledged Applicable Ownership Interests in the Treasury Portfolio, as the case may be, relating to the Purchase Contracts to which Early Settlement is effected, or (2) in the case of a Holder of Treasury Units, Pledged Treasury Securities, in each case with a Value equal to the product of (x) the Stated Amount times (y) the number of Purchase Contracts as to which such Holder has elected to effect Early Settlement, and shall instruct the Securities Intermediary to Transfer all such Pledged Applicable Ownership Interests in the Treasury Portfolio or Subordinated Notes underlying such Pledged Applicable Ownership Interests in Subordinated Notes or Pledged Treasury Securities, as the case may be, to the Purchase Contract Agent for distribution to such Holder, in each case free and clear of the Pledge created hereby.

Holders of Corporate Units and Treasury Units may only effect Early Settlement pursuant to this Section 5.07 in integral multiples of 40 Treasury Units. If Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, Corporate Units Holders may only effect Early Settlement pursuant to this Section 5.07 in integral multiples of 128,000 Corporate Units.

(c) Upon Early Settlement of Purchase Contracts by a Holder of the related Units, the Company shall issue, and the Holder shall be entitled to receive, a number of shares of Common Stock (or in the case of an Early Settlement following a Reorganization Event, a number of units of Exchange Property) equal to the Minimum Settlement Rate for each Purchase Contract as to which Early Settlement is effected.

(d) No later than the third Business Day after the applicable Early Settlement Date, the Company shall cause the shares of Common Stock issuable upon Early Settlement of Purchase Contracts and the Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or Treasury Securities, as the case may be, to be issued and delivered, together with payment in lieu of any fraction of a share, as provided in Section 5.08.

(e) Upon Early Settlement of any Purchase Contracts, and subject to receipt of shares of Common Stock from the Company and the Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or Treasury Securities, as the case may be, from the Securities Intermediary, as applicable, the Purchase Contract Agent shall, in accordance with the instructions provided by the Holder thereof on the applicable form of Election to Settle Early on the reverse of the Certificate evidencing the related Units:

(i) transfer to the Holder the Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or Treasury Securities, as the case may be, related to such Units,

(ii) deliver to the Holder a certificate or certificates for the full number of shares of Common Stock issuable upon such Early Settlement, together with payment in lieu of any fraction of a share, as provided in Section 5.08, and

(iii) if so required under the Securities Act, deliver a Prospectus for the shares of Common Stock issuable upon such Early Settlement as contemplated by Section 5.07(a).

(f) In the event that Early Settlement is effected with respect to Purchase Contracts underlying less than all the Units evidenced by a Certificate, upon such Early Settlement the Company shall execute and the Purchase Contract Agent shall execute on behalf of the Holder, authenticate and deliver to the Holder thereof, at the expense of the Company, a Certificate evidencing the Units as to which Early Settlement was not effected.

Section 5.08 No Fractional Shares. No fractional shares or scrip representing fractional shares of Common Stock shall be issued or delivered upon settlement on the Purchase Contract Settlement Date, or upon Early Settlement or Cash Merger Early Settlement of any Purchase Contracts. If Certificates evidencing more than one Purchase Contract shall be surrendered for settlement at one time by the same Holder, the number of full shares of Common Stock which shall be delivered upon settlement shall be computed on the basis of the aggregate number of Purchase Contracts evidenced by the Certificates so surrendered. Instead of any fractional share of Common Stock which would otherwise be deliverable upon settlement of any Purchase Contracts on the Purchase Contract Settlement Date, or upon Early Settlement or Cash Merger Early Settlement, the Company, through the Purchase Contract Agent, shall make a cash payment in respect of such fractional interest in an amount equal to the percentage of such fractional share multiplied by the Applicable Market Value calculated as if the date of such settlement were the Purchase Contract Settlement Date. The Company shall provide the Purchase Contract Agent from time to time with sufficient funds to permit the Purchase Contract Agent to make all cash payments required by this Section 5.08 in a timely manner.

Section 5.09 Charges and Taxes. The Company will pay all stock transfer and similar taxes attributable to the initial issuance and delivery of the shares of Common Stock pursuant to the Purchase Contracts; *provided, however,* that the Company shall not be required to pay any such tax or taxes which may be payable in respect of any exchange of or substitution for a Certificate evidencing a Unit or any issuance of a share of Common Stock in a name other than that of the registered Holder of a Certificate surrendered in respect of the Units evidenced thereby, other than in the name of the Purchase Contract Agent, as custodian for such Holder, and the Company shall not be required to issue or deliver such share certificates or Certificates unless or until the Person or Persons requesting the transfer or issuance thereof shall have paid to the Company the amount of such tax or shall have established to the satisfaction of the Company that such tax has been paid.

ARTICLE 6

RIGHTS AND REMEDIES OF HOLDERS

Section 6.01 *Unconditional Right of Holders to Purchase Shares of Common Stock*. Each Holder of a Unit shall have the right, which is absolute and unconditional, except upon and following a Termination Event, to purchase shares of Common Stock pursuant to such Purchase Contract and, in each such case, to institute suit for the enforcement of any such right to purchase shares of Common Stock, and such rights shall not be impaired without the consent of such Holder.

Section 6.02 *Restoration of Rights and Remedies*. If any Holder has instituted any proceeding to enforce any right or remedy under this Agreement and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to such Holder, then and in every such case, subject to any determination in such proceeding, the Company and such Holder shall be restored severally and respectively to their former positions hereunder, and thereafter all rights and remedies of such Holder shall continue as though no such proceeding had been instituted.

Section 6.03 *Rights and Remedies Cumulative*. Except as otherwise provided with respect to the replacement or payment of mutilated, destroyed, lost or stolen Certificates in the last paragraph of Section 3.10, no right or remedy herein conferred upon or reserved to the Holders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Section 6.04 *Delay or Omission Not Waiver*. No delay or omission of any Holder to exercise any right upon a default or remedy upon a default shall impair any such right or remedy or constitute a waiver of any such right. Every right and remedy given by this Article 6 or by law to the Holders may be exercised from time to time, and as often as may be deemed expedient, by such Holders.

Section 6.05 *Undertaking for Costs*. All parties to this Agreement agree, and each Holder of a Unit, by its acceptance of such Unit shall be deemed to have agreed, that any court of competent jurisdiction may in its discretion require, in any suit for the enforcement of any right or remedy under this Agreement, or in any suit against the Purchase Contract Agent for any action taken, suffered or omitted by it as Purchase Contract Agent, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees and costs against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; *provided* that the provisions of this Section shall not apply to any suit instituted by the Purchase Contract Agent, to any suit instituted by any Holder, or group of Holders, holding in the aggregate more than 10% of the Outstanding Units, or to any suit instituted by any Holder for the enforcement of interest on any Subordinated Notes owed pursuant to such Holder's Applicable Ownership Interests in Subordinated Notes on or after the respective Payment Date therefor in respect of any Unit held by such Holder, or for enforcement of the right to purchase shares of Common Stock under the Purchase Contracts constituting part of any Unit held by such Holder.

Section 6.06 *Waiver of Stay or Extension Laws*. The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, that may affect the covenants or the performance of this Agreement; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefit or advantage of any such law

and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Purchase Contract Agent or the Holders, but will suffer and permit the execution of every such power as though no such law had been enacted.

ARTICLE 7

THE PURCHASE CONTRACT AGENT

Section 7.01 *Certain Duties and Responsibilities.*

(a) The Purchase Contract Agent:

(i) undertakes to perform, with respect to the Units, such duties and only such duties as are specifically set forth in this Agreement and the Remarketing Agreement to be performed by the Purchase Contract Agent and no implied covenants or obligations shall be read into this Agreement or the Remarketing Agreement against the Purchase Contract Agent; and

(ii) in the absence of bad faith on its part, may, with respect to the Units, conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Purchase Contract Agent and conforming to the requirements of this Agreement or the Remarketing Agreement, as applicable, but in the case of any certificates or opinions which by any provision hereof are specifically required to be furnished to the Purchase Contract Agent, the Purchase Contract Agent shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Agreement or the Remarketing Agreement, as applicable (but need not confirm or investigate the accuracy of the mathematical calculations or other facts stated therein).

(b) No provision of this Agreement or the Remarketing Agreement shall be construed to relieve the Purchase Contract Agent from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that:

(i) this Section 7.01(b) shall not be construed to limit the effect of Section 7.01(a);

(ii) the Purchase Contract Agent shall not be liable for any error of judgment made in good faith by a Responsible Officer, unless it shall be conclusively determined by a court of competent jurisdiction that the Purchase Contract Agent was negligent in ascertaining the pertinent facts; and

(iii) no provision of this Agreement or the Remarketing Agreement shall require the Purchase Contract Agent to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

(c) Whether or not therein expressly so provided, every provision of this Agreement and the Remarketing Agreement relating to the conduct or affecting the liability of or affording protection to the Purchase Contract Agent shall be subject to the provisions of this Section.

(d) The Purchase Contract Agent is authorized to execute and deliver the Remarketing Agreement in its capacity as Purchase Contract Agent.

Section 7.02 *Notice of Default*. Within 30 days after the occurrence of any default by the Company hereunder of which a Responsible Officer of the Purchase Contract Agent has actual knowledge, the Purchase Contract Agent shall transmit by mail to the Company and the Holders, as their names and addresses appear in the Security Register, notice of such default hereunder, unless such default shall have been cured or waived.

Section 7.03 *Certain Rights of Purchase Contract Agent*.

Subject to the provisions of Section 7.01:

(a) the Purchase Contract Agent may, in the absence of bad faith, conclusively rely and shall be fully protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture, note, other evidence of indebtedness or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) any request or direction of the Company mentioned herein shall be sufficiently evidenced by an Officers' Certificate, Issuer Order or Issuer Request, and any resolution of the Board of Directors of the Company may be sufficiently evidenced by a Board Resolution;

(c) whenever in the administration of this Agreement or the Remarketing Agreement the Purchase Contract Agent shall deem it desirable that a matter be proved or established prior to taking, suffering or omitting to take any action hereunder or thereunder, the Purchase Contract Agent (unless other evidence be herein specifically prescribed in this Agreement) may, in the absence of bad faith on its part, conclusively rely upon an Officers' Certificate of the Company;

(d) the Purchase Contract Agent may consult with counsel of its selection and the advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in reliance thereon;

(e) the Purchase Contract Agent shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture, note, other evidence of indebtedness or other paper or document, but the Purchase Contract Agent, in its discretion, may make reasonable further inquiry or investigation into such facts or matters related to the execution, delivery and performance of the Purchase Contracts as it may see fit, and, if the Purchase Contract Agent shall determine to make such further inquiry or investigation, it shall be entitled to examine the relevant books, records and premises of the Company, personally or by agent or attorney;

(f) the Purchase Contract Agent may execute any of the powers hereunder or perform any duties hereunder either directly or by or through agents, attorneys, custodians or nominees or an Affiliate of the Purchase Contract Agent and the Purchase Contract Agent shall not be responsible for any misconduct or negligence on the part of any agent, attorney, custodian or nominee or an Affiliate appointed with due care by it hereunder;

(g) the Purchase Contract Agent shall be under no obligation to exercise any of the rights or powers vested in it by this Agreement at the request or direction of any of the Holders pursuant to this Agreement, unless such Holders shall have offered to the Purchase Contract Agent security or indemnity satisfactory to the Purchase Contract Agent against the costs, expenses and liabilities which might be incurred by it in compliance with such request or direction;

(h) the Purchase Contract Agent shall not be liable for any action taken, suffered, or omitted to be taken by it in the absence of bad faith or negligence by it and believed by it to be authorized and within the discretion or rights or powers conferred upon it by this Agreement;

(i) the Purchase Contract Agent shall not be deemed to have notice of any adjustment to each Fixed Settlement Rate, the occurrence of a Termination Event or any default hereunder unless a Responsible Officer of the Purchase Contract Agent has actual knowledge thereof or unless written notice of any event which is in fact such a default is received by a Responsible Offer at the Corporate Trust Office of the Purchase Contract Agent, and such notice references the Units or this Agreement;

(j) the Purchase Contract Agent may request that the Company deliver an Officers' Certificate setting forth the names of individuals and/or titles of officers authorized at such time to take specified actions pursuant to this Agreement, which Officers' Certificate may be signed by any person authorized to sign an Officers' Certificate, including any person specified as so authorized in any such certificate previously delivered and not superseded;

(k) the rights, privileges, protections, immunities and benefits given to the Purchase Contract Agent, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Purchase Contract Agent in each of its capacities hereunder, and to each officer, director, employee of the Purchase Contract Agent and each agent, custodian and other Person employed, in any capacity whatsoever, by the Purchase Contract Agent to act hereunder and shall survive the resignation or removal of the Purchase Contract Agent and the termination of this Agreement; and

(l) the Purchase Contract Agent shall not be required to initiate or conduct any litigation or collection proceedings hereunder and shall have no responsibilities with respect to any default hereunder except as expressly set forth herein.

Section 7.04 *Not Responsible for Recitals or Issuance of Units.* The recitals contained herein, in the Remarketing Agreement and in the Certificates shall be taken as the statements of the Company, and the Purchase Contract Agent assumes no responsibility for their accuracy or validity. The Purchase Contract Agent makes no representations as to the validity or sufficiency of either this Agreement or of the Units or the Pledge or the Collateral or the Remarketing Agreement and shall have no responsibility for perfecting or maintaining the perfection of any security interest in the Collateral. The Purchase Contract Agent shall not be accountable for the use or application by the Company of the proceeds in respect of the Purchase Contracts.

Section 7.05 *May Hold Units.* Any Security Registrar or any other agent of the Company, or the Purchase Contract Agent and its Affiliates, in their individual or any other capacity, may become the owner or pledgee of Units and may otherwise deal with the Company, the Collateral Agent or any other Person with the same rights it would have if it were not Security Registrar or such other agent, or the Purchase Contract Agent. The Company may become the owner or pledgee of Units.

Section 7.06 *Money Held in Custody.* Money held by the Purchase Contract Agent in custody hereunder need not be segregated from the Purchase Contract Agent's other funds except to the extent required by law or provided herein. The Purchase Contract Agent shall be under no obligation to invest or pay interest on any money received by it hereunder except as otherwise provided hereunder or agreed in writing with the Company.

Section 7.07 *Compensation and Reimbursement.*

The Company agrees:

(a) to pay to the Purchase Contract Agent compensation for all services rendered by it hereunder and under the Remarketing Agreement as the Company and the Purchase Contract Agent shall from time to time agree in writing;

(b) except as otherwise expressly provided for herein, to reimburse the Purchase Contract Agent upon its request for all reasonable expenses, disbursements and advances incurred or made by the Purchase Contract Agent in accordance with any provision of this Agreement and the Remarketing Agreement (including the reasonable compensation and the expenses and disbursements of its agents and counsel) in connection with the negotiation, preparation, execution and delivery and performance of this Agreement and the Remarketing Agreement and any modification, supplement or waiver of any of the terms thereof, except any such expense, disbursement or advance as may be attributable to its negligence, willful misconduct or bad faith; and

(c) to indemnify the Purchase Contract Agent and any predecessor Purchase Contract Agent and each of its directors, officers, agents and employees (collectively, with the Purchase Contract Agent, the “**Indemnitees**”) for, and to hold each Indemnitee harmless against, any loss, claim, damage, fine, penalty, liability, fee or expense (including reasonable fees and expenses of counsel) incurred without negligence, willful misconduct or bad faith on its part, arising out of or in connection with the acceptance or administration of its duties hereunder and the Remarketing Agreement, including the Indemnitees’ reasonable costs and expenses of defending themselves against any claim (whether asserted by the Company, a Holder or any other Person) or liability in connection with the exercise or performance of any of the Purchase Contract Agent’s powers or duties hereunder or thereunder.

The provisions of this Section shall survive the resignation and removal of the Purchase Contract Agent the satisfaction or discharge of the Units and the Purchase Contracts and the termination of this Agreement.

Section 7.08 *Corporate Purchase Contract Agent Required; Eligibility.* There shall at all times be a Purchase Contract Agent hereunder which shall be a Person organized and doing business under the laws of the United States of America, any State thereof or the District of Columbia, authorized under such laws to exercise corporate trust powers, having (or being a member of a bank holding company having) a combined capital and surplus of at least \$50,000,000, subject to supervision or examination by Federal or State authority and having a corporate trust office in the Borough of Manhattan, New York City, if there be such a Person in the Borough of Manhattan, New York City, qualified and eligible under this Article and willing to act on reasonable terms. If such Person publishes or files reports of condition at least annually, pursuant to law or to the requirements of said supervising or examining authority, then for the purposes of this Section, the combined capital and surplus of such Person shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published or filed. If at any time the Purchase Contract Agent shall cease to be eligible in accordance with the provisions of this Section, it shall resign immediately in the manner and with the effect hereinafter specified in this Article.

Section 7.09 *Resignation and Removal; Appointment of Successor.* (a) No resignation or removal of the Purchase Contract Agent and no appointment of a successor Purchase Contract Agent pursuant to this Article shall become effective until the acceptance of appointment by the successor Purchase Contract Agent in accordance with the applicable requirements of Section 7.10.

(b) The Purchase Contract Agent may resign at any time by giving written notice thereof to the Company 60 days prior to the effective date of such resignation. If the instrument of acceptance by a successor Purchase Contract Agent required by Section 7.10 shall not have been delivered to the Purchase Contract Agent within 30 days after the giving of such notice of resignation, the resigning Purchase Contract Agent may petition, at the expense of the Company, any court of competent jurisdiction for the appointment of a successor Purchase Contract Agent.

(c) The Purchase Contract Agent may be removed at any time by Act of the Holders of a majority in number of the Outstanding Units delivered to the Purchase Contract Agent and the Company. If the instrument of acceptance by a successor Purchase Contract Agent required by Section 7.10 shall not have been delivered to the Purchase Contract Agent within 30 days after such Act, the Purchase Contract Agent being removed may petition any court of competent jurisdiction for the appointment of a successor Purchase Contract Agent.

(d) If at any time:

(i) the Purchase Contract Agent fails to comply with Section 310(b) of the TIA, as if the Purchase Contract Agent were an indenture trustee under an indenture qualified under the TIA, and shall fail to resign after written request therefor by the Company or by any Holder who has been a bona fide Holder of a Unit for at least six months;

(ii) the Purchase Contract Agent shall cease to be eligible under Section 7.08 and shall fail to resign after written request therefor by the Company or by any such Holder; or

(iii) the Purchase Contract Agent shall become incapable of acting or shall be adjudged a bankrupt or insolvent or a receiver of the Purchase Contract Agent or of its property shall be appointed or any public officer shall take charge or control of the Purchase Contract Agent or of its property or affairs for the purpose of rehabilitation, conservation or liquidation,

then, in any such case, (i) the Company by a Board Resolution may remove the Purchase Contract Agent, or (ii) any Holder who has been a bona fide Holder of a Unit for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Purchase Contract Agent and the appointment of a successor Purchase Contract Agent.

(e) If the Purchase Contract Agent shall resign, be removed or become incapable of acting, or if a vacancy shall occur in the office of Purchase Contract Agent for any cause, the Company, by a Board Resolution, shall promptly appoint a successor Purchase Contract Agent and shall comply with the applicable requirements of Section 7.10. If no successor Purchase Contract Agent shall have been so appointed by the Company and accepted appointment in the manner required by Section 7.10, any Holder who has been a bona fide Holder of a Unit for at least six months, on behalf of itself and all others similarly situated, or the Purchase Contract Agent may petition, at the expense of the Company, any court of competent jurisdiction for the appointment of a successor Purchase Contract Agent.

(f) The Company shall give, or shall cause such successor Purchase Contract Agent to give, notice of each resignation and each removal of the Purchase Contract Agent and each appointment of a successor Purchase Contract Agent by mailing written notice of such event by first-class mail, postage prepaid, to all Holders as their names and addresses appear in the applicable Security Register. Each notice shall include the name of the successor Purchase Contract Agent and the address of its Corporate Trust Office.

Section 7.10 *Acceptance of Appointment by Successor.* (a) In case of the appointment hereunder of a successor Purchase Contract Agent, every such successor Purchase Contract Agent so appointed shall execute, acknowledge and deliver to the Company and to the retiring Purchase Contract Agent an instrument accepting such appointment, and thereupon the resignation or removal of the retiring Purchase Contract Agent shall become effective and such successor Purchase Contract Agent, without any further act, deed or conveyance, shall become vested with all the rights, powers, agencies and duties of the retiring Purchase Contract Agent; but, on the request of the Company or the successor Purchase Contract Agent, such retiring Purchase Contract Agent shall, upon payment of its charges, execute and deliver an instrument transferring to such successor Purchase Contract Agent all the rights, powers and trusts of the retiring Purchase Contract Agent and duly assign, transfer and deliver to such successor Purchase Contract Agent all property and money held by such retiring Purchase Contract Agent hereunder.

(b) Upon request of any such successor Purchase Contract Agent, the Company shall execute any and all instruments for more fully and certainly vesting in and confirming to such successor Purchase Contract Agent all such rights, powers and agencies referred to in clause (a) of this Section 7.10.

(c) No successor Purchase Contract Agent shall accept its appointment unless at the time of such acceptance such successor Purchase Contract Agent shall be qualified and eligible under this Article 7.

Section 7.11 *Merger, Conversion, Consolidation or Succession to Business.* Any Person into which the Purchase Contract Agent may be merged or converted or with which it may be consolidated, or any Person resulting from any merger, conversion or consolidation to which the Purchase Contract Agent shall be a party, or any Person succeeding to all or substantially all the corporate trust business of the Purchase Contract Agent, shall be the successor of the Purchase Contract Agent hereunder, *provided* that such Person shall be otherwise qualified and eligible under this Article, without the execution or filing of any paper or any further act on the part of any of the parties hereto. In case any Certificates shall have been authenticated and executed on behalf of the Holders, but not delivered, by the Purchase Contract Agent then in office, any successor by merger, conversion or consolidation to such Purchase Contract Agent may adopt such authentication and execution and deliver the Certificates so authenticated and executed with the same effect as if such successor Purchase Contract Agent had itself authenticated and executed such Units.

Section 7.12 *Preservation of Information; Communications to Holders.* (a) The Purchase Contract Agent shall preserve, in as current a form as is reasonably practicable, the names and addresses of Holders received by the Purchase Contract Agent in its capacity as Security Registrar.

(b) If three or more Holders (herein referred to as “**Applicants**”) apply in writing to the Purchase Contract Agent, and furnish to the Purchase Contract Agent reasonable proof that each such Applicant has owned a Unit for a period of at least six months preceding the date of such application, and such application states that the Applicants desire to communicate with other Holders with respect to their rights under this Agreement or under the Units and is accompanied by a copy of the form of proxy or other communication which such Applicants propose to transmit, then the Purchase Contract Agent shall mail to all the Holders copies of the form of proxy or other communication which is specified in such request, with reasonable promptness after a tender to the Purchase Contract Agent of the materials to be mailed and of payment, or provision for the payment, of the reasonable expenses of such mailing.

Section 7.13 *No Obligations of Purchase Contract Agent*. Except to the extent otherwise expressly provided in this Agreement, the Purchase Contract Agent assumes no obligations and shall not be subject to any liability under this Agreement, the Remarketing Agreement or any Purchase Contract in respect of the obligations of the Holder of any Unit thereunder. The Company agrees, and each Holder of a Certificate, by its acceptance thereof, shall be deemed to have agreed, that the Purchase Contract Agent's execution of the Certificates on behalf of the Holders shall be solely as agent and attorney-in-fact for the Holders, and that the Purchase Contract Agent shall have no obligation to perform such Purchase Contracts on behalf of the Holders, except to the extent expressly provided in Article Five hereof. Anything contained in this Agreement to the contrary notwithstanding, in no event shall the Purchase Contract Agent or its officers, directors, employees or agents be liable under this Agreement or the Remarketing Agreement for (i) indirect, incidental, special, punitive, or consequential loss or damage of any kind whatsoever, including lost profits, whether or not the likelihood of such loss or damage was known to the Purchase Contract Agent and regardless of the form of action or (ii) any failure or delay in the performance of its obligations under this Agreement arising out of or caused directly or indirectly, by acts of God; earthquake; fires; floods; wars; civil or military disturbances; terrorist acts; sabotage; epidemics; riots; interruptions, loss or malfunctions of utilities; accidents; labor disputes; or acts of civil or military authority or governmental actions; it being understood that the Purchase Contract Agent shall use reasonable efforts which are consistent with accepted practices in the banking industry to resume performance as soon as practicable under such circumstances.

Section 7.14 *Tax Compliance*. (a) The Purchase Contract Agent, on its own behalf and on behalf of the Company, will comply with all applicable certification, information reporting and withholding (including "backup" withholding) requirements imposed by applicable tax laws, regulations or administrative practice with respect to (i) any payments made with respect to the Units or (ii) the issuance, delivery, holding, transfer, redemption or exercise of rights under the Units. Such compliance shall include, without limitation, the preparation and timely filing of required returns and the timely payment of all amounts required to be withheld to the appropriate taxing authority or its designated agent.

(b) The Purchase Contract Agent shall comply in accordance with the terms hereof with any reasonable written direction received from the Company with respect to the execution or certification of any required documentation and the application of such requirements to particular payments or Holders or in other particular circumstances, and may for purposes of this Agreement conclusively rely on any such direction in accordance with the provisions of Section 7.01(a) hereof.

(c) The Purchase Contract Agent shall maintain all appropriate records documenting compliance with such requirements, and shall make such records available, on written request, to the Company or its authorized representative within a reasonable period of time after receipt of such request.

ARTICLE 8

SUPPLEMENTAL AGREEMENTS

Section 8.01 *Supplemental Agreements without Consent of Holders*. Without the consent of any Holders, the Company, when authorized by a Board Resolution, the Purchase Contract Agent, the Collateral Agent, the Custodial Agent and the Securities Intermediary at any time and from time to time, may enter into one or more agreements supplemental hereto, in form satisfactory to the Company and the Purchase Contract Agent, to:

(a) evidence the succession of another Person to the Company, and the assumption by any such successor of the covenants of the Company herein and in the Certificates;

(b) evidence and provide for the acceptance of appointment hereunder by a successor Purchase Contract Agent, Collateral Agent, Securities Intermediary or Custodial Agent;

(c) add to the covenants of the Company for the benefit of the Holders, or surrender any right or power herein conferred upon the Company;

(d) make provision with respect to the rights of Holders pursuant to the requirements of Section 5.04(b); or

(e) except as provided for in Section 5.04, cure any ambiguity, to correct or supplement any provisions herein that may be inconsistent with any other provision herein, or to make such other provisions in regard to matters or questions arising under this Agreement that do not adversely affect the interests of any Holders, *provided* that any amendment made solely to conform the provisions of this Agreement to the description of the Equity Units and the Purchase Contracts contained in the Prospectus under the sections entitled "Description of the Equity Units," "Description of the Purchase Contracts" and "Certain Provisions of the Purchase Contract and Pledge Agreement" will not be deemed to adversely affect the interests of the Holders.

Section 8.02 *Supplemental Agreements with Consent of Holders*. With the consent of the Holders of not less than a majority of the Outstanding Units voting together as one class, including without limitation the consent of the Holders obtained in connection with a tender or an exchange offer, by Act of said Holders delivered to the Company, the Purchase Contract Agent, the Company, the Collateral Agent, the Securities Intermediary and the Custodial Agent, as the case may be, when authorized by a Board Resolution, and the Purchase Contract Agent may enter into an agreement or agreements supplemental hereto for the purpose of modifying in any manner the terms of the Purchase Contracts, or the provisions of this Agreement or the rights of the Holders in respect of the Units; *provided, however*, that, except as contemplated herein, no such supplemental agreement shall, without the consent of the Holder of each outstanding Purchase Contract affected thereby,

(a) change any Payment Date;

(b) change the amount or the type of Collateral required to be Pledged to secure a Holder's obligations under the Purchase Contract (except for the rights of holders of Corporate Units to substitute Treasury Securities for the Pledged Applicable Ownership Interests in Subordinated Notes or the Pledged Applicable Ownership Interests in the Treasury Portfolio, as the case may be, or the rights of Holders of Treasury Units to substitute Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as applicable, for the Pledged Treasury Securities), impair the right of the Holder of any Purchase Contract to receive distributions on the related Collateral or otherwise adversely affect the Holder's rights in or to such Collateral;

(c) impair the Holders' right to institute suit for the enforcement of any Purchase Contract;

(d) except as set forth in Section 5.04, reduce the number of shares of Common Stock or the amount of any other property to be purchased pursuant to any Purchase Contract, increase the price to purchase shares of Common Stock or any other property upon settlement of any Purchase Contract or change the Purchase Contract Settlement Date or the right to Early Settlement or Cash Merger Early Settlement or otherwise adversely affect the Holder's rights under the Purchase Contract in any material respect; or

(e) reduce the percentage of the outstanding Purchase Contracts whose Holder's consent is required for any modification or amendment to the provisions of this Agreement or the Purchase Contracts;

provided that if any amendment or proposal referred to above would adversely affect only the Corporate Units or the Treasury Units, then only the affected class of Holders as of the record date for the Holders entitled to vote thereon will be entitled to vote on such amendment or proposal, and such amendment or proposal shall not be effective except with the consent of Holders of not less than a majority of such class; and *provided*, further, that the unanimous consent of the Holders of each outstanding Purchase Contract of such class affected thereby shall be required to approve any amendment or proposal specified in clauses (a) through (e) of this Section 8.02.

It shall not be necessary for any Act of Holders under this Section to approve the particular form of any proposed supplemental agreement, but it shall be sufficient if such Act shall approve the substance thereof.

Section 8.03 *Execution of Supplemental Agreements*. In executing, or accepting the additional agencies created by any supplemental agreement permitted by this Article or the modifications thereby of the agencies created by this Agreement, the Purchase Contract Agent, the Collateral Agent, the Securities Intermediary and the Custodial Agent shall be protected, and (subject to Section 7.01 with respect to the Purchase Contract Agent) shall be fully authorized and protected in relying upon, an Officers' Certificate and an Opinion of Counsel stating that the execution of such supplemental agreement is authorized or permitted by this Agreement and that any and all conditions precedent to the execution and delivery of such supplemental agreement have been satisfied. The Purchase Contract Agent, the Collateral Agent, the Securities Intermediary and the Custodial Agent may, but shall not be obligated to, enter into any such supplemental agreement which affects their own rights, duties or immunities under this Agreement or otherwise.

Section 8.04 *Effect of Supplemental Agreements*. Upon the execution of any supplemental agreement under this Article, this Agreement shall be modified in accordance therewith, and such supplemental agreement shall form a part of this Agreement for all purposes; and every Holder of Certificates theretofore or thereafter authenticated, executed on behalf of the Holders and delivered hereunder, shall be bound thereby.

Section 8.05 *Reference to Supplemental Agreements*. Certificates authenticated, executed on behalf of the Holders and delivered after the execution of any supplemental agreement pursuant to this Article may, and shall if required by the Purchase Contract Agent, bear a notation in form approved by the Purchase Contract Agent as to any matter provided for in such supplemental agreement. If the Company shall so determine, new Certificates so modified as to conform, in the opinion of the Purchase Contract Agent and the Company, to any such supplemental agreement may be prepared and executed by the Company and authenticated, executed on behalf of the Holders and delivered by the Purchase Contract Agent in exchange for outstanding Certificates.

ARTICLE 9

CONSOLIDATION, MERGER, CONVEYANCE, TRANSFER OR LEASE

Section 9.01 *Covenant Not To Consolidate, Merge, Convey, Transfer or Lease Property except under Certain Conditions*. The Company covenants that it will not merge or consolidate with any other Person or sell, convey, transfer, or otherwise dispose of all or substantially all of its assets to any other Person, unless:

(a) either the Company shall be the continuing corporation, or the successor Person (if other than the Company) or Person that acquires all or substantially all of its assets shall be a corporation organized and existing under the laws of the United States of America or a state thereof or the District of Columbia and such corporation shall expressly assume the due and punctual performance and observance of all the obligations of the Company under the Purchase Contracts, this Agreement (including the Pledge provided for herein), the Indenture (including any supplement thereto) and the Remarketing Agreement by one or more supplemental agreements in form reasonably satisfactory to the Purchase Contract Agent and the Collateral Agent, executed and delivered to the Purchase Contract Agent and the Collateral Agent by such corporation or limited liability company, as the case may be; and

(b) the Company or such successor corporation shall not, immediately after such merger or consolidation, or such sale, conveyance, transfer or other disposition, be in default in the performance of the covenants and conditions under the Purchase Contracts, this Agreement, the Indenture (including any supplement thereto) or the Remarketing Agreement. In the event of any such merger, consolidation, sale, conveyance (other than by way of lease), transfer or other disposition, the predecessor company may be dissolved, wound up and liquidated at any time thereafter.

Section 9.02 *Rights and Duties of Successor Corporation*. In case of any such merger, consolidation, sale, conveyance (other than by way of lease), transfer, or other disposition and upon any such assumption by a successor Person in accordance with Section 9.01, such successor corporation shall succeed to and be substituted for the Company with the same effect as if it had been named herein as the Company, and the Company shall be relieved of any for their obligations under this Agreement and under the Units. Such successor corporation thereupon may cause to be signed, and may issue either in its own name or in the name of E*TRADE Financial Corporation any or all of the Certificates evidencing Units issuable hereunder which theretofore shall not have been signed by the Company and delivered to the Purchase Contract Agent; and, upon the order of such successor instead of the Company, and subject to all the terms, conditions and limitations in this Agreement prescribed, the Purchase Contract Agent shall authenticate and execute on behalf of the Holders and deliver any Certificates which previously shall have been signed and delivered by the officers of the Company to the Purchase Contract Agent for authentication and execution, and any Certificate evidencing Units which such successor corporation thereafter shall cause to be signed and delivered to the Purchase Contract Agent for that purpose. All the Certificates issued shall in all respects have the same legal rank and benefit under this Agreement as the Certificates theretofore or thereafter issued in accordance with the terms of this Agreement as though all of such Certificates had been issued at the date of the execution hereof.

In case of any such merger, consolidation, sale, conveyance, transfer, or other disposition such change in phraseology and form (but not in substance) may be made in the Certificates evidencing Units thereafter to be issued as may be appropriate.

Section 9.03 *Officers' Certificate and Opinion of Counsel Given to Purchase Contract Agent*. The Purchase Contract Agent, subject to Section 7.01 and Section 7.03, shall receive an Officers' Certificate and an Opinion of Counsel as conclusive evidence that any such merger, consolidation, sale, conveyance, transfer, or other disposition, and any such assumption, complies with the provisions of this Article and that all conditions precedent to the consummation of any such merger, consolidation, sale, conveyance, transfer or other disposition have been met.

ARTICLE 10

COVENANTS

Section 10.01 *Performance under Purchase Contracts*. The Company covenants and agrees for the benefit of the Holders from time to time of the Units that it will duly and punctually perform its obligations under the Purchase Contracts in accordance with the terms of the Purchase Contracts and this Agreement.

Section 10.02 *Maintenance of Office or Agency*. The Company will maintain in the Borough of Manhattan, City of New York, New York an office or agency where Certificates may be presented or surrendered for acquisition of shares of Common Stock upon settlement of the Purchase Contracts on the Purchase Contract Settlement Date or upon Early Settlement or Cash Merger Early Settlement and for transfer of Collateral upon occurrence of a Termination Event, where Certificates may be surrendered for registration of transfer or exchange, or for a Collateral Substitution and where notices and demands to or upon the Company in respect of the Units and this Agreement may be served. The Company will give prompt written notice to the Purchase Contract Agent of the location, and any change in the location, of such office or agency. The Company initially designates the Corporate Trust Office of the Purchase Contract Agent as such office of the Company. If at any time the Company shall fail to maintain any such required office or agency or shall fail to furnish the Purchase Contract Agent with the address thereof, such presentations, surrenders, notices and demands may be made or served at the Corporate Trust Office, and the Company hereby appoints the Purchase Contract Agent as its agent to receive all such presentations, surrenders, notices and demands.

The Company may also from time to time designate one or more other offices or agencies where Certificates may be presented or surrendered for any or all such purposes and may from time to time rescind such designations; *provided, however*, that no such designation or rescission shall in any manner relieve the Company of its obligation to maintain an office or agency in the Borough of Manhattan, City of New York, New York for such purposes. The Company will give prompt written notice to the Purchase Contract Agent of any such designation or rescission and of any change in the location of any such other office or agency. The Company hereby designates as the place of payment for the Units the Corporate Trust Office and appoints the Purchase Contract Agent at its Corporate Trust Office as paying agent in such city.

Section 10.03 *Company To Reserve Common Stock*. The Company shall at all times prior to the Purchase Contract Settlement Date reserve and keep available, free from preemptive rights, out of its authorized but unissued Common Stock the full number of shares of Common Stock issuable against tender of payment in respect of all Purchase Contracts constituting a part of the Units evidenced by Outstanding Certificates.

Section 10.04 *Covenants as to Common Stock; Listing*. (a) The Company covenants that all shares of Common Stock which may be issued against tender of payment in respect of any Purchase Contract constituting a part of the Outstanding Units will, upon issuance, be duly authorized, validly issued, fully paid and nonassessable.

The Company further covenants that, if at any time the Common Stock shall be listed on the NYSE or any other national securities exchange or automated quotation system, the Company will, if permitted by the rules of such exchange or automated quotation system, list and keep listed, so long as the Common Stock shall be so listed on such exchange or automated quotation system, all Common Stock issuable upon Settlement of Purchase Contracts; *provided, however*, that, if the rules of such exchange or automated quotation system permit the Company to defer the listing of such Common Stock until the date

on which any Purchase Contract is first settled in accordance with the provisions of this Agreement, the Company covenants to list such Common Stock issuable upon settlement of the Purchase Contracts in accordance with the requirements of such exchange or automated quotation system no later than at such time.

Section 10.05 *Statements of Officers of the Company as to Default*. The Company will deliver to the Purchase Contract Agent, within 120 days after the end of each fiscal year of the Company (which as of the date hereof is December 31) ending after the date hereof, an Officers' Certificate, stating whether or not to the knowledge of the signers thereof the Company is in default in the performance and observance of any of the terms, provisions and conditions of this Agreement, and if the Company shall be in default, specifying all such defaults and the nature and status thereof of which they may have knowledge.

Section 10.06 *ERISA*. Each Holder from time to time of the Units that is a Plan or who used assets of a Plan to purchase Units hereby represents that either (i) no portion of the assets used by such Holder to acquire the Corporate Units constitutes assets of the Plan or (ii) the purchase or holding of the Corporate Units by such purchaser or transferee will not constitute a non-exempt prohibited transaction under Section 406 of ERISA or Section 4975 of the Code or similar violation under any applicable laws.

Section 10.07 *Tax Treatment*. The Company covenants and agrees, and by acceptance of a Unit, each Holder will be deemed to have agreed for U.S. federal income tax purposes (i) to treat each beneficial owner of a Corporate Unit or a Treasury Unit as the owner of the applicable interests in the Collateral, including the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or the Treasury Securities, as applicable, (ii) not to treat the Subordinated Notes as contingent payment debt instruments and (iii) to allocate a Holder's purchase price for a Corporate Unit between the Applicable Ownership Interests in Subordinated Notes and the Purchase Contract so that each Holder's initial tax basis in each Purchase Contract will be \$0.8313 and each Holder's initial tax basis in each Applicable Ownership Interest in Subordinated Notes will be \$24.1687.

ARTICLE 11

PLEDGE

Section 11.01 *Pledge*. Each Holder, acting through the Purchase Contract Agent as such Holder's attorney-in-fact, and the Purchase Contract Agent, acting solely as such attorney-in-fact, hereby pledges and grants to the Collateral Agent, as agent of and for the benefit of the Company, a continuing first priority security interest in and to, and a lien upon and right of set-off against, all of such Person's right, title and interest in and to the Collateral to secure the prompt and complete payment and performance when due (whether at stated maturity, by acceleration or otherwise) of the Obligations. The Collateral Agent shall have all of the rights, remedies and recourses with respect to the Collateral afforded a secured party by the UCC, in addition to, and not in limitation of, the other rights, remedies and recourses afforded to the Collateral Agent by this Agreement.

Section 11.02 *Termination*. As to each Holder, the Pledge created hereby shall terminate upon the satisfaction of such Holder's Obligations. Upon such termination, the Collateral Agent shall instruct the Securities Intermediary to Transfer such portion of the Collateral attributable to such Holder to the Purchase Contract Agent for distribution to such Holder, free and clear of the Pledge created hereby.

ARTICLE 12

ADMINISTRATION OF COLLATERAL

Section 12.01 *Initial Deposit of Subordinated Notes*. (a) Prior to or concurrently with the execution and delivery of this Agreement, the Purchase Contract Agent, on behalf of the initial Holders of the Corporate Units, shall Transfer to the Securities Intermediary, for credit to the Collateral Account, the Applicable Ownership Interests in Subordinated Notes and the Subordinated Notes underlying such Applicable Ownership Interests in Subordinated Notes or security entitlements relating thereto and the Securities Intermediary shall indicate by book-entry that a securities entitlement with respect to such Applicable Ownership Interests in Subordinated Notes has been credited to the Collateral Account.

(b) The Collateral Agent may, at any time or from time to time, in its sole discretion, cause any or all securities or other property underlying any financial assets credited to the Collateral Account to be registered in the name of the Securities Intermediary, the Collateral Agent or their respective nominees; *provided, however*, that unless any Event of Default (as defined in the Indenture) shall have occurred and be continuing, the Collateral Agent agrees not to cause any Subordinated Notes to be so re-registered.

Section 12.02 *Establishment of Collateral Account*. The Securities Intermediary hereby confirms that:

(a) the Securities Intermediary has established the Collateral Account;

(b) the Collateral Account is a securities account;

(c) subject to the terms of this Agreement, the Securities Intermediary shall identify in its records the Collateral Agent as the entitlement holder entitled to exercise the rights that comprise any financial asset credited to the Collateral Account;

(d) all property delivered to the Securities Intermediary pursuant to this Agreement, including any Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition thereof) or Treasury Securities and the Permitted Investments, will be credited promptly to the Collateral Account; and

(e) all securities or other property underlying any financial assets credited to the Collateral Account shall be (i) registered in the name of the Purchase Contract Agent and indorsed to the Securities Intermediary or in blank, (ii) registered in the name of the Securities Intermediary or (iii) credited to another securities account maintained in the name of the Securities Intermediary.

In no case will any financial asset credited to the Collateral Account be registered in the name of the Purchase Contract Agent (in its capacity as such) or any Holder or specially indorsed to the Purchase Contract Agent (in its capacity as such) or any Holder, unless such financial asset has been further indorsed to the Securities Intermediary or in blank.

Section 12.03 *Treatment as Financial Assets*. Each item of property (whether investment property, financial asset, security, instrument or cash) credited to the Collateral Account shall be treated as a financial asset.

Section 12.04 *Sole Control by Collateral Agent*. Except as provided in Section 15.01, at all times prior to the termination of the Pledge, the Collateral Agent shall have sole control of the Collateral

Account, and the Securities Intermediary shall take instructions and directions, and comply with entitlement orders, with respect to the Collateral Account or any financial asset credited thereto solely from the Collateral Agent. If at any time the Securities Intermediary shall receive an entitlement order issued by the Collateral Agent and relating to the Collateral Account, the Securities Intermediary shall comply with such entitlement order without further consent by the Purchase Contract Agent or any Holder or any other Person. Except as otherwise permitted under this Agreement, until termination of the Pledge, the Securities Intermediary will not comply with any entitlement orders issued by the Purchase Contract Agent or any Holder.

Section 12.05 *Jurisdiction*. The Collateral Account, and the rights and obligations of the Securities Intermediary, the Collateral Agent, the Purchase Contract Agent and the Holders with respect thereto, shall be governed by the laws of the State of New York. Regardless of any provision in any other agreement, the Securities Intermediary's jurisdiction is the State of New York.

Section 12.06 *No Other Claims*. Except for the claims and interest of the Collateral Agent and of the Purchase Contract Agent and the Holders in the Collateral Account, the Securities Intermediary (without having conducted any investigation) does not know of any claim to, or interest in, the Collateral Account or in any financial asset credited thereto. If any Person asserts any lien, encumbrance or adverse claim (including any writ, garnishment, judgment, warrant of attachment, execution or similar process) against the Collateral Account or in any financial asset carried therein, the Securities Intermediary will promptly notify the Collateral Agent and the Purchase Contract Agent.

Section 12.07 *Investment and Release*. All proceeds of financial assets from time to time credited to the Collateral Account shall be invested and reinvested as provided in this Agreement. At all times prior to termination of the Pledge, no property shall be released from the Collateral Account except in accordance with this Agreement or upon written instructions of the Collateral Agent.

Section 12.08 *Statements and Confirmations*. The Securities Intermediary will promptly send copies of all statements, confirmations and other correspondence concerning the Collateral Account and any financial assets credited thereto simultaneously to each of the Purchase Contract Agent and the Collateral Agent at their addresses for notices under this Agreement.

Section 12.09 *Tax Allocations*. The Purchase Contract Agent shall report all items of income, gain, expense and loss recognized in the Collateral Account, to the extent such reporting is required by law, to the Internal Revenue Service authorities in the manner required by law. Neither the Securities Intermediary nor the Collateral Agent shall have any tax reporting duties hereunder.

Section 12.10 *No Other Agreements*. The Securities Intermediary has not entered into, and prior to the termination of the Pledge will not enter into, any agreement with any other Person relating to the Collateral Account or any financial assets credited thereto, including, without limitation, any agreement to comply with entitlement orders of any Person other than the Collateral Agent.

Section 12.11 *Powers Coupled with an Interest*. The rights and powers granted in this Purchase Contract and Pledge Agreement to the Collateral Agent have been granted in order to perfect its security interests in the Collateral Account, are powers coupled with an interest and will be affected neither by the bankruptcy of the Purchase Contract Agent or any Holder nor by the lapse of time. The obligations of the Securities Intermediary under this Purchase Contract and Pledge Agreement shall continue in effect until the termination of the Pledge.

Section 12.12 *Waiver of Lien; Waiver of Set-off*. The Securities Intermediary waives any security interest, lien or right to make deductions or set-offs that it may now have or hereafter acquire in

or with respect to the Collateral Account, any financial asset credited thereto or any security entitlement in respect thereof. Neither the financial assets credited to the Collateral Account nor the security entitlements in respect thereof will be subject to deduction, set-off, banker's lien, or any other right in favor of any person other than the Company.

ARTICLE 13

RIGHTS AND REMEDIES OF THE COLLATERAL AGENT

Section 13.01 *Rights and Remedies of the Collateral Agent*. (a) In addition to the rights and remedies set forth herein or otherwise available at law or in equity, after a collateral event of default (as specified in Section 13.01(b) below) hereunder, the Collateral Agent shall have all of the rights and remedies with respect to the Collateral of a secured party under the UCC (whether or not the UCC is in effect in the jurisdiction where the rights and remedies are asserted) and the TRADES Regulations and such additional rights and remedies to which a secured party is entitled under the laws in effect in any jurisdiction where any rights and remedies hereunder may be asserted. Without limiting the generality of the foregoing, such remedies may include, to the extent permitted by applicable law, (1) retention of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Treasury Securities or the Pledged Applicable Ownership Interests in the Treasury Portfolio in full satisfaction of the Holders' obligations under the Purchase Contracts and the Purchase Contract Agreement or (2) sale of the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, the Pledged Treasury Securities or the Pledged Applicable Ownership Interests in the Treasury Portfolio in one or more public or private sales.

(b) Without limiting any rights or powers otherwise granted by this Agreement to the Collateral Agent, in the event the Collateral Agent is unable to make payments to the Company on account of Proceeds of (i) the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes (other than any interest payments thereon), (ii) Pledged Applicable Ownership Interests in the Treasury Portfolio, or (iii) the Pledged Treasury Securities as provided in this Agreement in satisfaction of the Obligations of the Holder of the Units of which such applicable Pledged Applicable Ownership Interests in the Treasury Portfolio or such Pledged Treasury Securities are a part under the related Purchase Contracts, the inability to make such payments shall constitute a "**collateral event of default**" hereunder and the Collateral Agent shall have and may exercise, with reference to such Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes, Pledged Treasury Securities or Pledged Applicable Ownership Interests in the Treasury Portfolio, as applicable, any and all of the rights and remedies available to a secured party under the UCC and the TRADES Regulations after default by a debtor, and as otherwise granted herein or under any other law.

(c) Without limiting any rights or powers otherwise granted by this Agreement to the Collateral Agent, the Collateral Agent is hereby irrevocably authorized to receive, collect and apply to the satisfaction of the Obligations all payments with respect to (i) the Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes (other than any interest payments thereon), (ii) the Pledged Treasury Securities and (iii) the Pledged Applicable Ownership Interests in the Treasury Portfolio, subject, in each case, to the provisions of this Agreement, and as otherwise provided herein.

(d) The Purchase Contract Agent and each Holder agrees that, from time to time, upon the written request of the Collateral Agent, the Purchase Contract Agent, on behalf of such Holder, shall execute and deliver such further documents and do such other acts and things as the Collateral Agent may reasonably request in order to maintain the Pledge, and the perfection and priority thereof, and to confirm the rights of the Collateral Agent hereunder. The Purchase Contract Agent shall have no liability to any Holder for executing any documents or taking any such acts requested by the Collateral Agent hereunder, except for liability for its own negligent acts, its own negligent failure to act or its own willful misconduct.

ARTICLE 14

**REPRESENTATIONS AND WARRANTIES TO
COLLATERAL AGENT; HOLDER COVENANTS**

Section 14.01 *Representations and Warranties*. Each Holder from time to time, acting through the Purchase Contract Agent as attorney-in-fact (it being understood that the Purchase Contract Agent shall not be liable for any representation or warranty made by or on behalf of a Holder), hereby represents and warrants to the Collateral Agent and the Company (with respect to such Holder's interest in the Collateral), which representations and warranties shall be deemed repeated on each day a Holder effects a Transfer of Collateral, that:

(a) such Holder has the power to grant a security interest in and lien on the Collateral;

(b) such Holder is the sole beneficial owner of the Collateral and, in the case of Collateral delivered in physical form, is the sole holder of such Collateral and is the sole beneficial owner of, or has the right to Transfer, the Collateral it Transfers to the Collateral Agent for credit to the Collateral Account, free and clear of any security interest, lien, encumbrance, call, liability to pay money or other restriction other than the security interest and lien granted under Article 11;

(c) upon the Transfer of the Collateral to the Securities Intermediary for credit to the Collateral Account, the Collateral Agent, for the benefit of the Company, will have a valid and perfected first priority security interest therein (assuming that any central clearing operation or any securities intermediary or other entity not within the control of the Holder involved in the Transfer of the Collateral, including the Collateral Agent and the Securities Intermediary, gives the notices and takes the action required of it hereunder and under applicable law for perfection of that interest and assuming the establishment and exercise of control pursuant to Article 12 hereof); and

(d) the execution and performance by the Holder of its obligations under this Agreement will not result in the creation of any security interest, lien or other encumbrance on the Collateral (other than the security interest and lien granted under Article 11 hereof) or violate any provision of any existing law or regulation applicable to it or of any mortgage, charge, pledge, indenture, contract or undertaking to which it is a party or which is binding on it or any of its assets.

Section 14.02 *Covenants*. The Purchase Contract Agent and the Holders from time to time, acting through the Purchase Contract Agent as their attorney-in-fact (it being understood that the Purchase Contract Agent shall not be liable for any covenant made by or on behalf of a Holder), hereby covenant to the Collateral Agent and the Company that for so long as the Collateral remains subject to the Pledge:

(a) neither the Purchase Contract Agent nor such Holders will create or purport to create or allow to subsist any mortgage, charge, lien, pledge or any other security interest whatsoever over the Collateral or any part of it other than pursuant to this Agreement; and

(b) neither the Purchase Contract Agent nor such Holders will sell or otherwise dispose (or attempt to dispose) of the Collateral or any part of it except for the beneficial interest therein, subject to the Pledge hereunder, transferred in connection with a Transfer of the Units.

ARTICLE 15

**THE COLLATERAL AGENT, THE CUSTODIAL AGENT
AND THE SECURITIES INTERMEDIARY**

It is hereby agreed as follows:

Section 15.01 *Appointment, Powers and Immunities*. The Collateral Agent, the Custodial Agent and the Securities Intermediary shall act as agent for the Company hereunder with such powers as are specifically vested in the Collateral Agent, the Custodial Agent and the Securities Intermediary, as the case may be, by the terms of this Agreement. The Collateral Agent, the Custodial Agent and Securities Intermediary shall:

(a) have no duties or responsibilities except those expressly set forth in this Agreement and no implied covenants or obligations shall be inferred from this Agreement against the Collateral Agent, the Custodial Agent or the Securities Intermediary, nor shall the Collateral Agent, the Custodial Agent or the Securities Intermediary be bound by the provisions of any agreement by any party hereto beyond the specific terms hereof;

(b) not be responsible for any recitals contained in this Agreement, or in any certificate or other document referred to or provided for in, or received by it under, this Agreement or the Units, or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement (other than as against the Collateral Agent, the Custodial Agent or the Securities Intermediary, as the case may be), the Units, any Collateral or any other document referred to or provided for herein or therein or for any failure by the Company or any other Person (except the Collateral Agent, the Custodial Agent or Securities Intermediary, as the case may be) to perform any of its obligations hereunder or thereunder or, except as expressly required hereby, for the perfection, priority or maintenance of any security interest created hereunder;

(c) not be required to initiate or conduct any litigation or collection proceedings hereunder (except pursuant to directions furnished under Section 15.02 hereof, subject to Section 15.08 hereof);

(d) not be responsible for any action taken or omitted to be taken by it hereunder or under any other document or instrument referred to or provided for herein or in connection herewith or therewith, except for its own negligence or willful misconduct; and

(e) not be required to advise any party as to selling or retaining, or taking or refraining from taking any action with respect to, any securities or other property deposited hereunder.

Subject to the foregoing, during the term of this Agreement, the Collateral Agent, the Custodial Agent and the Securities Intermediary shall take all reasonable action in connection with the safekeeping and preservation of the Collateral hereunder as determined by industry standards.

No provision of this Agreement shall require the Collateral Agent, the Custodial Agent or the Securities Intermediary to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties hereunder. In no event shall the Collateral Agent, the Custodial Agent or the Securities Intermediary be liable for any amount in excess of the Value of the Collateral.

Section 15.02 *Instructions of the Company*. The Company shall have the right, by one or more written instruments executed and delivered to the Collateral Agent, to direct the time, method and place of

conducting any proceeding for the realization of any right or remedy available to the Collateral Agent, or of exercising any power conferred on the Collateral Agent, or to direct the taking or refraining from taking of any action authorized by this Agreement; *provided, however*, that (i) such direction shall not conflict with the provisions of any law or of this Agreement or involve the Collateral Agent in personal liability and (ii) the Collateral Agent shall be indemnified to its satisfaction as provided herein. Nothing contained in this Section 15.02 shall impair the right of the Collateral Agent in its discretion to take any action or omit to take any action which it deems proper and which is not inconsistent with such direction. None of the Collateral Agent, the Custodial Agent or the Securities Intermediary has any obligation or responsibility to file UCC financing statements.

Section 15.03 *Reliance by Collateral Agent, Custodial Agent and Securities Intermediary*. Each of the Securities Intermediary, the Custodial Agent and the Collateral Agent shall be entitled to rely conclusively upon any certification, order, judgment, opinion, notice or other written communication (including, without limitation, any thereof by e-mail or similar electronic means, telecopy, telex or facsimile) believed by it in good faith to be genuine and correct and to have been signed or sent by or on behalf of the proper Person or Persons (without being required to determine the correctness of any fact stated therein) and consult with and conclusively rely upon advice, opinions and statements of legal counsel and other experts selected by the Collateral Agent, the Custodial Agent or the Securities Intermediary, as the case may be. As to any matters not expressly provided for by this Agreement, the Collateral Agent, the Custodial Agent and the Securities Intermediary shall in all cases be fully protected in acting, or in refraining from acting, hereunder in accordance with instructions given by the Company in accordance with this Agreement.

Section 15.04 *Certain Rights*. (a) Whenever in the administration of the provisions of this Agreement the Collateral Agent, the Custodial Agent or the Securities Intermediary shall deem it necessary or desirable that a matter be proved or established prior to taking or suffering any action to be taken hereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may, in the absence of negligence or bad faith on the part of the Collateral Agent, the Custodial Agent or the Securities Intermediary, be deemed to be conclusively proved and established by a certificate signed by one of the Company's officers, and delivered to the Collateral Agent, the Custodial Agent or the Securities Intermediary and such certificate, in the absence of negligence or bad faith on the part of the Collateral Agent, the Custodial Agent or the Securities Intermediary, shall be full warrant to the Collateral Agent, the Custodial Agent or the Securities Intermediary for any action taken, suffered or omitted by it under the provisions of this Agreement upon the faith thereof.

(b) The Collateral Agent, the Custodial Agent or the Securities Intermediary shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, entitlement order, approval or other paper or document.

(c) The rights, privileges, protections, immunities and benefits given to each of the Collateral Agent, the Custodial Agent and the Securities Intermediary, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each agent, custodian and other Person employed to act hereunder.

Section 15.05 *Merger, Conversion, Consolidation or Succession to Business*. Any corporation or national association into which the Collateral Agent, the Custodial Agent or the Securities Intermediary may be merged or converted or with which it may be consolidated, or any corporation or national association resulting from any merger, conversion or consolidation to which the Collateral Agent, the Custodial Agent or the Securities Intermediary shall be a party, or any corporation succeeding to all or substantially all of the corporate trust business of the Collateral Agent, the Custodial Agent or the

Securities Intermediary shall be the successor of the Collateral Agent, the Custodial Agent or the Securities Intermediary hereunder without the execution or filing of any paper with any party hereto or any further act on the part of any of the parties hereto except where an instrument of transfer or assignment is required by law to effect such succession, anything herein to the contrary notwithstanding.

Section 15.06 *Rights in Other Capacities*. The Collateral Agent, the Custodial Agent and the Securities Intermediary and their affiliates may (without having to account therefor to the Company) accept deposits from, lend money to, make their investments in and generally engage in any kind of banking, trust or other business with the Purchase Contract Agent, any other Person interested herein and any Holder (and any of their respective subsidiaries or affiliates) as if it were not acting as the Collateral Agent, the Custodial Agent or the Securities Intermediary, as the case may be, and the Collateral Agent, the Custodial Agent, the Securities Intermediary and their affiliates may accept fees and other consideration from the Purchase Contract Agent and any Holder without having to account for the same to the Company; *provided* that each of the Collateral Agent, the Custodial Agent and the Securities Intermediary covenants and agrees with the Company that it shall not accept, receive or permit there to be created in favor of itself and shall take no affirmative action to permit there to be created in favor of any other Person, any security interest, lien or other encumbrance of any kind in or upon the Collateral other than the lien created by the Pledge.

Section 15.07 *Non-reliance on the Collateral Agent, Custodial Agent and Securities Intermediary*. None of the Collateral Agent, the Custodial Agent and the Securities Intermediary shall be required to keep itself informed as to the performance or observance by the Purchase Contract Agent or any Holder of this Agreement, the Units or any other document referred to or provided for herein or therein or to inspect the properties or books of the Purchase Contract Agent or any Holder. None of the Collateral Agent, the Custodial Agent or the Securities Intermediary shall have any duty or responsibility to provide the Company with any credit or other information concerning the affairs, financial condition or business of the Purchase Contract Agent or any Holder (or any of their respective affiliates) that may come into the possession of the Collateral Agent, the Custodial Agent or the Securities Intermediary or any of their respective affiliates.

Section 15.08 *Compensation and Indemnity*. The Company agrees to:

(a) pay the Collateral Agent, the Custodial Agent and the Securities Intermediary from time to time such compensation as shall be agreed in writing between the Company and the Collateral Agent, the Custodial Agent or the Securities Intermediary, as the case may be, for all services rendered by them hereunder;

(b) indemnify and hold harmless the Collateral Agent, the Custodial Agent, the Securities Intermediary and each of their respective directors, officers, agents and employees (collectively, the “**Pledge Indemnitees**”), from and against any and all claims, liabilities, losses, damages, fines, penalties and expenses (including reasonable fees and expenses of counsel) (collectively, “**Losses**” and individually, a “**Loss**”) that may be imposed on, incurred by, or asserted against, the Indemnitees or any of them for following any instructions or other directions upon which any of the Collateral Agent, the Custodial Agent or the Securities Intermediary is entitled to rely pursuant to the terms of this Agreement, provided that the Collateral Agent, the Custodial Agent or the Securities Intermediary has not acted with negligence or engaged in willful misconduct or bad faith with respect to the specific Loss against which indemnification is sought; and

(c) in addition to and not in limitation of paragraph (b) of this Section 15.08, indemnify and hold the Indemnitees and each of them harmless from and against any and all Losses that may be imposed on, incurred by or asserted against, the Indemnitees or any of them in connection with or

arising out of the Collateral Agent's, the Custodial Agent's or the Securities Intermediary's acceptance or performance of its powers and duties under this Agreement, *provided* the Collateral Agent, the Custodial Agent or the Securities Intermediary has not acted with negligence or engaged in willful misconduct or bad faith with respect to the specific Loss against which indemnification is sought.

The provisions of this Section and Section 15.14 shall survive the resignation or removal of the Collateral Agent, the Custodial Agent or the Securities Intermediary and the termination of this Agreement.

Section 15.09 *Failure to Act*. In the event that, in the good faith belief of the Collateral Agent, the Custodial Agent or the Securities Intermediary, an ambiguity in the provisions of this Agreement arises or any actual dispute between or conflicting claims by or among the parties hereto or any other Person with respect to any funds or property deposited hereunder has been asserted in writing, then at its sole option, each of the Collateral Agent, the Custodial Agent and the Securities Intermediary shall be entitled, after prompt notice to the Company and the Purchase Contract Agent, to refuse to comply with any and all claims, demands or instructions with respect to such property or funds so long as such dispute or conflict shall continue, and the Collateral Agent, the Custodial Agent and the Securities Intermediary, as the case may be, shall not be or become liable in any way to any of the parties hereto for its failure or refusal to comply with such conflicting claims, demands or instructions. The Collateral Agent, the Custodial Agent and the Securities Intermediary shall be entitled to refuse to act until either:

(a) such conflicting or adverse claims or demands shall have been finally determined by a court of competent jurisdiction or settled by agreement between the conflicting parties as evidenced in a writing satisfactory to the Collateral Agent, the Custodial Agent or the Securities Intermediary; or

(b) the Collateral Agent, the Custodial Agent or the Securities Intermediary shall have received security or an indemnity satisfactory to it sufficient to hold it harmless from and against any and all loss, liability or reasonable out-of-pocket expense which it may incur by reason of its acting.

The Collateral Agent, the Custodial Agent and the Securities Intermediary may in addition elect to commence an interpleader action or seek other judicial relief or orders as the Collateral Agent, the Custodial Agent or the Securities Intermediary may deem necessary. Notwithstanding anything contained herein to the contrary, none of the Collateral Agent, the Custodial Agent or the Securities Intermediary shall be required to take any action that is in its opinion contrary to law or to the terms of this Agreement, or which would in its opinion subject it or any of its officers, employees or directors to liability.

Section 15.10 *Resignation of Collateral Agent, the Custodial Agent and the Securities Intermediary*. (a) Subject to the appointment and acceptance of a successor Collateral Agent, Custodial Agent or Securities Intermediary as provided below:

(i) the Collateral Agent, the Custodial Agent or the Securities Intermediary may resign at any time by giving notice thereof to the Company and the Purchase Contract Agent as attorney-in-fact for the Holders;

(ii) the Collateral Agent, the Custodial Agent or the Securities Intermediary may be removed at any time by the Company; and

(iii) if the Collateral Agent, the Custodial Agent or the Securities Intermediary fails to perform any of its material obligations hereunder in any material respect for a period of not less than 20 days after receiving written notice of such failure by the Purchase Contract Agent and such failure shall be continuing, the Collateral Agent, the Custodial Agent and the Securities Intermediary may be removed by the Purchase Contract Agent, acting at the direction of the Holders.

The Purchase Contract Agent shall promptly notify the Company upon the transmission of notice as contemplated by clause (iii) of Section 15.10(a) and any removal of the Collateral Agent, the Custodial Agent or the Securities Intermediary pursuant to clause (iii) of this Section 15.10(a). Upon any such resignation or removal, the Company shall have the right to appoint a successor Collateral Agent, Custodial Agent or Securities Intermediary, as the case may be, which shall not be an Affiliate of the Purchase Contract Agent. If no successor Collateral Agent, Custodial Agent or Securities Intermediary shall have been so appointed and shall have accepted such appointment within 45 days after the retiring Collateral Agent's, Custodial Agent's or Securities Intermediary's giving of notice of resignation or the Company's or the Purchase Contract Agent's giving notice of such removal, then the retiring or removed Collateral Agent, Custodial Agent or Securities Intermediary may petition any court of competent jurisdiction, at the expense of the Company, for the appointment of a successor Collateral Agent, Custodial Agent or Securities Intermediary. The Collateral Agent, the Custodial Agent and the Securities Intermediary shall each be a bank or a national banking association which has an office (or an agency office) in New York City with a combined capital and surplus of at least \$50,000,000. Upon the acceptance of any appointment as Collateral Agent, Custodial Agent or Securities Intermediary hereunder by a successor Collateral Agent, Custodial Agent or Securities Intermediary, as the case may be, such successor Collateral Agent, Custodial Agent or Securities Intermediary, as the case may be, shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Collateral Agent, Custodial Agent or Securities Intermediary, as the case may be, and the retiring Collateral Agent, Custodial Agent or Securities Intermediary, as the case may be, shall take all appropriate action, subject to payment of any amounts then due and payable to it hereunder, to transfer any money and property held by it hereunder (including the Collateral) to such successor. The retiring Collateral Agent, Custodial Agent or Securities Intermediary shall, upon such succession, be discharged from its duties and obligations as Collateral Agent, Custodial Agent or Securities Intermediary hereunder. After any retiring Collateral Agent's, Custodial Agent's or Securities Intermediary's resignation hereunder as Collateral Agent, Custodial Agent or Securities Intermediary, the provisions of this Article 15 shall continue in effect for its benefit in respect of any actions taken or omitted to be taken by it while it was acting as the Collateral Agent, the Custodial Agent or the Securities Intermediary. Any resignation or removal of the Collateral Agent, the Custodial Agent or the Securities Intermediary hereunder, at a time when such Person is also acting as the Collateral Agent, the Custodial Agent or the Securities Intermediary, as the case may be, shall be deemed for all purposes of this Agreement as the simultaneous resignation or removal of the Collateral Agent, the Securities Intermediary or the Custodial Agent, as the case may be.

(b) Because The Bank of New York is serving as the Collateral Agent hereunder and also as the Purchase Contract Agent hereunder, if an event of default or a collateral event of default occurs hereunder The Bank of New York will resign as the Collateral Agent, Custodial Agent and the Securities Intermediary, but continue to act as the Purchase Contract Agent. A successor Collateral Agent, Custodial Agent and Securities Intermediary will be appointed in accordance with the terms of this Article 15.

Section 15.11 *Right to Appoint Agent or Advisor*. The Collateral Agent shall have the right to appoint agents or advisors in connection with any of its duties hereunder, and the Collateral Agent shall not be liable for any action taken or omitted by, or in reliance upon the advice of, such agents or advisors selected in good faith. The appointment of agents pursuant to this Section 15.11 shall be subject to prior written consent of the Company, which consent shall not be unreasonably withheld.

Section 15.12 *Survival*. The provisions of this Article 15 shall survive termination of this Agreement and the resignation or removal of the Collateral Agent, the Custodial Agent or the Securities Intermediary.

Section 15.13 *Exculpation*. Anything contained in this Agreement to the contrary notwithstanding, in no event shall the Collateral Agent, the Custodial Agent or the Securities Intermediary or their officers, directors, employees or agents be liable under this Agreement to any third party for indirect, special, punitive, or consequential loss or damage of any kind whatsoever, including, but not limited to, lost profits, whether or not the likelihood of such loss or damage was known to the Collateral Agent, the Custodial Agent or the Securities Intermediary, or any of them and regardless of the form of action.

Section 15.14 *Expenses, Etc.* The Company agrees to reimburse the Collateral Agent, the Custodial Agent and the Securities Intermediary for:

(a) all reasonable costs, fees and expenses of the Collateral Agent, the Custodial Agent and the Securities Intermediary (including, without limitation, the reasonable fees and expenses of counsel to the Collateral Agent, the Custodial Agent and the Securities Intermediary), in connection with (i) the negotiation, preparation, execution and delivery or performance of this Agreement and (ii) any modification, supplement or waiver of any of the terms of this Agreement;

(b) all reasonable costs, fees and expenses of the Collateral Agent, the Custodial Agent and the Securities Intermediary (including, without limitation, reasonable fees and expenses of counsel) in connection with (i) any enforcement or proceedings resulting or incurred in connection with causing any Holder to satisfy its obligations under the Purchase Contracts forming a part of the Units and (ii) the enforcement of this Section 15.14;

(c) all transfer, stamp, documentary or other similar taxes, assessments or charges levied by any governmental or revenue authority in respect of this Agreement or any other document referred to herein and all costs, expenses, taxes, assessments and other charges incurred in connection with any filing, registration, recording or perfection of any security interest contemplated hereby;

(d) all reasonable fees and expenses of any agent or advisor appointed by the Collateral Agent and consented to by the Company under Section 15.11 of this Agreement; and

(e) any other out-of-pocket costs and expenses reasonably incurred by the Collateral Agent, the Custodial Agent and the Securities Intermediary in connection with the performance of their duties hereunder.

Section 15.15 *Force Majeure*.

In no event shall any of the Collateral Agent, Custodial Agent and Securities Intermediary be responsible or liable for any failure or delay in the performance of its obligations under this Agreement arising out of or caused directly or indirectly, by acts of God; earthquake; fires; floods; wars; civil or military disturbances; terrorist acts; sabotage; epidemics; riots; interruptions, loss or malfunctions of utilities; accidents; labor disputes; or acts of civil or military authority or governmental actions; it being understood that the Purchase Contract Agent shall use reasonable efforts which are consistent with accepted practices in the banking industry to resume performance as soon as practicable under such circumstances.

ARTICLE 16

MISCELLANEOUS

Section 16.01 *Security Interest Absolute*. All rights of the Collateral Agent and security interests hereunder, and all obligations of the Holders from time to time hereunder pursuant to the Pledge, shall be absolute and unconditional irrespective of:

(a) any lack of validity or enforceability of any provision of the Purchase Contracts or the Units or any other agreement or instrument relating thereto;

(b) any change in the time, manner or place of payment of, or any other term of, or any increase in the amount of, all or any of the obligations of Holders of the Units under the related Purchase Contracts, or any other amendment or waiver of any term of, or any consent to any departure from any requirement of, the Purchase Contract Agreement or any Purchase Contract or any other agreement or instrument relating thereto; or

(c) any other circumstance which might otherwise constitute a defense available to, or discharge of, a borrower, a guarantor or a pledgor.

Section 16.02 *Notice of Special Event, Special Event Redemption and Termination Event*. Upon the occurrence of a Special Event, a Special Event Redemption or a Termination Event, the Company shall deliver written notice to the Purchase Contract Agent, the Collateral Agent and the Securities Intermediary. Upon the written request of the Collateral Agent or the Securities Intermediary, the Company shall inform such party whether or not a Special Event, a Special Event Redemption or a Termination Event has occurred.

[SIGNATURES ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

E*TRADE FINANCIAL CORPORATION

THE BANK OF NEW YORK,
as Purchase Contract Agent and as attorney-in-fact of
the Holders from time to time of the Units

By: /s/ Robert J. Simmons
Name: Robert J. Simmons
Title: Chief Financial Officer

By: /s/ Stacey B. Poindexter
Name: Stacey B. Poindexter
Title: Assistant Vice President

Address for Notices:

E*TRADE Financial Corporation
671 North Glebe Road
Arlington, Virginia 22203
Attention: General Counsel

Address for Notices:

The Bank of New York
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division –
Corporate Finance Unit

THE BANK OF NEW YORK
as Collateral Agent, Custodial Agent and
Securities Intermediary

By: /s/ Stacey B. Poindexter
Name: Stacey B. Poindexter
Title: Assistant Vice President

Address for Notices:

The Bank of New York
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division –
Corporate Finance Unit

(FORM OF FACE OF CORPORATE UNIT CERTIFICATE)

[For inclusion in Global Certificates only - THIS CERTIFICATE IS A GLOBAL CERTIFICATE WITHIN THE MEANING OF THE PURCHASE CONTRACT AND PLEDGE AGREEMENT HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF CEDE & CO., AS NOMINEE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION (THE "DEPOSITORY"), THE DEPOSITORY OR ANOTHER NOMINEE OF THE DEPOSITORY. THIS CERTIFICATE IS EXCHANGEABLE FOR CERTIFICATES REGISTERED IN THE NAME OF A PERSON OTHER THAN THE DEPOSITORY OR ITS NOMINEE ONLY IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE PURCHASE CONTRACT AND PLEDGE AGREEMENT AND NO TRANSFER OF THIS CERTIFICATE (OTHER THAN A TRANSFER OF THIS CERTIFICATE AS A WHOLE BY THE DEPOSITORY TO A NOMINEE OF THE DEPOSITORY OR BY A NOMINEE OF THE DEPOSITORY TO THE DEPOSITORY OR ANOTHER NOMINEE OF THE DEPOSITORY) MAY BE REGISTERED EXCEPT IN LIMITED CIRCUMSTANCES.

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR SUCH OTHER NAME AS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY (AND ANY PAYMENT HEREON IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL SINCE THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.]

No. 1
Number of Corporate Units:

CUSIP No. []

E*TRADE FINANCIAL CORPORATION
Corporate Units

This Corporate Units Certificate certifies that _____ is the registered Holder of the number of Corporate Units set forth above [For inclusion in Global Certificates only - or such other number of Corporate Units reflected in the Schedule of Increases or Decreases in Global Certificate attached hereto, which number shall not exceed 18,000,000]. Each Corporate Unit consists of (i) either (a) an Applicable Ownership Interest in Subordinated Notes, subject to the Pledge thereof by such Holder pursuant to the Purchase Contract and Pledge Agreement, or (b) upon the occurrence of a Special Event Redemption prior to the Purchase Contract Settlement Date, the Applicable Ownership Interest in the Treasury Portfolio, subject to the pledge of the Applicable Ownership Interest in the Treasury Portfolio (as specified in clause (i) of the definition of such term) by such Holder pursuant to the Purchase Contract and Pledge Agreement, and (ii) the rights and obligations of the Holder under one Purchase Contract with the Company.

All capitalized terms used herein that are defined in the Purchase Contract and Pledge Agreement (as defined on the reverse hereof) have the meaning set forth therein.

Pursuant to the Purchase Contract and Pledge Agreement, the Applicable Ownership Interest in Subordinated Notes or the Applicable Ownership Interest in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as the case may be, constituting part of each Corporate Unit evidenced hereby have been pledged to the Collateral Agent, for the benefit of the Company, to secure the obligations of the Holder under the Purchase Contract comprising part of such Corporate Unit.

All payments of the principal amount with respect to the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes or all payments with respect to the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as the case may be, or payments of interest on the Pledged Applicable Ownership Interests in Subordinated Notes or distributions with respect to the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (ii) of the definition of such term), as the case may be, constituting part of the Corporate Units shall be paid on the dates and in the manner set forth in the Purchase Contract and Pledge Agreement. Interest on the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes and distributions on the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (ii) of the definition of such term), as the case may be, forming part of the Corporate Units evidenced hereby, which are payable on each Payment Date, shall, subject to receipt thereof by the Purchase Contract Agent, be paid to the Person in whose name this Corporate Units Certificate (or a Predecessor Corporate Units Certificate) is registered at the close of business on the Record Date for such Payment Date.

Each Purchase Contract evidenced hereby obligates the Holder of this Corporate Units Certificate to purchase, and the Company to sell, on the Purchase Contract Settlement Date, at a Purchase Price equal to the Stated Amount, a number of newly issued shares of Common Stock of the Company, equal to the Settlement Rate, unless on or prior to the Purchase Contract Settlement Date there shall have occurred a Termination Event, an Early Settlement or a Cash Merger Early Settlement with respect to such Purchase Contract, all as provided in the Purchase Contract and Pledge Agreement. The Purchase Price for the shares of Common Stock purchased pursuant to each Purchase Contract evidenced hereby, if not paid earlier, shall be paid on the Purchase Contract Settlement Date by application of payment received in the Remarketing of the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes equal to the principal amount thereof or the proceeds of the Pledged Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as the case may be, pledged to secure the obligations under such Purchase Contract of the Holder of the Corporate Units of which such Purchase Contract is a part.

Distributions on the Applicable Ownership Interests in Subordinated Notes and distributions on the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (ii) of the definition of such term) will be payable at the office of the Purchase Contract Agent in New York City, except that all payments with respect to Global Certificates will be made by wire transfer of immediately available funds to the Depository.

Each Purchase Contract evidenced hereby obligates the holder to agree, for U.S. federal income tax purposes (i) to treat each beneficial owner of a Corporate Unit as the owner of the applicable interests in the Collateral Account, including the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes, the Applicable Ownership Interests in the Treasury Portfolio or the Treasury Securities, as applicable, (ii) not to treat the Subordinated Notes as contingent payment debt instruments, and (iii) to allocate all of a holder's purchase price for a Corporate Unit between the Applicable Ownership Interests in Subordinated Notes and the Purchase Contract so that each holder's initial tax basis in each Purchase Contract will be \$0.8313 and each holder's initial tax basis in each Applicable Ownership Interest in Subordinated Notes will be \$24.1687.

Reference is hereby made to the further provisions set forth on the reverse hereof, which further provisions shall for all purposes have the same effect as if set forth at this place.

Unless the certificate of authentication hereon has been executed by the Purchase Contract Agent by manual signature, this Corporate Units Certificate shall not be entitled to any benefit under the Purchase Contract and Pledge Agreement or be valid or obligatory for any purpose.

IN WITNESS WHEREOF, the Company and the Holder specified above have caused this instrument to be duly executed.

E*TRADE FINANCIAL CORPORATION

By: _____
Name:
Title:

HOLDER SPECIFIED ABOVE
(as to obligations of such Holder under the Purchase Contracts)

By: THE BANK OF NEW YORK, not
individually but solely as
attorney-in-fact of such Holder

By: _____
Name:
Title:

Dated: _____

CERTIFICATE OF AUTHENTICATION
OF PURCHASE CONTRACT AGENT

This is one of the Corporate Units Certificates referred to in the within mentioned Purchase Contract and Pledge Agreement.

THE BANK OF NEW YORK,
as Purchase Contract Agent

By: _____
Name:
Title:

Dated: _____

(REVERSE OF CORPORATE UNIT CERTIFICATE)

Each Purchase Contract evidenced hereby is governed by a Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (as may be supplemented from time to time, the “**Purchase Contract and Pledge Agreement**”), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time, to which Purchase Contract and Pledge Agreement and supplemental agreements thereto reference is hereby made for a description of the respective rights, limitations of rights, obligations, duties and immunities thereunder of the Purchase Contract Agent, the Company, and the Holders and of the terms upon which the Corporate Units Certificates are, and are to be, executed and delivered.

Each Purchase Contract evidenced hereby obligates the Holder of this Corporate Units Certificate to purchase, and the Company to sell, on the Purchase Contract Settlement Date at a price equal to the Stated Amount, a number of shares of Common Stock equal to the Settlement Rate, unless an Early Settlement, a Cash Merger Early Settlement or a Termination Event with respect to the Units of which such Purchase Contract is a part shall have occurred. The Settlement Rate is subject to adjustment as described in the Purchase Contract and Pledge Agreement.

No fractional shares of Common Stock will be issued upon settlement of Purchase Contracts, as provided in Section 5.08 of the Purchase Contract and Pledge Agreement.

Each Purchase Contract evidenced hereby that is settled through Early Settlement or Cash Merger Early Settlement shall obligate the Holder of the related Corporate Units to purchase at the Purchase Price, and the Company to sell, a number of newly issued shares of Common Stock equal to the Minimum Settlement Rate (in the case of an Early Settlement) or applicable Settlement Rate (in the case of a Cash Merger Early Settlement).

In accordance with the terms of the Purchase Contract and Pledge Agreement, unless a Termination Event shall have occurred, the Holder of this Corporate Units Certificate shall pay the Purchase Price for the shares of Common Stock purchased pursuant to each Purchase Contract evidenced hereby by effecting a Cash Settlement, an Early Settlement or, if applicable, a Cash Merger Early Settlement or from the proceeds of the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) or a Remarketing of the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes. Unless Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in Subordinated Notes as a component of Corporate Units, a Holder of Corporate Units who (1) does not, on or prior to 5:00 p.m. (New York City time) on the sixth Business Day immediately preceding the Purchase Contract Settlement Date make an effective Cash Settlement in the manner provided in the Purchase Contract and Pledge Agreement or (2) on or prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date (in the case of Corporate Units, unless a Special Event Redemption has occurred) or the second Business Day immediately preceding the Purchase Contract Settlement Date (in the case of Corporate Units after the occurrence of a Special Event Redemption), does not make an effective Early Settlement, shall pay the Purchase Price for the shares of Common Stock to be delivered under the related Purchase Contract from the proceeds of the sale of the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes held by the Collateral Agent in the Remarketing unless the Holder has previously made a Cash Merger Early Settlement. If the Treasury Portfolio has replaced the Subordinated Notes as a component of Corporate Units, a Holder of Corporate Units shall pay the Purchase Price for the shares of Common Stock to be delivered under the related Purchase Contract from the proceeds at maturity of the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term).

As provided in the Purchase Contract and Pledge Agreement, upon the occurrence of a Failed Final Remarketing, as of the Purchase Contract Settlement Date, each Holder of any Pledged Applicable Interests in Subordinated Notes, unless such Holder has elected Cash Settlement and delivered cash in accordance with Section 5.02(a) of the Purchase Contract and Pledge Agreement, shall be deemed to have exercised such Holder's Put Right with respect to the Subordinated Notes underlying such Applicable Ownership Interests in Subordinated Notes and to have elected to have the Proceeds of the Put Right set-off against such Holder's obligation to pay the aggregate Purchase Price for the shares of Common Stock to be issued under the related Purchase Contracts in full satisfaction of such Holders' obligations under such Purchase Contracts.

The Company shall not be obligated to issue any shares of Common Stock in respect of a Purchase Contract or deliver any certificates therefor to the Holder unless it shall have received payment of the aggregate Purchase Price for the shares of Common Stock to be purchased thereunder in the manner set forth in the Purchase Contract and Pledge Agreement.

Each Purchase Contract evidenced hereby and all obligations and rights of the Company and the Holder thereunder shall terminate if a Termination Event shall occur. Upon the occurrence of a Termination Event, the Company shall give written notice to the Purchase Contract Agent and to the Holders, at their addresses as they appear in the Security Register. Upon and after the occurrence of a Termination Event, the Collateral Agent shall release the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) forming a part of each Corporate Unit from the Pledge. A Corporate Unit shall thereafter represent the right to receive the Subordinated Note underlying the Applicable Ownership Interest in the Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio forming a part of such Corporate Units in accordance with the terms of the Purchase Contract and Pledge Agreement.

Under the terms of the Purchase Contract and Pledge Agreement, the Purchase Contract Agent will be entitled to exercise the voting and any other consensual rights pertaining to the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes, but only to the extent instructed in writing by the Holders. Upon receipt of notice of any meeting at which holders of Subordinated Notes are entitled to vote or upon any solicitation of consents, waivers or proxies of holders of Subordinated Notes, the Purchase Contract Agent shall, as soon as practicable thereafter, mail, first class, postage pre-paid, to the Corporate Units Holders the notice required by the Purchase Contract and Pledge Agreement.

Upon the occurrence of a Special Event Redemption, the Collateral Agent shall surrender the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes against delivery of an amount equal to the aggregate Redemption Price of such Subordinated Notes and shall deposit the funds in the Collateral Account in exchange for such Subordinated Notes. Thereafter, the Collateral Agent shall cause the Securities Intermediary to apply an amount equal to the aggregate Redemption Amount of such funds to purchase, on behalf of the Holders of Corporate Units, the Treasury Portfolio.

Following the occurrence of a Special Event Redemption prior to the Purchase Contract Settlement Date, the Collateral Agent shall have such security interest rights with respect to the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) as the Collateral Agent had in respect of Applicable Ownership Interests in Subordinated

Notes and the underlying Subordinated Notes, as provided in the Purchase Contract and Pledge Agreement and any reference herein to the Subordinated Notes or Applicable Ownership Interests in Subordinated Notes shall be deemed to be a reference to the Treasury Portfolio or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be.

The Corporate Units Certificates are issuable only in registered form and only in denominations of a single Corporate Unit and any integral multiple thereof. The transfer of any Corporate Units Certificate will be registered and Corporate Units Certificates may be exchanged as provided in the Purchase Contract and Pledge Agreement. A Holder who elects to substitute a Treasury Security for the Subordinated Note underlying the Applicable Ownership Interests in Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio, as the case may be, thereby creating Treasury Units, shall be responsible for any fees or expenses payable in connection therewith. Except as provided in the Purchase Contract and Pledge Agreement, such Corporate Unit shall not be separable into its constituent parts, and the rights and obligations of the Holder of such Corporate Unit in respect of the Applicable Ownership Interest in Subordinated Notes, or Applicable Ownership Interest in the Treasury Portfolio, as the case may be, and Purchase Contract constituting such Corporate Units may be transferred and exchanged only as a Corporate Unit.

Subject to, and in compliance with, the conditions and terms set forth in the Purchase Contract and Pledge Agreement, the Holder of Corporate Units may effect a Collateral Substitution. From and after such Collateral Substitution, each Unit for which Pledged Treasury Securities secure the Holder's obligation under the Purchase Contract shall be referred to as a "Treasury Unit". A Holder may make such Collateral Substitution only in integral multiples of 40 Corporate Units for 40 Treasury Units. If Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, a Holder may substitute Treasury Securities for the Applicable Ownership Interests in the Treasury Portfolio only in integral multiples of 128,000 Corporate Units.

Subject to and upon compliance with the provisions of the Purchase Contract and Pledge Agreement, at the option of the Holder thereof, Purchase Contracts underlying Units may be settled early by effecting an Early Settlement as provided in the Purchase Contract and Pledge Agreement in integral multiples of 40 Corporate Units, or if Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, in integral multiples of 128,000 Corporate Units.

Upon Early Settlement of Purchase Contracts by a Holder of the related Units, the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term) underlying such Units shall be released from the Pledge as provided in the Purchase Contract and Pledge Agreement and the Holder shall be entitled to receive a number of shares of Common Stock on account of each Purchase Contract forming part of a Corporate Unit as to which Early Settlement is effected equal to the Minimum Settlement Rate.

Upon the occurrence of a Cash Merger, a Holder of Corporate Units may effect Cash Merger Early Settlement of the Purchase Contracts underlying such Corporate Units pursuant to the terms of the Purchase Contract and Pledge Agreement in integral multiples of 40 Corporate Units, or if the Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, in integral multiples of 128,000 Corporate Units. Upon Cash Merger Early Settlement of Purchase Contracts by a Holder of the related Corporate Units, the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the

definition of such term) underlying such Corporate Units shall be released from the Pledge as provided in the Purchase Contract and Pledge Agreement and the Holder shall be entitled to receive a number of shares of Common Stock on account of each Purchase Contract forming part of a Corporate Unit as to which Cash Merger Early Settlement is effected equal to the applicable Settlement Rate.

Upon registration of transfer of this Corporate Units Certificate, the transferee shall be bound (without the necessity of any other action on the part of such transferee, except as may be required by the Purchase Contract Agent pursuant to the Purchase Contract and Pledge Agreement), under the terms of the Purchase Contract and Pledge Agreement and the Purchase Contracts evidenced hereby and the transferor shall be released from the obligations under the Purchase Contracts evidenced by this Corporate Units Certificate. The Company covenants and agrees, and the Holder, by its acceptance hereof, likewise covenants and agrees, to be bound by the provisions of this paragraph.

The Holder of this Corporate Units Certificate, by its acceptance hereof, authorizes the Purchase Contract Agent to enter into and perform the related Purchase Contracts forming part of the Corporate Units evidenced hereby on its behalf as its attorney-in-fact, expressly withholds any consent to the assumption (i.e., affirmance) of the Purchase Contracts by the Company or its trustee in the event that the Company becomes the subject of a case under the Bankruptcy Code, agrees to be bound by the terms and provisions thereof, covenants and agrees to perform its obligations under such Purchase Contracts, consents to the provisions of the Purchase Contract and Pledge Agreement, authorizes the Purchase Contract Agent to enter into and perform the Purchase Contract and Pledge Agreement on its behalf as its attorney-in-fact, and consents to the Pledge of the Applicable Ownership Interests in Subordinated Notes and the underlying Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as the case may be, underlying this Corporate Units Certificate pursuant to the Purchase Contract and Pledge Agreement. The Holder further covenants and agrees that, to the extent and in the manner provided in the Purchase Contract and Pledge Agreement, but subject to the terms thereof, any payments with respect to the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes (other than interest payments thereon) or the Proceeds of the Applicable Ownership Interests in the Treasury Portfolio (as specified in clause (i) of the definition of such term), as the case may be, on the Purchase Contract Settlement Date equal to the aggregate Purchase Price for the related Purchase Contracts shall be paid by the Collateral Agent to the Company in satisfaction of such Holder's obligations under the related Purchase Contracts and such Holder shall acquire no right, title or interest in such payments.

Subject to certain exceptions, the provisions of the Purchase Contract and Pledge Agreement may be amended with the consent of the Holders of a majority of the Purchase Contracts.

The Purchase Contracts shall be governed by, and construed in accordance with, the laws of the State of New York, without giving effect to the conflicts of law provisions thereof to the extent a different law would govern as a result.

The Purchase Contracts shall not, prior to the settlement thereof, entitle the Holder to any of the rights of a holder of shares of Common Stock.

Prior to due presentation of this Certificate for registration of transfer, the Company, the Purchase Contract Agent and its Affiliates and any agent of the Company or the Purchase Contract Agent may treat the Person in whose name this Corporate Units Certificate is registered as the owner of the Corporate Units evidenced hereby for the purpose of receiving payments of interest payable on the Subordinated Notes underlying the Applicable Ownership Interests in Subordinated Notes (subject to any applicable record date), performance of the Purchase Contracts and for all other purposes whatsoever, whether or not

any payments in respect thereof be overdue and notwithstanding any notice to the contrary, and neither the Company, the Purchase Contract Agent nor any such agent shall be affected by notice to the contrary.

A copy of the Purchase Contract and Pledge Agreement is available for inspection at the offices of the Purchase Contract Agent.

ABBREVIATIONS

The following abbreviations, when used in the inscription on the face of this instrument, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM: as tenants in common

UNIF GIFT MIN ACT: _____ Custodian (cust) _____ (minor) Under Uniform Gifts to Minors Act of

TENANT: as tenants by the entireties

JT TEN: as joint tenants with right of survivorship and not as tenants in common

Additional abbreviations may also be used though not in the above list.

FOR VALUE RECEIVED, the undersigned hereby sell(s), assign(s) and transfer(s) unto (Please insert Social Security or Taxpayer I.D. or other Identifying Number of Assignee)

(Please Print or Type Name and Address Including Postal Zip Code of Assignee)

the within Corporate Units Certificates and all rights thereunder, hereby irrevocably constituting and appointing attorney _____, to transfer said Corporate Units Certificates on the books of E*TRADE Financial Corporation, with full power of substitution in the premises.

Dated: _____

Signature _____

NOTICE: The signature to this assignment must correspond with the name as it appears upon the face of the within Corporate Units Certificates in every particular, without alteration or enlargement or any change whatsoever.

Signature Guarantee: _____

Dated: _____

REGISTERED HOLDER

If shares are to be registered in the name of
and delivered to a Person other than the Holder, please
(i) print such Person's name and address and (ii) provide a guarantee of your
signature:

Please print name and address
of Register Holder:

Name

Name

Address

Address

Social Security or other Taxpayer
Identification Number, if any

Signature _____

Signature Guarantee: _____

SETTLEMENT INSTRUCTIONS

The undersigned Holder directs that a certificate for shares of Common Stock deliverable upon settlement on or after the Purchase Contract Settlement Date of the Purchase Contracts underlying the number of Corporate Units evidenced by this Corporate Units Certificate be registered in the name of, and delivered, together with a check in payment for any fractional share, to the undersigned at the address indicated below unless a different name and address have been indicated below. If shares are to be registered in the name of a Person other than the undersigned, the undersigned will pay any transfer tax payable incident thereto.

(if assigned to another person)

Dated: _____

REGISTERED HOLDER

If shares are to be registered in the name of and delivered to a Person other than the Holder, please (i) print such Person's name and address and (ii) provide a guarantee of your signature:

Please print name and address of Registered Holder:

Name

Name

Address

Address

Social Security or other Taxpayer Identification Number, if any

Signature _____

Signature
Guarantee: _____

ELECTION TO SETTLE EARLY/CASH MERGER EARLY SETTLEMENT

The undersigned Holder of this Corporate Units Certificate hereby irrevocably exercises the option to effect [Early Settlement] [Cash Merger Early Settlement] in accordance with the terms of the Purchase Contract and Pledge Agreement with respect to the Purchase Contracts underlying the number of Corporate Units evidenced by this Corporate Units Certificate specified below. The option to effect [Early Settlement] [Cash Merger Early Settlement] may be exercised only with respect to Purchase Contracts underlying Corporate Units in multiples of 40 Corporate Units or an integral multiple thereof; *provided* that if Applicable Ownership Interests in the Treasury Portfolio have replaced Applicable Ownership Interests in the Subordinated Notes as a component of the Corporate Units, Corporate Units Holders may only effect [Early Settlement] [Cash Merger Early Settlement] in multiples of 128,000 Corporate Units. The undersigned Holder directs that a certificate for shares of Common Stock or other securities deliverable upon such [Early Settlement] [Cash Merger Early Settlement] be registered in the name of, and delivered, together with a check in payment for any fractional share and any Corporate Units Certificate representing any Corporate Units evidenced hereby as to which [Early Settlement] [Cash Merger Early Settlement] of the related Purchase Contracts is not effected, to the undersigned at the address indicated below unless a different name and address have been indicated below. Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, deliverable upon such [Early Settlement] [Cash Merger Early Settlement] will be transferred in accordance with the transfer instructions set forth below. If shares are to be registered in the name of a Person other than the undersigned, the undersigned will pay any transfer tax payable incident thereto.

Dated: _____

Signature _____

Signature Guarantee: _____

Number of Units evidenced hereby as to which [Early Settlement] [Cash Merger Early Settlement] of the related Purchase Contracts is being elected:

If shares of Common Stock or Corporate Units Certificates are to be registered in the name of and delivered to, and Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, are to be transferred, to a Person other than the Holder, please print such Person's name and address:

Name

Address

Social Security or other Taxpayer
Identification Number, if any

REGISTERED HOLDER

Please print name and address of Registered Holder:

Name

Address

Transfer Instructions for Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes or the Applicable Ownership Interests in the Treasury Portfolio, as the case may be, transferable upon [Early Settlement] [Cash Merger Early Settlement]:

[TO BE ATTACHED TO GLOBAL CERTIFICATES]

SCHEDULE OF INCREASES OR DECREASES IN GLOBAL CERTIFICATE

The initial number of Corporate Units evidenced by this Global Certificate is []. The following increases or decreases in this Global Certificate have been made:

Date	Amount of increase in number of Corporate Units evidenced by the Global Certificate	Amount of decrease in number of Corporate Units evidenced by the Global Certificate	Number of Corporate Units evidenced by this Global Certificate following such decrease or increase	Signature of authorized signatory of Purchase Contract Agent
-------------	--	--	---	---

(FORM OF FACE OF TREASURY UNIT CERTIFICATE)

[For inclusion in Global Certificate only - THIS CERTIFICATE IS A GLOBAL CERTIFICATE WITHIN THE MEANING OF THE PURCHASE CONTRACT AND PLEDGE AGREEMENT HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF CEDE & CO., AS NOMINEE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION (THE "DEPOSITORY"), THE DEPOSITORY OR ANOTHER NOMINEE OF THE DEPOSITORY. THIS CERTIFICATE IS EXCHANGEABLE FOR CERTIFICATES REGISTERED IN THE NAME OF A PERSON OTHER THAN THE DEPOSITORY OR ITS NOMINEE ONLY IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE PURCHASE CONTRACT AND PLEDGE AGREEMENT AND NO TRANSFER OF THIS CERTIFICATE (OTHER THAN A TRANSFER OF THIS CERTIFICATE AS A WHOLE BY THE DEPOSITORY TO A NOMINEE OF THE DEPOSITORY OR BY A NOMINEE OF THE DEPOSITORY TO THE DEPOSITORY OR ANOTHER NOMINEE OF THE DEPOSITORY) MAY BE REGISTERED EXCEPT IN LIMITED CIRCUMSTANCES.

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR SUCH OTHER NAME AS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY (AND ANY PAYMENT HEREON IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL SINCE THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.]

No. 1
Number of Treasury Units:

CUSIP No. []

E*TRADE FINANCIAL CORPORATION
Treasury Units

This Treasury Units Certificate certifies that _____ is the registered Holder of the number of Treasury Units set forth above [For inclusion in Global Certificates only - or such other number of Treasury Units reflected in the Schedule of Increases or Decreases in Global Certificate attached hereto, which number shall not exceed 18,000,000]. Each Treasury Unit consists of (i) a 1/40 undivided beneficial ownership interest in a Treasury Security having a principal amount at maturity equal to \$1,000, subject to the Pledge of such Treasury Security by such Holder pursuant to the Purchase Contract and Pledge Agreement, and (ii) the rights and obligations of the Holder under one Purchase Contract with the Company.

All capitalized terms used herein that are defined in the Purchase Contract and Pledge Agreement (as defined on the reverse hereof) have the meaning set forth therein.

Pursuant to the Purchase Contract and Pledge Agreement, the Treasury Securities underlying each Treasury Unit evidenced hereby have been pledged to the Collateral Agent, for the benefit of the Company, to secure the obligations of the Holder under the Purchase Contract comprising part of such Treasury Unit.

Each Purchase Contract evidenced hereby obligates the Holder of this Treasury Units Certificate to purchase, and the Company to sell, on the Purchase Contract Settlement Date, at a Purchase Price equal to the Stated Amount, a number of newly issued shares of Common Stock of the Company, equal to the Settlement Rate, unless prior to or on the Purchase Contract Settlement Date there shall have occurred a Termination Event, an Early Settlement or a Cash Merger Early Settlement with respect to such Purchase Contract, all as provided in the Purchase Contract and Pledge Agreement. The Purchase Price for the shares of Common Stock purchased pursuant to each Purchase Contract evidenced hereby, if not paid earlier, shall be paid on the Purchase Contract Settlement Date by application of the proceeds from the Treasury Securities at maturity pledged to secure the obligations under such Purchase Contract of the Holder of the Treasury Units of which such Purchase Contract is a part.

Each Purchase Contract evidenced hereby obligates the holder to agree, for U.S. federal income tax purposes, to treat each beneficial owner of a Treasury Unit as the owner of the applicable interests in the Treasury Securities.

Reference is hereby made to the further provisions set forth on the reverse hereof, which further provisions shall for all purposes have the same effect as if set forth at this place.

Unless the certificate of authentication hereon has been executed by the Purchase Contract Agent by manual signature, this Treasury Units Certificate shall not be entitled to any benefit under Purchase Contract and Pledge Agreement or be valid or obligatory for any purpose.

IN WITNESS WHEREOF, the Company and the Holder specified above have caused this instrument to be duly executed.

E*TRADE FINANCIAL CORPORATION

By: _____
Name:
Title:

HOLDER SPECIFIED ABOVE
(as to obligations of such Holder under the Purchase Contracts)

By: THE BANK OF NEW YORK,
not individually but solely as attorney-in-fact or such
Holder

By: _____
Name:
Title:

Dated: _____

CERTIFICATE OF AUTHENTICATION OF
PURCHASE CONTRACT AGENT

This is one of the Treasury Units referred to in the within-mentioned Purchase Contract and Pledge Agreement.

THE BANK OF NEW YORK,
as Purchase Contract Agent

By: _____
Name:
Title:

Dated: _____

(REVERSE OF TREASURY UNIT CERTIFICATE)

Each Purchase Contract evidenced hereby is governed by a Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (as may be supplemented from time to time, the “**Purchase Contract and Pledge Agreement**”) between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time, to which Purchase Contract and Pledge Agreement and supplemental agreements thereto reference is hereby made for a description of the respective rights, limitations of rights, obligations, duties and immunities thereunder of the Purchase Contract Agent, the Company and the Holders and of the terms upon which the Treasury Units Certificates are, and are to be, executed and delivered.

Each Purchase Contract evidenced hereby obligates the Holder of this Treasury Units Certificate to purchase, and the Company to sell, on the Purchase Contract Settlement Date at a price equal to the Stated Amount, a number of newly issued shares of Common Stock equal to the Settlement Rate, unless an Early Settlement, a Cash Merger Early Settlement or a Termination Event with respect to the Unit of which such Purchase Contract is a part shall have occurred. The Settlement Rate is subject to adjustment as described in the Purchase Contract and Pledge Agreement.

No fractional shares of Common Stock will be issued upon settlement of Purchase Contracts, as provided in Section 5.08 of the Purchase Contract and Pledge Agreement.

Each Purchase Contract evidenced hereby that is settled through Early Settlement or Cash Merger Early Settlement shall obligate the Holder of the related Treasury Units to purchase at the Purchase Price and the Company to sell, a number of newly issued shares of Common Stock equal to the Minimum Settlement Rate (in the case of an Early Settlement) or applicable Settlement Rate (in the case of a Cash Merger Early Settlement).

In accordance with the terms of the Purchase Contract and Pledge Agreement, the Holder of this Treasury Unit shall pay the Purchase Price for the shares of the Common Stock to be purchased pursuant to each Purchase Contract evidenced hereby either by effecting an Early Settlement or, if applicable, a Cash Merger Early Settlement of each such Purchase Contract or by applying the proceeds of the Pledged Treasury Securities underlying such Holder's Treasury Unit equal to the Purchase Price for such Purchase Contract to the purchase of the Common Stock.

The Company shall not be obligated to issue any shares of Common Stock in respect of a Purchase Contract or deliver any certificates therefor to the Holder unless it shall have received payment of the aggregate Purchase Price for the shares of Common Stock to be purchased thereunder in the manner set forth in the Purchase Contract and Pledge Agreement.

Each Purchase Contract evidenced hereby and all obligations and rights of the Company and the Holder thereunder, shall terminate if a Termination Event shall occur. Upon the occurrence of a Termination Event, the Company shall give written notice to the Purchase Contract Agent and the Holders, at their addresses as they appear in the Security Register. Upon and after the occurrence of a Termination Event, the Collateral Agent shall release the Treasury Securities underlying each Treasury Unit from the Pledge. A Treasury Unit shall thereafter represent the right to receive the Treasury Security underlying such Treasury Unit, in accordance with the terms of the Purchase Contract and Pledge Agreement.

The Treasury Units Certificates are issuable only in registered form and only in denominations of a single Treasury Unit and any integral multiple thereof. The transfer of any Treasury Units Certificate will be registered and Treasury Units Certificates may be exchanged as provided in the Purchase Contract and Pledge Agreement. A Holder who elects to substitute Subordinated Notes or Applicable Ownership Interests in the Treasury Portfolio, as the case may be, for Treasury Securities, thereby recreating Corporate Units, shall be responsible for any fees or expenses payable in connection therewith. Except as provided in the Purchase Contract and Pledge Agreement, such Treasury Unit shall not be separable into its constituent parts, and the rights and obligations of the Holder of such Treasury Unit in respect of the Treasury Security and the Purchase Contract constituting such Treasury Unit may be transferred and exchanged only as a Treasury Unit.

Subject to, and in compliance with, the conditions and terms set forth in the Purchase Contract and Pledge Agreement, the Holder of Treasury Units may effect a Collateral Substitution. From and after such substitution, each Unit for which Pledged Applicable Ownership Interests in Subordinated Notes, or Pledged Applicable Ownership Interests in the Treasury Portfolio, as the case may be, secure the Holder's obligation under the Purchase Contract shall be referred to as a "Corporate Unit". A Holder may make such Collateral substitution only in multiples of 40 Treasury Units for 40 Corporate Units. If Applicable Ownership Interests in the Treasury Portfolio have replaced the Applicable Ownership Interests in Subordinated Notes as a component of the Corporate Units, a Holder may substitute Applicable Ownership Interests in the Treasury Portfolio for Treasury Securities only in integral multiples of 128,000 Treasury Units.

Subject to and upon compliance with the provisions of the Purchase Contract and Pledge Agreement, at the option of the Holder thereof, Purchase Contracts underlying Units may be settled early by effecting an Early Settlement as provided in the Purchase Contract and Pledge Agreement in integral multiples of 40 Treasury Units.

Upon Early Settlement of Purchase Contracts by a Holder of the related Units, the Pledged Treasury Securities underlying such Units shall be released from the Pledge as provided in the Purchase Contract and Pledge Agreement and the Holder shall be entitled to receive a number of shares of Common Stock on account of each Purchase Contract forming part of a Treasury Unit as to which Early Settlement is effected equal to the Minimum Settlement Rate.

Upon the occurrence of a Cash Merger, a Holder of Treasury Units may effect Cash Merger Early Settlement of the Purchase Contracts underlying such Treasury Units pursuant to the terms of the Purchase Contract and Pledge Agreement in integral multiples of 40 Treasury Units. Upon Cash Merger Early Settlement of Purchase Contracts by a Holder of the related Treasury Units, the Pledged Treasury Securities underlying such Treasury Units shall be released from the Pledge as provided in the Purchase Contract and Pledge Agreement and the Holder shall be entitled to receive a number of shares of Common Stock on account of each Purchase Contract forming part of a Treasury Unit as to which Cash Merger Early Settlement is effected equal to the applicable Settlement Rate.

Upon registration of transfer of this Treasury Units Certificate, the transferee shall be bound (without the necessity of any other action on the part of such transferee, except as may be required by the Purchase Contract Agent pursuant to the Purchase Contract and Pledge Agreement), under the terms of the Purchase Contract and Pledge Agreement and the Purchase Contracts evidenced hereby and the transferor shall be released from the obligations under the Purchase Contracts evidenced by this Treasury Units Certificate. The Company covenants and agrees, and the Holder, by its acceptance hereof, likewise covenants and agrees, to be bound by the provisions of this paragraph.

The Holder of this Treasury Units Certificate, by its acceptance hereof, authorizes the Purchase Contract Agent to enter into and perform the related Purchase Contracts forming part of the Treasury Units evidenced hereby on its behalf as its attorney-in-fact, expressly withholds any consent to the assumption (i.e., affirmance) of the Purchase Contracts by the Company or its trustee in the event that the Company becomes the subject of a case under the Bankruptcy Code, agrees to be bound by the terms and provisions thereof, covenants and agrees to perform its obligations under such Purchase Contracts, consents to the provisions of the Purchase Contract and Pledge Agreement, authorizes the Purchase Contract Agent to enter into and perform the Purchase Contract and Pledge Agreement on its behalf as its attorney-in-fact, and consents to the Pledge of the Treasury Securities underlying this Treasury Units Certificate pursuant to the Purchase Contract and Pledge Agreement. The Holder further covenants and agrees, that, to the extent and in the manner provided in the Purchase Contract and Pledge Agreement, but subject to the terms thereof, payments in respect to the aggregate principal amount at maturity of the Pledged Treasury Securities on the Purchase Contract Settlement Date equal to the aggregate Purchase Price for the related Purchase Contracts shall be paid by the Collateral Agent to the Company in satisfaction of such Holder's obligations under such Purchase Contracts and such Holder shall acquire no right, title or interest in such payments.

Subject to certain exceptions, the provisions of the Purchase Contract and Pledge Agreement may be amended with the consent of the Holders of a majority of the Purchase Contracts.

The Purchase Contracts shall be governed by, and construed in accordance with, the laws of the State of New York, without giving effect to the conflicts of law provisions thereof to the extent a different law would govern as a result.

The Purchase Contracts shall not, prior to the settlement thereof, entitle the Holder to any of the rights of a holder of shares of Common Stock.

Prior to due presentment of this Certificate for registration of transfer, the Company, the Purchase Contract Agent and its Affiliates and any agent of the Company or the Purchase Contract Agent may treat the Person in whose name this Treasury Units Certificate is registered as the owner of the Treasury Units evidenced hereby for the purpose of performance of the Purchase Contracts and for all other purposes whatsoever, whether or not any payments in respect thereof be overdue and notwithstanding any notice to the contrary, and neither the Company, the Purchase Contract Agent nor any such agent shall be affected by notice to the contrary.

A copy of the Purchase Contract and Pledge Agreement is available for inspection at the offices of the Purchase Contract Agent.

ABBREVIATIONS

The following abbreviations, when used in the inscription on the face of this instrument, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM: as tenants in common

UNIF GIFT MIN ACT: _____ Custodian _____
(cust) (minor)
Under Uniform Gifts to Minors Act of

TENANT: as tenants by the entireties

JT TEN: as joint tenants with right of survivorship and not as tenants in common

Additional abbreviations may also be used though not in the above list.

FOR VALUE RECEIVED, the undersigned hereby sell(s), assign(s) and transfer(s) unto
(Please insert Social Security or Taxpayer I.D. or other Identifying Number of Assignee)

(Please Print or Type Name and Address Including Postal Zip Code of Assignee)

the within Treasury Units Certificates and all rights thereunder, hereby irrevocably constituting and appointing attorney, to transfer said Treasury Units Certificates on the books of E*TRADE Financial Corporation, with full power of substitution in the premises.

Dated: _____

Signature _____

NOTICE: The signature to this assignment must correspond with the name as it appears upon the face of the within Treasury Units Certificates in every particular, without alteration or enlargement or any change whatsoever.

Signature Guarantee: _____

SETTLEMENT INSTRUCTIONS

The undersigned Holder directs that a certificate for shares of Common Stock deliverable upon settlement on or after the Purchase Contract Settlement Date of the Purchase Contracts underlying the number of Treasury Units evidenced by this Treasury Units Certificate be registered in the name of, and delivered, together with a check in payment for any fractional share, to the undersigned at the address indicated below unless a different name and address have been indicated below. If shares are to be registered in the name of a Person other than the undersigned, the undersigned will pay any transfer tax payable incident thereto.

Dated: _____

(if assigned to another person)

REGISTERED HOLDER

If shares are to be registered in the name of and delivered to a Person other than the Holder, please (i) print such Person's name and address and (ii) provide a guarantee of your signature:

Please print name and address of Registered Holder:

Name

Name

Address

Address

Social Security or other Taxpayer
Identification Number, if any

Signature _____

Signature Guarantee: _____

ELECTION TO SETTLE EARLY/CASH MERGER EARLY SETTLEMENT

The undersigned Holder of this Treasury Units Certificate hereby irrevocably exercises the option to effect [Early Settlement] [Cash Merger Early Settlement] in accordance with the terms of the Purchase Contract and Pledge Agreement with respect to the Purchase Contracts underlying the number of Treasury Units evidenced by this Treasury Units Certificate specified below. The option to effect [Early Settlement] [Cash Merger Early Settlement] may be exercised only with respect to Purchase Contracts underlying Treasury Units in multiples of 40 Treasury Units or an integral multiple thereof. The undersigned Holder directs that a certificate for shares of Common Stock or other securities deliverable upon such [Early Settlement] [Cash Merger Early Settlement] be registered in the name of, and delivered, together with a check in payment for any fractional share and any Treasury Units Certificate representing any Treasury Units evidenced hereby as to which [Early Settlement] [Cash Merger Early Settlement] of the related Purchase Contracts is not effected, to the undersigned at the address indicated below unless a different name and address have been indicated below. Pledged Treasury Securities deliverable upon such [Early Settlement] [Cash Merger Early Settlement] will be transferred in accordance with the transfer instructions set forth below. If shares are to be registered in the name of a Person other than the undersigned, the undersigned will pay any transfer tax payable incident thereto.

Dated: _____

Signature _____

Signature Guarantee: _____

Number of Units evidenced hereby as to which [Early Settlement] [Cash Merger Early Settlement] of the related Purchase Contracts is being elected:

If shares are to be registered in the name of and delivered to a Person other than the Holder, please (i) print such Person's name and address and (ii) provide a guarantee of your signature:

REGISTERED HOLDER
Please print name and address of Registered Holder:

Name

Name

Address

Address

Social Security or other Taxpayer
Identification Number, if any

[TO BE ATTACHED TO GLOBAL CERTIFICATES]

SCHEDULE OF INCREASES OR DECREASES IN GLOBAL CERTIFICATE

The initial number of Treasury Units evidenced by this Global Certificate is []. The following increases or decreases in this Global Certificate have been made:

Date	Amount of increase in number of Treasury Units evidenced by the Global Certificate	Amount of decrease in number of Treasury Units evidenced by the Global Certificate	Number of Treasury Units evidenced by this Global Certificate following such decrease or increase	Signature of authorized signatory of Purchase Contract Agent
-------------	---	---	--	---

INSTRUCTION TO PURCHASE CONTRACT AGENT FROM HOLDER
(To Create Treasury Units or Corporate Units)

The Bank of New York,
as Purchase Contract Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: [Corporate Units] [Treasury Units] of E*TRADE Financial Corporation, a Delaware corporation (the “**Company**”).

The undersigned Holder hereby notifies you that it has delivered to The Bank of New York, as Securities Intermediary, for credit to the Collateral Account, \$ Value of [Subordinated Notes] [Applicable Ownership Interests in the Treasury Portfolio] [Treasury Securities] in exchange for an equal Value of [Pledged Treasury Securities] [Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio] held in the Collateral Account, in accordance with the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Agreement**”; unless otherwise defined herein, terms defined in the Agreement are used herein as defined therein), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time. The undersigned Holder has paid all applicable fees and expenses relating to such exchange. The undersigned Holder hereby instructs you to instruct the Collateral Agent to release to you on behalf of the undersigned Holder the [Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio] [Pledged Treasury Securities] related to such [Corporate Units] [Treasury Units].

Dated: _____

Signature _____

Signature Guarantee: _____

Please print name and address of Registered Holder:

Name:

Social Security or other Taxpayer Identification Number, if any

Address

**NOTICE FROM PURCHASE CONTRACT AGENT
TO HOLDERS UPON TERMINATION EVENT**

(Transfer of Collateral upon Occurrence of a Termination Event)

[HOLDER]

Attention:
Telecopy:

Re: [Corporate Units] [Treasury Units] of E*TRADE Financial Corporation, a Delaware corporation (the “**Company**”).

Please refer to the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Purchase Contract and Pledge Agreement**”; unless otherwise defined herein, terms defined in the Purchase Contract and Pledge Agreement are used herein as defined therein), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time.

We hereby notify you that a Termination Event has occurred and that [the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes] [the Pledged Applicable Ownership Interests in the Treasury Portfolio] [the Treasury Securities] comprising a portion of your ownership interest in [Corporate Units] [Treasury Units] have been released and are being held by us for your account pending receipt of transfer instructions with respect to such [Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio] [Pledged Treasury Securities] (the “**Released Securities**”).

Pursuant to Section 3.15 of the Purchase Contract and Pledge Agreement, we hereby request written transfer instructions with respect to the Released Securities. Upon receipt of your instructions and upon transfer to us of your [Corporate Units] [Treasury Units] effected through book-entry or by delivery to us of your [Corporate Units Certificate] [Treasury Units Certificate], we shall transfer the Released Securities by book-entry transfer or other appropriate procedures, in accordance with your instructions. In the event you fail to effect such transfer or delivery, the Released Securities and any distributions thereon, shall be held in our name, or a nominee in trust for your benefit, until such time as such [Corporate Units] [Treasury Units] are transferred or your [Corporate Units Certificate] [Treasury Units Certificate] is surrendered or satisfactory evidence is provided that such [Corporate Units Certificate] [Treasury Units Certificate] has been destroyed, lost or stolen, together with any indemnification that we or the Company may require.

Dated: _____

THE BANK OF NEW YORK,
as Purchase Contract Agent

By: _____
Name:
Title:
Authorized Signatory

NOTICE TO SETTLE BY SEPARATE CASH

The Bank of New York,
as Purchase Contract Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Corporate Units of E*TRADE Financial Corporation, a Delaware corporation (the “**Company**”).

The undersigned Holder hereby irrevocably notifies you in accordance with Section 5.02 of the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Purchase Contract and Pledge Agreement**”; unless otherwise defined herein, terms defined in the Purchase Contract and Pledge Agreement are used herein as defined therein), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the Holders of the Corporate Units and Treasury Units from time to time, that such Holder has elected to pay to the Securities Intermediary for deposit in the Collateral Account, prior to 5:00 p.m. (New York City time) on the sixth Business Day immediately preceding the Purchase Contract Settlement Date (in lawful money of the United States by certified or cashiers’ check or wire transfer, in immediately available funds payable to or upon the order of the Securities Intermediary), \$ as the Purchase Price for the shares of Common Stock issuable to such Holder by the Company with respect to Purchase Contracts on the Purchase Contract Settlement Date. The undersigned Holder hereby instructs you to notify promptly the Collateral Agent of the undersigned Holders’ election to make such Cash Settlement with respect to the Purchase Contracts related to such Holder’s Corporate Units.

Date: _____

Signature

Signature Guarantee: _____

Please print name and address of Registered Holder:

RESERVED

F-1

**INSTRUCTION
FROM PURCHASE CONTRACT AGENT
TO COLLATERAL AGENT
(Creation of Treasury Units)**

The Bank of New York,
as Purchase Contract Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Corporate Units of E*TRADE Financial Corporation (the “**Company**”).

Please refer to the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Agreement**”), among the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of _____ Corporate Units and Treasury Units from time to time. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

We hereby notify you in accordance with Section 3.13 of the Agreement that the holder of securities named below (the “**Holder**”) has elected to substitute \$_____ Value of Treasury Securities or security entitlements with respect thereto in exchange for an equal Value of [Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio] relating to _____ Corporate Units and has delivered to the undersigned a notice stating that the Holder has Transferred such Treasury Securities or security entitlements with respect thereto to the Securities Intermediary, for credit to the Collateral Account.

We hereby request that you instruct the Securities Intermediary, upon confirmation that such Treasury Securities or security entitlements thereto have been credited to the Collateral Account, to release to the undersigned an equal Value of [Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto related to _____ Corporate Units of such Holder in accordance with Section 3.13 of the Agreement.

Dated: _____

THE BANK OF NEW YORK,
as Purchase Contract Agent and as attorney-in-fact of the
Holders from time to time of the Units

By: _____
Name:
Title:
Authorized Signatory

Please print name and address of Holder electing to substitute Treasury Securities or security entitlements with respect thereto for the [Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio]:

Name:

Social Security or other Taxpayer Identification Number, if any

Address

**INSTRUCTION
FROM COLLATERAL AGENT
TO SECURITIES INTERMEDIARY
(Creation of Treasury Units)**

The Bank of New York,
as Securities Intermediary
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Corporate Units of E*TRADE Financial Corporation (the “**Company**”).

The securities account of The Bank of New York, as Collateral Agent, maintained by the Securities Intermediary and designated “The Bank of New York, as Collateral Agent of E*TRADE Financial Corporation, as pledgee of The Bank of New York, as the Purchase Contract Agent on behalf of and as attorney-in-fact for the Holders” (the “**Collateral Account**”).

Please refer to the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Agreement**”), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

When you have confirmed that \$ _____ Value of Treasury Securities or security entitlements with respect thereto has been credited to the Collateral Account by or for the benefit of _____, as Holder of Corporate Units (the “**Holder**”), you are hereby instructed to release from the Collateral Account an equal Value of [Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes] [Pledged Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto relating to Corporate Units of the Holder by Transfer to the Purchase Contract Agent.

Dated: _____

THE BANK OF NEW YORK,
as Collateral Agent

By: _____
Name:
Title:
Authorized Signatory

**INSTRUCTION
FROM PURCHASE CONTRACT AGENT
TO COLLATERAL AGENT
(Recreation of Corporate Units)**

The Bank of New York,
as Collateral Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Treasury Units of E*TRADE Financial Corporation (the “**Company**”).

Please refer to the Purchase Contract and Pledge Agreement dated as of November 22, 2005 (the “**Agreement**”), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

We hereby notify you in accordance with Section 3.14 of the Agreement that the holder of securities named below (the “**Holder**”) has elected to substitute \$ Value of [Subordinated Notes] [Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto in exchange for \$ Value of Pledged Treasury Securities relating to Treasury Units and has delivered to the undersigned a notice stating that the holder has Transferred such [Subordinated Notes] [Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto to the Securities Intermediary, for credit to the Collateral Account.

We hereby request that you instruct the Securities Intermediary, upon confirmation that such [Subordinated Notes] [Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto have been credited to the Collateral Account, to release to the undersigned \$ Value of Treasury Securities or security entitlements with respect thereto related to _____ Treasury Units of such Holder in accordance with Section 3.14 of the Agreement.

THE BANK OF NEW YORK,
as Purchase Contract Agent

Dated: _____

By: _____
Name:
Title:
Authorized Signatory

Please print name and address of Holder electing to substitute [Subordinated Notes] [Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto for Pledged Treasury Securities:

Name

Social Security or other Taxpayer Identification Number, if any

Address

**INSTRUCTION
FROM COLLATERAL AGENT
TO SECURITIES INTERMEDIARY
(Recreation of Corporate Units)**

The Bank of New York,
as Securities Intermediary
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Treasury Units of E*TRADE Financial Corporation (the “**Company**”).

The securities account of The Bank of New York, as Collateral Agent, maintained by the Securities Intermediary and designated “The Bank of New York, as Collateral Agent of E*TRADE Financial Corporation, as pledgee of The Bank of New York, as the Purchase Contract Agent on behalf of and as attorney-in-fact for the Holders” (the “**Collateral Account**”).

Please refer to the Purchase Contract and Pledge Agreement dated as of November 22, 2005 (the “**Agreement**”), among the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

When you have confirmed that \$ _____ Value of [Subordinated Notes] [Applicable Ownership Interests in the Treasury Portfolio] or security entitlements with respect thereto has been credited to the Collateral Account by or for the benefit of _____, as Holder of Treasury Units (the “**Holder**”), you are hereby instructed to release from the Collateral Account \$ _____ Value of Treasury Securities or security entitlements thereto by Transfer to the Purchase Contract Agent.

THE BANK OF NEW YORK,
as Collateral Agent

Dated: _____

By: _____
Name:
Title:
Authorized Signatory

**NOTICE OF CASH SETTLEMENT FROM COLLATERAL
AGENT TO PURCHASE CONTRACT AGENT**
(Cash Settlement Amounts)

The Bank of New York,
as Purchase Contract Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Corporate Units of E*TRADE Financial Corporation (the “Company”).

Please refer to the Purchase Contract and Pledge Agreement dated as of November 22, 2005 (the “**Agreement**”), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time. Unless otherwise defined herein, terms defined in the Agreement are used herein as defined therein.

In accordance with Section 5.02(a)(iv) of the Agreement, we hereby notify you that as of 5:00 p.m. (New York City time) on the sixth Business Day immediately preceding November 18, 2008 (the “**Purchase Contract Settlement Date**”), we have received (i) \$ _____ in immediately available funds paid in an aggregate amount equal to the Purchase Price due to the Company on the Purchase Contract Settlement Date with respect to Corporate Units and (ii) based on the funds received set forth in clause (i) above, an aggregate principal amount of \$ _____ of Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes are to be offered for purchase in each Remarketing.

THE BANK OF NEW YORK,
as Collateral Agent

Dated: _____

By: _____
Name:
Title:
Authorized Signatory

INSTRUCTION TO CUSTODIAL AGENT REGARDING REMARKETING

The Bank of New York,
as Custodial Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Subordinated Notes Due 2018 of E*TRADE Financial Corporation (the “**Company**”).

The undersigned hereby notifies you in accordance with Section 5.02(b)(ii) of the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Agreement**”), between the Company and The Bank of New York, as Collateral Agent, as Custodial Agent, as Securities Intermediary, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time, that the undersigned elects to deliver \$ _____ aggregate principal amount of Separate Subordinated Notes for delivery to the Remarketing Agent prior to 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date for remarketing pursuant to Section 5.02(b)(ii) of the Agreement. The undersigned will, upon request of the Remarketing Agent, execute and deliver any additional documents deemed by the Remarketing Agent or by the Company to be necessary or desirable to complete the sale, assignment and transfer of the Separate Subordinated Notes tendered hereby. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

The undersigned hereby instructs you, upon receipt of the Proceeds of a Successful Remarketing from the Remarketing Agent, to deliver such Proceeds to the undersigned in accordance with the instructions indicated herein under “A. Payment Instructions.” The undersigned hereby instructs you, in the event of a Failed Final Remarketing, upon receipt of the Separate Subordinated Notes tendered herewith from the Remarketing Agent, to deliver such Separate Subordinated Notes to the person(s) and the address(es) indicated herein under “B. Delivery Instructions.”

With this notice, the undersigned hereby (i) represents and warrants that the undersigned has full power and authority to tender, sell, assign and transfer the Separate Subordinated Notes tendered hereby and that the undersigned is the record owner of any Separate Subordinated Notes tendered herewith in physical form or a participant in The Depository Trust Company (“**DTC**”) and the beneficial owner of any Separate Subordinated Notes tendered herewith by book-entry transfer to your account at DTC, (ii) agrees to be bound by the terms and conditions of Section 5.02(b) of the Agreement and (iii) acknowledges and agrees that after 5:00 p.m. (New York City time) on the seventh Business Day immediately preceding the Purchase Contract Settlement Date, such election shall become an irrevocable election to have such Separate Subordinated Notes remarketed in each Remarketing, and that the Separate Subordinated Notes tendered herewith will only be returned in the event of a Failed Final Remarketing.

Date: _____

By: _____
Name: _____
Title: _____

Signature Guarantee: _____

Name

Address

Social Security or other Taxpayer
Identification Number, if any

A. PAYMENT INSTRUCTIONS

Proceeds of a Successful Remarketing should be paid by check in the name of the person(s) set forth below and mailed to the address set forth below.

Name(s) _____
(Please Print)

Address _____
(Please Print)

(Zip Code)

(Tax Identification or Social Security Number)

B. DELIVERY INSTRUCTIONS

In the event of a Failed Final Remarketing, Subordinated Notes which are in physical form should be delivered to the person(s) set forth below and mailed to the address set forth below.

Name(s) _____
(Please Print)

Address _____
(Please Print)

(Zip Code)

(Tax Identification or Social Security Number)

In the event of a Failed Final Remarketing, Subordinated Notes which are in book-entry form should be credited to the account at The Depository Trust Company set forth below.

DTC Account Number

Name of Account Party: _____

INSTRUCTION TO CUSTODIAL AGENT REGARDING
WITHDRAWAL FROM REMARKETING

The Bank of New York,
as Custodial Agent
101 Barclay Street, 8W
New York, NY 10286
Telecopier No.: 212-815-5707
Attention: Corporate Trust Division -
Corporate Finance Unit

Re: Subordinated Notes Due 2018 of E*TRADE Financial Corporation (the “Company”).

The undersigned hereby notifies you in accordance with Section 5.02(b)(ii) of the Purchase Contract and Pledge Agreement, dated as of November 22, 2005 (the “**Agreement**”), among the Company and you, as Collateral Agent, Custodial Agent and Securities Intermediary, and The Bank of New York, as Purchase Contract Agent and as attorney-in-fact for the holders of Corporate Units and Treasury Units from time to time, that the undersigned elects to withdraw the \$ _____ aggregate principal amount of Separate Subordinated Notes delivered to you for Remarketing pursuant to Section 5.02 of the Agreement. The undersigned hereby instructs you to return such Separate Subordinated Notes to the undersigned in accordance with the undersigned’s instructions. With this notice, the Undersigned hereby agrees to be bound by the terms and conditions of Section 5.02(b) of the Agreement. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

Dated: _____

By: _____
Name:
Title:

Name

Signature Guarantee: _____

Address

Social Security or other Taxpayer Identification Number, if any

**E*TRADE Financial Corporation
as Issuer**

AND

The Bank of New York, as Trustee

Subordinated Indenture

Dated as of November 22, 2005

TABLE OF CONTENTS

	<u>PAGE</u>
ARTICLE 1	
DEFINITIONS	
Section 1.01. <i>Certain Terms Defined</i>	1
ARTICLE 2	
SECURITIES	
Section 2.01. <i>Forms Generally</i>	7
Section 2.02. <i>Form of Trustee's Certificate of Authentication</i>	8
Section 2.03. <i>Amount Unlimited; Issuable in Series</i>	8
Section 2.04. <i>Authentication and Delivery of Securities</i>	11
Section 2.05. <i>Execution of Securities</i>	14
Section 2.06. <i>Certificate of Authentication</i>	15
Section 2.07. <i>Denomination and Date of Securities; Payments of Interest</i>	15
Section 2.08. <i>Registration, Transfer and Exchange</i>	16
Section 2.09. <i>Mutilated, Defaced, Destroyed, Lost and Stolen Securities</i>	19
Section 2.10. <i>Cancellation of Securities; Disposition Thereof</i>	20
Section 2.11. <i>Temporary Securities</i>	21
ARTICLE 3	
COVENANTS OF THE ISSUER	
Section 3.01. <i>Payment of Principal and Interest</i>	22
Section 3.02. <i>Offices for Payments, etc</i>	22
Section 3.03. <i>Appointment to Fill a Vacancy in Office of Trustee</i>	23
Section 3.04. <i>Paying Agents</i>	24
Section 3.05. <i>Written Statement to Trustee</i>	25
ARTICLE 4	
SECURITYHOLDERS LISTS AND REPORTS BY THE ISSUER AND THE TRUSTEE	
Section 4.01. <i>Issuer to Furnish Trustee Information as to Names and Addresses of Securityholders</i>	25
Section 4.02. [THIS SECTION INTENTIONALLY LEFT BLANK]	25
Section 4.03. <i>Reports by the Issuer</i>	25
Section 4.04. <i>Reports by the Trustee</i>	25

ARTICLE 5
REMEDIES OF THE TRUSTEE AND SECURITYHOLDERS ON DEFAULT OR EVENT OF DEFAULT

Section 5.01.	<i>Event of Default Defined; Acceleration of Maturity; Waiver of Event of Default</i>	26
Section 5.02.	<i>Collection of Indebtedness by Trustee; Trustee May Prove Debt</i>	28
Section 5.03.	<i>Application of Proceeds</i>	30
Section 5.04.	<i>Suits for Enforcement</i>	31
Section 5.05.	<i>Restoration of Rights on Abandonment of Proceedings</i>	31
Section 5.06.	<i>Limitations on Suits by Securityholders</i>	32
Section 5.07.	<i>Unconditional Right of Securityholders to Institute Certain Suits</i>	32
Section 5.08.	<i>Powers and Remedies Cumulative; Delay or Omission Not Waiver of Default</i>	32
Section 5.09.	<i>Control by Holders of Securities</i>	33
Section 5.10.	<i>Waiver of Past Defaults</i>	33
Section 5.11.	<i>Trustee to Give Notice of Default, But May Withhold In Certain Circumstances</i>	34
Section 5.12.	<i>Right of Court to Require Filing of Undertaking to Pay Costs</i>	34

ARTICLE 6
CONCERNING THE TRUSTEE

Section 6.01.	<i>Duties and Responsibilities of the Trustee; During Default; Prior to Default</i>	35
Section 6.02.	<i>Certain Rights of the Trustee</i>	36
Section 6.03.	<i>Trustee Not Responsible for Recitals, Disposition of Securities or Application of Proceeds Thereof</i>	37
Section 6.04.	<i>Trustee and Agents May Hold Securities or Coupons; Collections, etc</i>	37
Section 6.05.	<i>Moneys Held by Trustee</i>	38
Section 6.06.	<i>Compensation and Indemnification of Trustee and Its Prior Claim</i>	38
Section 6.07.	<i>Right of Trustee to Rely on Officer's Certificate, etc</i>	38
Section 6.08.	[THIS SECTION INTENTIONALLY LEFT BLANK]	39
Section 6.09.	<i>Persons Eligible for Appointment as Trustee</i>	39
Section 6.10.	<i>Resignation and Removal; Appointment of Successor Trustee</i>	39
Section 6.11.	<i>Acceptance of Appointment by Successor Trustee</i>	41
Section 6.12.	<i>Merger, Conversion, Consolidation or Succession to Business of Trustee</i>	42
Section 6.13.	<i>Preferential Collection of Claims Against the Issuer.</i>	43
Section 6.14.	<i>Appointment of Authenticating Agent</i>	43

ARTICLE 7
CONCERNING THE SECURITYHOLDERS

Section 7.01.	<i>Evidence of Action Taken by Securityholders</i>	44
Section 7.02.	<i>Proof of Execution of Instruments and of Holding of Securities</i>	44
Section 7.03.	<i>Holder to Be Treated as Owner</i>	45
Section 7.04.	<i>Securities Owned by Issuer Deemed not Outstanding</i>	46
Section 7.05.	<i>Right of Revocation of Action Taken</i>	46

ARTICLE 8
SUPPLEMENTAL INDENTURES

Section 8.01.	<i>Supplemental Indentures Without Consent of Securityholders</i>	47
Section 8.02.	<i>Supplemental Indentures with Consent of Securityholders</i>	48
Section 8.03.	<i>Effect of Supplemental Indenture</i>	50
Section 8.04.	<i>Documents to Be Given to Trustee</i>	50
Section 8.05.	<i>Notation on Securities in Respect of Supplemental Indentures</i>	50
Section 8.06.	<i>Subordination Unimpaired</i>	50

ARTICLE 9
CONSOLIDATION, MERGER, SALE OR CONVEYANCE

Section 9.01.	<i>Covenant Not to Merge, Consolidate, Sell or Convey Property Except Under Certain Conditions</i>	50
Section 9.02.	<i>Successor Corporation Substituted</i>	51
Section 9.03.	<i>Opinion of Counsel Delivered to Trustee</i>	52

ARTICLE 10
SATISFACTION AND DISCHARGE OF INDENTURE; UNCLAIMED MONEYS

Section 10.01.	<i>Satisfaction and Discharge of Indenture</i>	52
Section 10.02.	<i>Application by Trustee of Funds Deposited for Payment of Securities</i>	57
Section 10.03.	<i>Repayment of Moneys Held by Paying Agent</i>	57
Section 10.04.	<i>Return of Moneys Held by Trustee and Paying Agent Unclaimed for Two Years</i>	57
Section 10.05.	<i>Indemnity for U.S. Government Obligations</i>	58

ARTICLE 11
MISCELLANEOUS PROVISIONS

Section 11.01.	<i>Incorporators, Stockholders, Officers and Directors of Issuer Exempt from Individual Liability</i>	58
Section 11.02.	<i>Provisions of Indenture for the Sole Benefit of Parties and Holders of Securities and Coupons</i>	59
Section 11.03.	<i>Successors and Assigns of Issuer Bound by Indenture</i>	59

Section 11.04.	<i>Notices and Demands on Issuer, Trustee and Holders of Securities and Coupons</i>	59
Section 11.05.	<i>Officer's Certificates and Opinions of Counsel; Statements to Be Contained Therein</i>	60
Section 11.06.	<i>Payments Due on Saturdays, Sundays and Holidays</i>	61
Section 11.07.	<i>Conflict of Any Provision of Indenture with Trust Indenture Act of 1939</i>	61
Section 11.08.	<i>New York Law to Govern</i>	61
Section 11.09.	<i>Counterparts</i>	61
Section 11.10.	<i>Effect of Headings</i>	61
Section 11.11.	<i>Securities in a Foreign Currency</i>	61
Section 11.12.	<i>Judgment Currency</i>	62

ARTICLE 12

REDEMPTION OF SECURITIES AND SINKING FUNDS

Section 12.01.	<i>Applicability of Article</i>	63
Section 12.02.	<i>Notice of Redemption; Partial Redemptions</i>	63
Section 12.03.	<i>Payment of Securities Called for Redemption</i>	65
Section 12.04.	<i>Exclusion of Certain Securities from Eligibility for Selection for Redemption</i>	66
Section 12.05.	<i>Mandatory and Optional Sinking Funds</i>	66

ARTICLE 13

SUBORDINATION

Section 13.01.	<i>Securities and Coupons Subordinated to Senior Indebtedness</i>	68
Section 13.02.	<i>Disputes with Holders of Certain Senior Indebtedness</i>	70
Section 13.03.	<i>Subrogation</i>	70
Section 13.04.	<i>Obligation of Issuer Unconditional</i>	71
Section 13.05.	<i>Payments on Securities and Coupons Permitted</i>	71
Section 13.06.	<i>Effectuation of Subordination by Trustee</i>	71
Section 13.07.	<i>Knowledge of Trustee</i>	72
Section 13.08.	<i>Trustee May Hold Senior Indebtedness</i>	72
Section 13.09.	<i>Rights of Holders of Senior Indebtedness Not Impaired</i>	72
Section 13.10.	<i>Article Applicable to Paying Agents</i>	72
Section 13.11.	<i>Trustee; Compensation Not Prejudiced</i>	73

THIS INDENTURE, dated as of November 22, 2005 between E*TRADE Financial Corporation, a Delaware corporation (the “**Issuer**”), and The Bank of New York, a New York banking corporation, as trustee (the “**Trustee**”),

WITNESSETH:

WHEREAS, the Issuer has duly authorized the issue from time to time of its unsecured debentures, notes or other evidences of indebtedness to be issued in one or more series (the “**Securities**”) up to such principal amount or amounts as may from time to time be authorized in accordance with the terms of this Indenture;

WHEREAS, the Issuer has duly authorized the execution and delivery of this Indenture to provide, among other things, for the authentication, delivery and administration of the Securities; and

WHEREAS, all things necessary to make this Indenture a valid indenture and agreement according to its terms have been done;

NOW, THEREFORE:

In consideration of the premises and the purchases of the Securities by the holders thereof, the Issuer and the Trustee mutually covenant and agree for the equal and proportionate benefit of the respective holders from time to time of the Securities and of the coupons, if any, appertaining thereto as follows:

ARTICLE 1
DEFINITIONS

Section 1.01. *Certain Terms Defined.* The following terms (except as otherwise expressly provided or unless the context otherwise clearly requires) for all purposes of this Indenture and of any indenture supplemental hereto shall have the respective meanings specified in this Section. All other terms used in this Indenture that are defined in the Trust Indenture Act of 1939 or the definitions of which in the Securities Act of 1933 are referred to in the Trust Indenture Act of 1939, including terms defined therein by reference to the Securities Act of 1933 (except as herein otherwise expressly provided or unless the context otherwise requires), shall have the meanings assigned to such terms in said Trust Indenture Act and in said Securities Act as in force at the date of this Indenture. All accounting terms used herein and not expressly defined shall have the meanings assigned to such terms in accordance with generally accepted accounting principles, and the term “generally accepted accounting principles” means such accounting principles as are generally accepted at the time of any computation. The words “herein,” “hereof” and “hereunder” and other words of similar import

refer to this Indenture as a whole and not to any particular Article, Section or other subdivision. The terms defined in this Article have the meanings assigned to them in this Article and include the plural as well as the singular.

“**Authenticating Agent**” shall have the meaning set forth in Section 6.14.

“**Authorized Newspaper**” means a newspaper (which, in the case of The City of New York, will, if practicable, be The Wall Street Journal (Eastern Edition), in the case of the United Kingdom, will, if practicable, be the Financial Times (London Edition) published in an official language of the country of publication customarily published at least once a day for at least five days in each calendar week and of general circulation in The City of New York or the United Kingdom. If it shall be impractical in the opinion of the Trustee to make any publication of any notice required hereby in an Authorized Newspaper, any publication or other notice in lieu thereof which is made or given with the approval of the Trustee shall constitute a sufficient publication of such notice.

“**Board of Directors**” means either the Board of Directors of the Issuer or any committee of such Board duly authorized to act on its behalf.

“**Board Resolution**” means a copy of one or more resolutions, certified by the secretary or an assistant secretary of the Issuer to have been duly adopted or consented to by the Board of Directors and to be in full force and effect, and delivered to the Trustee.

“**Business Day**” means, with respect to any Security, unless otherwise specified pursuant to Section 2.03, a day that in the city (or in any of the cities, if more than one) in which amounts are payable, as specified in the form of such Security, is not a day on which banking institutions are authorized or required by law or regulation to close.

“**Commission**” means the Securities and Exchange Commission, as from time to time constituted, created under the Securities Exchange Act of 1934, or if at any time after the execution and delivery of this Indenture such Commission is not existing and performing the duties now assigned to it under the Trust Indenture Act, then the body performing such duties on such date.

“**Corporate Trust Office**” means the office of the Trustee at which the corporate trust business of the Trustee shall, at any particular time, be principally administered, which office is, at the date as of which this Indenture is dated, located at 101 Barclay Street, Floor 8W, New York, New York 10286, Attention: Corporate Trust Administration.

“**Coupon**” means any interest coupon appertaining to a Security.

“**covenant defeasance**” shall have the meaning set forth in Section 10.01(c).

“Default,” with respect to Securities of any series wherever used herein, means each one of the following events which shall have occurred and be continuing (whatever the reason for such Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body) unless it is specifically deleted or modified in the supplemental indenture, if any, under which such series of Securities is issued:

(a) default in the payment of any installment of interest upon any of the Securities of such series as and when the same shall become due and payable, and continuance of such default for a period of 30 days; or

(b) default in the payment of all or any part of the principal on any of the Securities of such series as and when the same shall become due and payable either at maturity, upon any redemption, by declaration or otherwise; or

(c) failure on the part of the Issuer duly to observe or perform any other of the covenants or agreements on the part of the Issuer in the Securities of such series (other than a covenant or warranty in respect of the Securities of such series a default in the performance or breach of which is elsewhere in this Section or in Section 5.01 specifically dealt with) or contained in this Indenture for a period of 60 days after the date on which written notice specifying such failure, stating that such notice is a “Notice of Default” hereunder and demanding that the Issuer remedy the same, shall have been given by registered or certified mail, return receipt requested, to the Issuer by the Trustee, or to the Issuer and the Trustee by the holders of at least 25% in aggregate principal amount of the Outstanding Securities of all series affected thereby; or

(d) an Event of Default with respect to such series specified in Section 5.01; or

(e) any other Default provided in the supplemental indenture under which such series of Securities is issued or in the form of Security for such series.

“Depositary” means, with respect to the Securities of any series issuable or issued in the form of one or more Registered Global Securities, the Person designated as Depositary by the Issuer pursuant to Section 2.03 until a successor Depositary shall have become such pursuant to the applicable provisions of this Indenture, and thereafter **“Depositary”** shall mean or include each Person who is then a Depositary hereunder, and if at any time there is more than one such Person, **“Depositary”** as used with respect to the Securities of any such series shall mean the Depositary with respect to the Registered Global Securities of that series.

“Dollar” means the coin or currency of the United States of America as at the time of payment is legal tender for the payment of public and private debts.

“**Event of Default**” means any event or condition specified as such in Section 5.01.

“**Foreign Currency**” means a currency issued by the government of a country other than the United States (or any currency unit comprised of any such currencies).

“**Holder**,” “**Holder of Securities**,” “**Securityholder**” or other similar terms mean (a) in the case of any Registered Security, the Person in whose name such Security is registered in the security register kept by the Issuer for that purpose in accordance with the terms hereof, and (b) in the case of any Unregistered Security, the bearer of such Security, or any Coupon appertaining thereto, as the case may be.

“**Indenture**” means this instrument as originally executed and delivered or, if amended or supplemented as herein provided, as so amended or supplemented or both, and shall include the forms and terms of particular series of Securities established as contemplated hereunder.

“**Interest**” means, when used with respect to non-interest bearing Securities, interest payable after maturity.

“**Issuer**” means (except as otherwise provided in Article 6) E*TRADE Financial Corporation, a Delaware corporation, and subject to Article 9 its successors and assigns.

“**Issuer Order**” means a written statement, request or order of the Issuer signed in its name by any one of the following: the Chairman of the Board, the Chief Executive Officer, the Chief Financial Officer, the General Counsel, the Treasurer, any Assistant Treasurer or any other person authorized by the Board of Directors to execute any such written statement, request or order.

“**Judgment Currency**” shall have the meaning set forth in Section 11.12.

“**Officer’s Certificate**” means a certificate (i) signed by any one of the following: the Chairman of the Board, the Chief Executive Officer, the Chief Financial Officer, the General Counsel, the Treasurer, any Assistant Treasurer or any other person authorized by the Board of Directors to execute any such certificate and (ii) delivered to the Trustee. Each such certificate shall comply with Section 314 of the Trust Indenture Act of 1939 and include the statements provided for in Section 11.05.

“**Opinion of Counsel**” means an opinion in writing signed by the General Counsel of the Issuer, or by such other legal counsel who may be an employee of or counsel to the Issuer. Each such opinion shall comply with Section 314 of the Trust Indenture Act of 1939 and include the statements provided for in Section 11.05.

“**original issue date**” of any Security (or portion thereof) means the earlier of (a) the date of such Security or (b) the date of any Security (or portion thereof) for which such Security was issued (directly or indirectly) on registration of transfer, exchange or substitution.

“**Original Issue Discount Security**” means any Security that provides for an amount less than the principal amount thereof to be due and payable upon a declaration of acceleration of the maturity thereof pursuant to Section 5.01.

“**Outstanding**” when used with reference to Securities, shall, subject to the provisions of Section 7.04, mean, as of any particular time, all Securities authenticated and delivered by the Trustee under this Indenture, except

(a) Securities theretofore cancelled by the Trustee or delivered to the Trustee for cancellation;

(b) Securities, or portions thereof, for the payment or redemption of which moneys or U.S. Government Obligations (as provided for in Section 10.01) in the necessary amount shall have been deposited in trust with the Trustee or with any paying agent (other than the Issuer) or shall have been set aside, segregated and held in trust by the Issuer for the Holders of such Securities (if the Issuer shall act as its own paying agent), *provided* that if such Securities, or portions thereof, are to be redeemed prior to the maturity thereof, notice of such redemption shall have been given as herein provided, or provision satisfactory to the Trustee shall have been made for giving such notice; and

(c) Securities which shall have been paid or in substitution for which other Securities shall have been authenticated and delivered pursuant to the terms of Section 2.09 (except with respect to any such Security as to which proof satisfactory to the Trustee is presented that such Security is held by a person in whose hands such Security is a legal, valid and binding obligation of the Issuer).

In determining whether the Holders of the requisite principal amount of Outstanding Securities of any or all series have given any request, demand, authorization, direction, notice, consent or waiver hereunder, the principal amount of an Original Issue Discount Security that shall be deemed to be Outstanding for such purposes shall be the amount of the principal thereof that would be due and payable as of the date of such determination upon a declaration of acceleration of the maturity thereof pursuant to Section 5.01.

“**Payment Blockage Notice**”) has the meaning specified in Section 5.01.

“**Periodic Offering**” means an offering of Securities of a series from time to time, the specific terms of which Securities, including, without limitation, the rate or rates of interest, if any, thereon, the stated maturity or maturities thereof and the redemption provisions, if any, with respect thereto, are to be determined by the Issuer or its agents upon the issuance of such Securities.

“**Person**” means any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization or government or any agency or political subdivision thereof.

“**principal**” whenever used with reference to the Securities or any Security or any portion thereof, shall be deemed to include “and premium, if any”.

“**record date**” shall have the meaning set forth in Section 2.07.

“**Redemption Notice Period**” shall have the meaning set forth in Section 12.02.

“**Registered Global Security**” means a Security evidencing all or a part of a series of Registered Securities, issued to the Depositary for such series in accordance with Section 2.04, and bearing the legend prescribed in Section 2.04.

“**Registered Security**” means any Security registered on the Security register of the Issuer.

“**Required Currency**” shall have the meaning set forth in Section 11.12.

“**Responsible Officer**” when used with respect to the Trustee means the chairman of the Board of Directors, any vice chairman of the board of directors, the chairman of the trust committee, the chairman of the executive committee, any vice chairman of the executive committee, the president, any vice president, (whether or not designated by numbers or words added before or after the title “vice president”) the cashier, the secretary, the treasurer, any trust officer, any assistant trust officer, any assistant vice president, any assistant cashier, any assistant secretary, any assistant treasurer, or any other officer or assistant officer of the Trustee customarily performing functions similar to those performed by the persons who at the time shall be such officers, respectively, or to whom any corporate trust matter is referred because of his knowledge of and familiarity with the particular subject.

“**Security**” or “**Securities**” has the meaning stated in the first recital of this Indenture, or, as the case may be, Securities that have been authenticated and delivered under this Indenture.

“**Senior Indebtedness**” means (i) obligations (other than non-recourse obligations, the Securities or any other obligations specifically designated as being subordinate in right of payment to Senior Indebtedness) of, or guaranteed or assumed by, the Issuer for borrowed money or evidenced by bonds, debentures, notes or other similar instruments, and amendments, renewals, extensions, modifications and refundings of any such indebtedness or obligation and (ii) if

provided in the supplemental indenture under which a series of Securities is issued or in the form of Security for such series, any additional obligations that the Issuer determines to include within the definition of Senior Indebtedness.

“**Trust Indenture Act of 1939**” means the Trust Indenture Act of 1939.

“**Trustee**” means the Person identified as “**Trustee**” in the first paragraph hereof and, subject to the provisions of Article 6, shall also include any successor trustee. “**Trustee**” shall also mean or include each Person who is then a trustee hereunder and if at any time there is more than one such Person, “**Trustee**” as used with respect to the Securities of any series shall mean the trustee with respect to the Securities of such series.

“**Unregistered Security**” means any Security other than a Registered Security.

“**U.S. Government Obligations**” shall have the meaning set forth in Section 10.01(a).

“**Yield to Maturity**” means the yield to maturity on a series of securities, calculated at the time of issuance of such series, or, if applicable, at the most recent redetermination of interest on such series, and calculated in accordance with accepted financial practice.

ARTICLE 2 SECURITIES

Section 2.01. *Forms Generally.* The Securities of each series and the Coupons, if any, to be attached thereto shall be substantially in such form (not inconsistent with this Indenture) as shall be established by or pursuant to one or more Board Resolutions (as set forth in a Board Resolution or, to the extent established pursuant to rather than set forth in a Board Resolution, an Officer’s Certificate detailing such establishment) or in one or more indentures supplemental hereto, in each case with such appropriate insertions, omissions, substitutions and other variations as are required or permitted by this Indenture and may have imprinted or otherwise reproduced thereon such legend or legends or endorsements, not inconsistent with the provisions of this Indenture, as may be required to comply with any law or with any rules or regulations pursuant thereto, or with any rules of any securities exchange or to conform to general usage, all as may be determined by the officers executing such Securities and Coupons, if any, as evidenced by their execution of such Securities and Coupons.

The definitive Securities and Coupons, if any, shall be printed, lithographed or engraved on steel engraved borders or may be produced in any other manner, all as determined by the officers executing such Securities and Coupons, if any, as evidenced by their execution of such Securities and Coupons, if any.

Section 2.02. *Form of Trustee's Certificate of Authentication.* The Trustee's certificate of authentication on all Securities shall be in substantially the following form:

"This is one of the Securities referred to in the within-mentioned Subordinated Indenture.

as Trustee

By:

Authorized Officer

If at any time there shall be an Authenticating Agent appointed with respect to any series of Securities, then the Trustee's Certificate of Authentication to be borne by the Securities of each such series shall be substantially as follows:

"This is one of the Securities referred to in the within-mentioned Subordinated Indenture.

as Authenticating Agent

By:

Authorized Officer

Section 2.03. *Amount Unlimited; Issuable in Series.* The aggregate principal amount of Securities which may be authenticated and delivered under this Indenture is unlimited.

The Securities may be issued in one or more series and the Securities of each such series shall rank equally and pari passu with the Securities of each other series, but all Securities issued hereunder shall be subordinate and junior in right of payment, to the extent and in the manner set forth in Article 13, to all Senior Indebtedness of the Issuer. There shall be established in or pursuant to one or more Board Resolutions (and, to the extent established pursuant to rather than set forth in a Board Resolution, in an Officer's Certificate detailing such establishment) or established in one or more indentures supplemental hereto, prior to the initial issuance of Securities of any series,

-
- (a) the designation of the Securities of the series, which shall distinguish the Securities of the series from the Securities of all other series;
 - (b) any limit upon the aggregate principal amount of the Securities of the series that may be authenticated and delivered under this Indenture (except for Securities authenticated and delivered upon registration of transfer of, or in exchange for, or in lieu of, other Securities of the series pursuant to Section 2.08, 2.09, 2.11, 8.05 or 12.03);
 - (c) if other than Dollars, the coin or currency in which the Securities of that series are denominated (including, but not limited to, any Foreign Currency);
 - (d) the date or dates on which the principal of the Securities of the series is payable;
 - (e) the rate or rates (which may be fixed or variable) at which the Securities of the series shall bear interest, if any, the date or dates from which such interest shall accrue, on which such interest shall be payable and (in the case of Registered Securities) on which a record shall be taken for the determination of Holders to whom interest is payable and/or the method by which such rate or rates or date or dates shall be determined;
 - (f) the place or places where the principal of and any interest on Securities of the series shall be payable (if other than as provided in Section 3.02);
 - (g) the right, if any, of the Issuer to redeem Securities, in whole or in part, at its option and the period or periods within which, the price or prices at which and any terms and conditions, including the Redemption Notice Period, upon which Securities of the series may be so redeemed, pursuant to any sinking fund or otherwise;
 - (h) the obligation, if any, of the Issuer to redeem, purchase or repay Securities of the series pursuant to any mandatory redemption, sinking fund or analogous provisions or at the option of a Holder thereof and the price or prices at which and the period or periods within which and any terms and conditions upon which Securities of the series shall be redeemed, purchased or repaid, in whole or in part, pursuant to such obligation;
 - (i) if other than denominations of \$1,000 and any integral multiple thereof in the case of Registered Securities, or \$1,000 and \$5,000 in the case of Unregistered Securities, the denominations in which Securities of the series shall be issuable;

(j) if other than the principal amount thereof, the portion of the principal amount of Securities of the series which shall be payable upon declaration of acceleration of the maturity thereof;

(k) if other than the coin or currency in which the Securities of that series are denominated, the coin or currency in which payment of the principal of or interest on the Securities of such series shall be payable;

(l) if the principal of or interest on the Securities of such series are to be payable, at the election of the Issuer or a Holder thereof, in a coin or currency other than that in which the Securities are denominated, the period or periods within which, and the terms and conditions upon which, such election may be made;

(m) if the amount of payments of principal of and interest on the Securities of the series may be determined with reference to an index based on a coin or currency other than that in which the Securities of the series are denominated, or with reference to any currencies, securities or baskets of securities, commodities or indices, the manner in which such amounts shall be determined;

(n) if the Holders of the Securities of the series may convert or exchange the Securities of the series into or for securities of the Issuer or of other entities or other property (or the cash value thereof), the specific terms of and period during which such conversion or exchange may be made;

(o) whether the Securities of the series will be issuable as Registered Securities (and if so, whether such Securities will be issuable as Registered Global Securities) or Unregistered Securities (with or without Coupons), or any combination of the foregoing, any restrictions applicable to the offer, sale, transfer, exchange or delivery of Unregistered Securities or Registered Securities or the payment of interest thereon and, if other than as provided in Section 2.08, the terms upon which Unregistered Securities of any series may be exchanged for Registered Securities of such series and vice versa;

(p) whether and under what circumstances the Issuer will pay additional amounts on the Securities of the series held by a Person who is not a U.S. Person in respect of any tax, assessment or governmental charge withheld or deducted and, if so, whether the Issuer will have the option to redeem such Securities rather than pay such additional amounts;

(q) if the Securities of such series are to be issuable in definitive form (whether upon original issue or upon exchange of a temporary Security of such series) only upon receipt of certain certificates or other documents or satisfaction of other conditions, the form and terms of such certificates, documents or conditions;

(r) any trustees, depositaries, authenticating or paying agents, transfer agents or registrars or any other agents with respect to the Securities of such series;

(s) any additions, modifications or deletions in the Defaults, Events of Default or covenants of the Issuer set forth herein with respect to the Securities of such series;

(t) any modifications to the definition of Senior Indebtedness, as contemplated by clause (ii) thereof; and

(u) any other terms of the series.

All Securities of any one series and Coupons, if any, appertaining thereto, shall be substantially identical, except in the case of Registered Securities as to denomination and except as may otherwise be provided by or pursuant to the Board Resolution or Officer's Certificate referred to above or as set forth in any such indenture supplemental hereto. All Securities of any one series need not be issued at the same time and may be issued from time to time, consistent with the terms of this Indenture, if so provided by or pursuant to such Board Resolution, such Officer's Certificate or in any such indenture supplemental hereto.

Notwithstanding Section 2.03(b) hereof and unless otherwise expressly provided with respect to a series of Securities, the aggregate principal amount of a series of Securities may be increased and additional Securities of such series may be issued up to the maximum aggregate principal amount authorized with respect to such series as increased.

Section 2.04. *Authentication and Delivery of Securities.* The Issuer may deliver Securities of any series having attached thereto appropriate Coupons, if any, executed by the Issuer to the Trustee for authentication together with the applicable documents referred to below in this Section, and the Trustee shall thereupon authenticate and deliver such Securities to or upon the order of the Issuer (contained in the Issuer Order referred to below in this Section) or pursuant to such procedures acceptable to the Trustee and to such recipients as may be specified from time to time by an Issuer Order. The maturity date, original issue date, interest rate and any other terms of the Securities of such series and Coupons, if any, appertaining thereto (including Redemption Notice Periods) shall be determined by or pursuant to such Issuer Order and procedures. If provided for in such procedures, such Issuer Order may authorize authentication and delivery pursuant to oral instructions from the Issuer or its duly authorized agent, which instructions shall be promptly confirmed in writing. In authenticating such Securities and accepting the additional responsibilities under this Indenture in relation to such Securities, the Trustee shall be entitled to receive (in the case of subparagraphs (b), (c) and (d) below only at or before the time of the first request of the Issuer to the Trustee to authenticate Securities of such series) and (subject to Section 6.01) shall be fully protected in relying upon, unless and until such documents have been superceded or revoked:

(a) an Issuer Order requesting such authentication and setting forth delivery instructions if the Securities and Coupons, if any, are not to be delivered to the Issuer, provided that, with respect to Securities of a series subject to a Periodic Offering, (i) such Issuer Order may be delivered by the Issuer to the Trustee prior to the delivery to the Trustee of such Securities for authentication and delivery, (ii) the Trustee shall authenticate and deliver Securities of such series for original issue from time to time, in an aggregate principal amount not exceeding the aggregate principal amount established for such series, pursuant to an Issuer Order or pursuant to procedures acceptable to the Trustee as may be specified from time to time by an Issuer Order, (iii) the maturity date or dates, original issue date or dates, interest rate or rates and any other terms of Securities of such series (including Redemption Notice Periods) shall be determined by an Issuer Order or pursuant to such procedures and (iv) if provided for in such procedures, such Issuer Order may authorize authentication and delivery pursuant to oral or electronic instructions from the Issuer or its duly authorized agent or agents, which oral instructions shall be promptly confirmed in writing;

(b) any Board Resolution, Officer's Certificate and/or executed supplemental indenture referred to in Sections 2.01 and 2.03 by or pursuant to which the forms and terms of the Securities and Coupons, if any, were established;

(c) an Officer's Certificate setting forth the form or forms and terms of the Securities and Coupons, if any, stating that the form or forms and terms of the Securities and Coupons, if any, have been established pursuant to Sections 2.01 and 2.03 and comply with this Indenture, and covering such other matters as the Trustee may reasonably request; and

(d) at the option of the Issuer, either an Opinion of Counsel, or a letter addressed to the Trustee permitting it to rely on an Opinion of Counsel, substantially to the effect that:

(i) the forms of the Securities and Coupons, if any, have been duly authorized and established in conformity with the provisions of this Indenture;

(ii) in the case of an underwritten offering, the terms of the Securities have been duly authorized and established in conformity with the provisions of this Indenture, and, in the case of an offering that is not underwritten, certain terms of the Securities have been established pursuant to a Board Resolution, an Officer's Certificate or a supplemental indenture in accordance with this Indenture, and when such other terms as are to be established pursuant to procedures set forth in an Issuer Order shall have been established, all such terms will have been duly authorized by the Issuer and will have been established in conformity with the provisions of this Indenture;

(iii) when the Securities and Coupons, if any, have been executed by the Issuer and authenticated by the Trustee in accordance with the provisions of this Indenture and delivered to and duly paid for by the purchasers thereof, they will have been duly issued under this Indenture and will be valid and binding obligations of the Issuer, enforceable in accordance with their respective terms, and will be entitled to the benefits of this Indenture; and

(iv) the execution and delivery by the Issuer of, and the performance by the Issuer of its obligations under, the Securities and Coupons, if any, will not contravene any provision of applicable law or the certificate of incorporation or by-laws of the Issuer or any agreement or other instrument binding upon the Issuer or any of its consolidated subsidiaries that is material to the Issuer and its subsidiaries, taken as a whole, or, to the best of such counsel's knowledge, any judgment, order or decree of any U.S. governmental body, agency or court having jurisdiction over the Issuer or any of its consolidated subsidiaries, and no consent, approval or authorization of any U.S. governmental body or agency is required for the performance by the Issuer of its obligations under the Securities and Coupons, if any, except such as are specified and have been obtained and such as may be required by the securities or blue sky laws of the various states in connection with the offer and sale of the Securities and Coupons, if any.

In rendering such opinions, such counsel may qualify any opinions as to enforceability by stating that such enforceability may be limited by bankruptcy, insolvency, reorganization, liquidation, moratorium and other similar laws affecting the rights and remedies of creditors and is subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). Such counsel may rely, as to all matters governed by the laws of jurisdictions other than the State of New York and the federal law of the United States, upon opinions of other counsel (copies of which shall be delivered to the Trustee), who shall be counsel reasonably satisfactory to the Trustee, in which case the opinion shall state that such counsel believes he and the Trustee are entitled so to rely. Such counsel may also state that, insofar as such opinion involves factual matters, he has relied, to the extent he deems proper, upon certificates of officers of the Issuer and its subsidiaries and certificates of public officials.

The Trustee shall have the right to decline to authenticate and deliver any Securities under this Section if the Trustee, being advised by counsel, determines that such action may not lawfully be taken by the Issuer or if the Trustee in good faith by its board of directors or board of trustees, executive committee, or a trust committee of directors or trustees or Responsible Officers shall determine that

such action would expose the Trustee to personal liability to existing Holders or would affect the Trustee's own rights, duties or immunities under the Securities, this Indenture or otherwise.

If the Issuer shall establish pursuant to Section 2.03 that the Securities of a series are to be issued in the form of one or more Registered Global Securities, then the Issuer shall execute and the Trustee shall, in accordance with this Section and the Issuer Order with respect to such series, authenticate and deliver one or more Registered Global Securities that (i) shall represent and shall be denominated in an amount equal to the aggregate principal amount of all of the Securities of such series issued and not yet cancelled, (ii) shall be registered in the name of the Depository for such Registered Global Security or Securities or the nominee of such Depository, (iii) shall be delivered by the Trustee to such Depository or pursuant to such Depository's instructions and (iv) shall bear a legend substantially to the following effect: "Unless and until it is exchanged in whole or in part for Securities in definitive registered form, this Security may not be transferred except as a whole by the Depository to the nominee of the Depository or by a nominee of the Depository to the Depository or another nominee of the Depository or by the Depository or any such nominee to a successor Depository or a nominee of such successor Depository."

Each Depository designated pursuant to Section 2.03 must, at the time of its designation and at all times while it serves as Depository, be a clearing agency registered under the Securities Exchange Act of 1934 and any other applicable statute or regulation.

Section 2.05. *Execution of Securities.* The Securities and, if applicable, each Coupon appertaining thereto shall be signed on behalf of the Issuer by any one of the following: the Chairman of the Board, the Chief Executive Officer, the Chief Financial Officer, the General Counsel, the Treasurer, any Assistant Treasurer or any other person authorized by the Board of Directors to execute Securities or, if applicable, Coupons, which Securities or Coupons may, but need not, be attested. Such signatures may be the manual or facsimile signatures of the present or any future such officers. Minor errors or defects in any such reproduction of any such signature shall not affect the validity or enforceability of any Security that has been duly authenticated and delivered by the Trustee.

In case any officer of the Issuer who shall have signed any of the Securities or Coupons, if any, shall cease to be such officer before the Security or Coupon so signed (or the Security to which the Coupon so signed appertains) shall be authenticated and delivered by the Trustee or disposed of by the Issuer, such Security or Coupon nevertheless may be authenticated and delivered or disposed of as though the person who signed such Security or Coupon had not ceased to be such officer of the Issuer; and any Security or Coupon may be signed on behalf of the Issuer by such persons as, at the actual date of the execution of such Security or Coupon, shall be the proper officers of the Issuer, although at the date of the execution and delivery of this Indenture any such person was not such an officer.

Section 2.06. *Certificate of Authentication.* Only such Securities as shall bear thereon a certificate of authentication substantially in the form hereinbefore recited, executed by the Trustee by the manual signature of one of its authorized officers, shall be entitled to the benefits of this Indenture or be valid or obligatory for any purpose. No Coupon shall be entitled to the benefits of this Indenture or shall be valid and obligatory for any purpose until the certificate of authentication on the Security to which such Coupon appertains shall have been duly executed by the Trustee. The execution of such certificate by the Trustee upon any Security executed by the Issuer shall be conclusive evidence that the Security so authenticated has been duly authenticated and delivered hereunder and that the Holder is entitled to the benefits of this Indenture.

Section 2.07. *Denomination and Date of Securities; Payments of Interest.* The Securities of each series shall be issuable as Registered Securities or Unregistered Securities in denominations established as contemplated by Section 2.03 or, with respect to the Registered Securities of any series, if not so established, in denominations of \$1,000 and any integral multiple thereof. If denominations of Unregistered Securities of any series are not so established, such Securities shall be issuable in denominations of \$1,000 and \$5,000. The Securities of each series shall be numbered, lettered or otherwise distinguished in such manner or in accordance with such plan as the officers of the Issuer executing the same may determine with the approval of the Trustee, as evidenced by the execution and authentication thereof.

Each Registered Security shall be dated the date of its authentication. Each Unregistered Security shall be dated as provided in the resolution or resolutions of the Board of Directors of the Issuer referred to in Section 2.03. The Securities of each series shall bear interest, if any, from the date, and such interest shall be payable on the dates, established as contemplated by Section 2.03.

The Person in whose name any Registered Security of any series is registered at the close of business on any record date applicable to a particular series with respect to any interest payment date for such series shall be entitled to receive the interest, if any, payable on such interest payment date notwithstanding any transfer or exchange of such Registered Security subsequent to the record date and prior to such interest payment date, except if and to the extent the Issuer shall default in the payment of the interest due on such interest payment date for such series, in which case such defaulted interest shall be paid to the Persons in whose names Outstanding Registered Securities for such series are registered at the close of business on a subsequent record date (which shall be not less than five Business Days prior to the date of payment of such defaulted interest) established by notice given by mail by or on behalf of the Issuer to the Holders of Registered Securities not less than 15 days preceding such subsequent record date. The term “**record date**” as used with respect to any interest payment date (except

a date for payment of defaulted interest) for the Securities of any series shall mean the date specified as such in the terms of the Registered Securities of such series established as contemplated by Section 2.03, or, if no such date is so established, if such interest payment date is the first day of a calendar month, the fifteenth day of the next preceding calendar month or, if such interest payment date is the fifteenth day of a calendar month, the first day of such calendar month, whether or not such record date is a Business Day.

Section 2.08. *Registration, Transfer and Exchange.* The Issuer will keep at each office or agency to be maintained for the purpose as provided in Section 3.02 for each series of Securities a register or registers in which, subject to such reasonable regulations as it may prescribe, it will provide for the registration of Registered Securities of such series and the registration of transfer of Registered Securities of such series. Such register shall be in written form in the English language or in any other form capable of being converted into such form within a reasonable time. At all reasonable times such register or registers shall be open for inspection by the Trustee.

Upon due presentation for registration of transfer of any Registered Security of any series at any such office or agency to be maintained for the purpose as provided in Section 3.02, the Issuer shall execute and the Trustee shall authenticate and deliver in the name of the transferee or transferees a new Registered Security or Registered Securities of the same series, maturity date, interest rate and original issue date in authorized denominations for a like aggregate principal amount.

Unregistered Securities (except for any temporary global Unregistered Securities) and Coupons (except for Coupons attached to any temporary global Unregistered Securities) shall be transferable by delivery.

At the option of the Holder thereof, Registered Securities of any series (other than a Registered Global Security, except as set forth below) may be exchanged for a Registered Security or Registered Securities of such series having authorized denominations and an equal aggregate principal amount, upon surrender of such Registered Securities to be exchanged at the agency of the Issuer that shall be maintained for such purpose in accordance with Section 3.02 and upon payment, if the Issuer shall so require, of the charges hereinafter provided. If the Securities of any series are issued in both registered and unregistered form, except as otherwise specified pursuant to Section 2.03, at the option of the Holder thereof, Unregistered Securities of any series may be exchanged for Registered Securities of such series having authorized denominations and an equal aggregate principal amount, upon surrender of such Unregistered Securities to be exchanged at the agency of the Issuer that shall be maintained for such purpose in accordance with Section 3.02, with, in the case of Unregistered Securities that have Coupons attached, all unmatured Coupons and all matured Coupons in default thereto appertaining, and upon payment, if the Issuer shall so require, of the charges hereinafter provided. At the option of the

Holder thereof, if Unregistered Securities of any series, maturity date, interest rate and original issue date are issued in more than one authorized denomination, except as otherwise specified pursuant to Section 2.03, such Unregistered Securities may be exchanged for Unregistered Securities of such series having authorized denominations and an equal aggregate principal amount, upon surrender of such Unregistered Securities to be exchanged at the agency of the Issuer that shall be maintained for such purpose in accordance with Section 3.02 or as specified pursuant to Section 2.03, with, in the case of Unregistered Securities that have Coupons attached, all unmatured Coupons and all matured Coupons in default thereto appertaining, and upon payment, if the Issuer shall so require, of the charges hereinafter provided. Unless otherwise specified pursuant to Section 2.03, Registered Securities of any series may not be exchanged for Unregistered Securities of such series. Whenever any Securities are so surrendered for exchange, the Issuer shall execute, and the Trustee shall authenticate and deliver, the Securities which the Holder making the exchange is entitled to receive. All Securities and Coupons surrendered upon any exchange or transfer provided for in this Indenture shall be promptly cancelled and disposed of by the Trustee and the Trustee will deliver a certificate of disposition thereof to the Issuer.

All Registered Securities presented for registration of transfer, exchange, redemption or payment shall (if so required by the Issuer or the Trustee) be duly endorsed by, or be accompanied by a written instrument or instruments of transfer in form satisfactory to the Issuer and the Trustee duly executed by the Holder or his attorney duly authorized in writing.

The Issuer may require payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection with any exchange or registration of transfer of Securities. No service charge shall be made for any such transaction.

The Issuer shall not be required to exchange or register a transfer of (a) any Securities of any series for a period of 15 days next preceding the first mailing of notice of redemption of Securities of such series to be redeemed or (b) any Securities selected, called or being called for redemption, in whole or in part, except, in the case of any Security to be redeemed in part, the portion thereof not so to be redeemed or (c) any Securities if the Holder thereof has exercised any right to require the Issuer to repurchase such Securities, in whole or in part, except, in the case of any Security to be repurchased in part, the portion thereof not so to be repurchased.

Notwithstanding any other provision of this Section 2.08, unless and until it is exchanged in whole or in part for Securities in definitive registered form, a Registered Global Security representing all or a portion of the Securities of a series may not be transferred except as a whole by the Depository for such series to a nominee of such Depository or by a nominee of such Depository to such Depository or another nominee of such Depository or by such Depository or any such nominee to a successor Depository for such series or a nominee of such successor Depository.

If at any time the Depositary for any Registered Securities of a series represented by one or more Registered Global Securities notifies the Issuer that it is unwilling or unable to continue as Depositary for such Registered Securities or if at any time the Depositary for such Registered Securities shall no longer be eligible under Section 2.04, the Issuer shall appoint a successor Depositary eligible under Section 2.04 with respect to such Registered Securities. If a successor Depositary eligible under Section 2.04 for such Registered Securities is not appointed by the Issuer within 90 days after the Issuer receives such notice or becomes aware of such ineligibility, the Issuer's election pursuant to Section 2.03 that such Registered Securities be represented by one or more Registered Global Securities shall no longer be effective and the Issuer will execute, and the Trustee, upon receipt of an Officer's Certificate for the authentication and delivery of definitive Securities of such series, will authenticate and deliver, Securities of such series in definitive registered form without coupons, in any authorized denominations, in an aggregate principal amount equal to the principal amount of the Registered Global Security or Securities representing such Registered Securities in exchange for such Registered Global Security or Securities.

Subject to the procedures of the Depositary, the Issuer may at any time and in its sole discretion determine that the Registered Securities of any series issued in the form of one or more Registered Global Securities shall no longer be represented by a Registered Global Security or Securities. In such event the Issuer will execute, and the Trustee, upon receipt of an Officer's Certificate for the authentication and delivery of definitive Securities of such series, will authenticate and deliver, Securities of such series in definitive registered form without coupons, in any authorized denominations, in an aggregate principal amount equal to the principal amount of the Registered Global Security or Securities representing such Registered Securities, in exchange for such Registered Global Security or Securities. Beneficial interests in a Registered Global Security may be exchanged for definitive certificated notes upon request by or on behalf of the Depositary in accordance with customary procedures following the request of a beneficial owner seeking to exercise its rights under such Securities.

If specified by the Issuer pursuant to Section 2.03 with respect to Securities represented by a Registered Global Security, the Depositary for such Registered Global Security may surrender such Registered Global Security in exchange in whole or in part for Securities of the same series in definitive registered form on such terms as are acceptable to the Issuer and such Depositary. Thereupon, the Issuer shall execute, and the Trustee shall authenticate and deliver, without service charge,

(a) to the Person specified by such Depositary a new Registered Security or Securities of the same series, of any authorized denominations as

requested by such Person, in an aggregate principal amount equal to and in exchange for such Person's beneficial interest in the Registered Global Security; and

(b) to such Depository a new Registered Global Security in a denomination equal to the difference, if any, between the principal amount of the surrendered Registered Global Security and the aggregate principal amount of Registered Securities authenticated and delivered pursuant to clause (a) above.

Upon the exchange of a Registered Global Security for Securities in definitive registered form without coupons, in authorized denominations, such Registered Global Security shall be cancelled by the Trustee or an agent of the Issuer or the Trustee. Securities in definitive registered form without coupons issued in exchange for a Registered Global Security pursuant to this Section 2.08 shall be registered in such names and in such authorized denominations as the Depository for such Registered Global Security, pursuant to instructions from its direct or indirect participants or otherwise, shall instruct the Trustee or an agent of the Issuer or the Trustee. The Trustee or such agent shall deliver such Securities to or as directed by the Persons in whose names such Securities are so registered.

All Securities issued upon any transfer or exchange of Securities shall be valid obligations of the Issuer, evidencing the same debt, and entitled to the same benefits under this Indenture, as the Securities surrendered upon such transfer or exchange.

Notwithstanding anything herein or in the terms of any series of Securities to the contrary, none of the Issuer, the Trustee or any agent of the Issuer or the Trustee (any of which, other than the Issuer, shall rely on an Officer's Certificate and an Opinion of Counsel) shall be required to exchange any Unregistered Security for a Registered Security if such exchange would result in adverse Federal income tax consequences to the Issuer (such as, for example, the inability of the Issuer to deduct from its income, as computed for Federal income tax purposes, the interest payable on the Unregistered Securities) under then applicable United States Federal income tax laws.

Section 2.09. *Mutilated, Defaced, Destroyed, Lost and Stolen Securities.* In case any temporary or definitive Security or any Coupon appertaining to any Security shall become mutilated, defaced or be destroyed, lost or stolen, the Issuer in its discretion may execute, and upon the written request of any officer of the Issuer, the Trustee shall authenticate and deliver a new Security of the same series, maturity date, interest rate and original issue date, bearing a number or other distinguishing symbol not contemporaneously outstanding, in exchange and substitution for the mutilated or defaced Security, or in lieu of and in substitution for the Security so destroyed, lost or stolen with Coupons corresponding to the Coupons appertaining to the Securities so mutilated, defaced, destroyed, lost or stolen, or in exchange or substitution for the Security to which such mutilated, defaced, destroyed, lost or stolen Coupon appertained, with Coupons appertaining

thereto corresponding to the Coupons so mutilated, defaced, destroyed, lost or stolen. In every case the applicant for a substitute Security or Coupon shall furnish to the Issuer and to the Trustee and any agent of the Issuer or the Trustee security or indemnity satisfactory to them to indemnify and defend and to save each of them harmless and, in every case of destruction, loss or theft, evidence to their satisfaction of the destruction, loss or theft of such Security or Coupon and of the ownership thereof and in the case of mutilation or defacement shall surrender the Security and related Coupons to the Trustee or such agent.

Upon the issuance of any substitute Security or Coupon, the Issuer may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses (including the fees and expenses of the Trustee or its agent) connected therewith. In case any Security or Coupon which has matured or is about to mature or has been called for redemption in full shall become mutilated or defaced or be destroyed, lost or stolen, the Issuer may instead of issuing a substitute Security, pay or authorize the payment of the same or the relevant Coupon (without surrender thereof except in the case of a mutilated or defaced Security or Coupon), if the applicant for such payment shall furnish to the Issuer and to the Trustee and any agent of the Issuer or the Trustee security or indemnity satisfactory to them to save each of them harmless, and, in every case of destruction, loss or theft, the applicant shall also furnish to the Issuer and the Trustee and any agent of the Issuer or the Trustee evidence to their satisfaction of the destruction, loss or theft of such Security or Coupon and of the ownership thereof.

Every substitute Security or Coupon of any series issued pursuant to the provisions of this Section by virtue of the fact that any such Security or Coupon is destroyed, lost or stolen shall constitute an additional contractual obligation of the Issuer, whether or not the destroyed, lost or stolen Security or Coupon shall be at any time enforceable by anyone and shall be entitled to all the benefits of (but shall be subject to all the limitations of rights set forth in) this Indenture equally and proportionately with any and all other Securities or Coupons of such series duly authenticated and delivered hereunder. All Securities and Coupons shall be held and owned upon the express condition that, to the extent permitted by law, the foregoing provisions are exclusive with respect to the replacement or payment of mutilated, defaced or destroyed, lost or stolen Securities and Coupons and shall preclude any and all other rights or remedies notwithstanding any law or statute existing or hereafter enacted to the contrary with respect to the replacement or payment of negotiable instruments or other securities without their surrender.

Section 2.10. *Cancellation of Securities; Disposition Thereof.* All Securities and Coupons surrendered for payment, redemption, registration of transfer or exchange, or for credit against any payment in respect of a sinking or analogous fund, if surrendered to the Issuer or any agent of the Issuer or the Trustee or any agent of the Trustee, shall be delivered to the Trustee or its agent for cancellation or, if surrendered to the Trustee, shall be cancelled by it; and no Securities or Coupons shall be issued in lieu thereof except as expressly permitted

by any of the provisions of this Indenture. The Trustee or its agent shall dispose of cancelled Securities and Coupons held by it and deliver a certificate of disposition to the Issuer. If the Issuer or its agent shall acquire any of the Securities or Coupons, such acquisition shall not operate as a redemption or satisfaction of the indebtedness represented by such Securities or Coupons unless and until the same are delivered to the Trustee or its agent for cancellation.

Section 2.11. *Temporary Securities.* Pending the preparation of definitive Securities for any series, the Issuer may execute and the Trustee shall authenticate and deliver temporary Securities for such series (printed, lithographed, typewritten or otherwise reproduced, in each case in form satisfactory to the Trustee). Temporary Securities of any series shall be issuable as Registered Securities without coupons, or as Unregistered Securities with or without coupons attached thereto, of any authorized denomination, and substantially in the form of the definitive Securities of such series but with such omissions, insertions and variations as may be appropriate for temporary Securities, all as may be determined by the Issuer with the concurrence of the Trustee as evidenced by the execution and authentication thereof. Temporary Securities may contain such references to any provisions of this Indenture as may be appropriate. Every temporary Security shall be executed by the Issuer and be authenticated by the Trustee upon the same conditions and in substantially the same manner, and with like effect, as the definitive Securities. Without unreasonable delay the Issuer shall execute and shall furnish definitive Securities of such series and thereupon temporary Registered Securities of such series may be surrendered in exchange therefor without charge at each office or agency to be maintained by the Issuer for that purpose pursuant to Section 3.02 and, in the case of Unregistered Securities, at any agency maintained by the Issuer for such purpose as specified pursuant to Section 2.03, and the Trustee shall authenticate and deliver in exchange for such temporary Securities of such series an equal aggregate principal amount of definitive Securities of the same series having authorized denominations and, in the case of Unregistered Securities, having attached thereto any appropriate Coupons. Until so exchanged, the temporary Securities of any series shall be entitled to the same benefits under this Indenture as definitive Securities of such series, unless otherwise established pursuant to Section 2.03. The provisions of this Section are subject to any restrictions or limitations on the issue and delivery of temporary Unregistered Securities of any series that may be established pursuant to Section 2.03 (including any provision that Unregistered Securities of such series initially be issued in the form of a single global Unregistered Security to be delivered to a depositary or agency located outside the United States and the procedures pursuant to which definitive or global Unregistered Securities of such series would be issued in exchange for such temporary global Unregistered Security).

ARTICLE 3
COVENANTS OF THE ISSUER

Section 3.01. *Payment of Principal and Interest.* The Issuer covenants and agrees for the benefit of each series of Securities that it will duly and punctually pay or cause to be paid the principal of, and interest on, each of the Securities of such series (together with any additional amounts payable pursuant to the terms of such Securities) at the place or places, at the respective times and in the manner provided in such Securities and in the Coupons, if any, appertaining thereto and in this Indenture. The interest on Securities with Coupons attached (together with any additional amounts payable pursuant to the terms of such Securities) shall be payable only upon presentation and surrender of the several Coupons for such interest installments as are evidenced thereby as they severally mature. If any temporary Unregistered Security provides that interest thereon may be paid while such Security is in temporary form, the interest on any such temporary Unregistered Security (together with any additional amounts payable pursuant to the terms of such Security) shall be paid, as to the installments of interest evidenced by Coupons attached thereto, if any, only upon presentation and surrender thereof, and, as to the other installments of interest, if any, only upon presentation of such Securities for notation thereon of the payment of such interest, in each case subject to any restrictions that may be established pursuant to Section 2.03. The interest on Registered Securities (together with any additional amounts payable pursuant to the terms of such Securities) shall be payable only to or upon the written order of the Holders thereof and, at the option of the Issuer, may be paid by wire transfer or by mailing checks for such interest payable to or upon the written order of such Holders at their last addresses as they appear on the registry books of the Issuer.

Section 3.02. *Offices for Payments, etc.* So long as any Registered Securities are authorized for issuance pursuant to this Indenture or are outstanding hereunder, the Issuer will maintain in the Borough of Manhattan, The City of New York, an office or agency where the Registered Securities of each series may be presented for payment, where the Securities of each series may be presented for exchange as is provided in this Indenture and, if applicable, pursuant to Section 2.03 and where the Registered Securities of each series may be presented for registration of transfer as in this Indenture provided.

The Issuer initially appoints the Corporate Trust Office of the Trustee in the Borough of Manhattan, The City of New York, as its agency for the foregoing purposes. The Issuer may subsequently appoint a different office or agency of the Issuer in the Borough of Manhattan, The City of New York. The Issuer further initially appoints the Trustee at said Corporate Trust Office as Security registrar for each series of Securities. The Issuer will have the right to remove and replace from time to time the Security registrar for any series of Securities; provided that no such removal or replacement will be effective until a successor Security registrar with respect to such series of Securities has been appointed by the Issuer and has accepted such appointment.

The Issuer will maintain one or more offices or agencies in a city or cities located outside the United States (including any city in which such an agency is required to be maintained under the rules of any stock exchange on which the Securities of such series are listed) where the Unregistered Securities, if any, of each series and Coupons, if any, appertaining thereto may be presented for payment. No payment on any Unregistered Security or Coupon will be made upon presentation of such Unregistered Security or Coupon at an agency of the Issuer within the United States nor will any payment be made by transfer to an account in, or by mail to an address in, the United States unless pursuant to applicable United States laws and regulations then in effect such payment can be made without adverse tax consequences to the Issuer. Notwithstanding the foregoing, payments in Dollars of Unregistered Securities of any series and Coupons appertaining thereto which are payable in Dollars may be made at an agency of the Issuer maintained in the Borough of Manhattan, The City of New York if such payment in Dollars at each agency maintained by the Issuer outside the United States for payment on such Unregistered Securities is illegal or effectively precluded by exchange controls or other similar restrictions.

The Issuer will maintain in the Borough of Manhattan, The City of New York, an office or agency where notices and demands to or upon the Issuer in respect of the Securities of any series, the Coupons appertaining thereto or this Indenture may be served.

The Issuer will give to the Trustee written notice of the location of each such office or agency and of any change of location thereof. In case the Issuer shall fail to maintain any agency required by this Section to be located in the Borough of Manhattan, The City of New York, or shall fail to give such notice of the location or of any change in the location of any of the above agencies, presentations and demands may be made and notices may be served at the Corporate Trust Office of the Trustee.

The Issuer may from time to time designate one or more additional offices or agencies where the Securities of a series and any Coupons appertaining thereto may be presented for payment, where the Securities of that series may be presented for exchange as provided in this Indenture and pursuant to Section 2.03 and where the Registered Securities of that series may be presented for registration of transfer as in this Indenture provided, and the Issuer may from time to time rescind any such designation, as the Issuer may deem desirable or expedient; *provided, however*, that no such designation or rescission shall in any manner relieve the Issuer of its obligation to maintain the agencies provided for in this Section. The Issuer will give to the Trustee prompt written notice of any such designation or rescission thereof.

Section 3.03. *Appointment to Fill a Vacancy in Office of Trustee.* The Issuer, whenever necessary to avoid or fill a vacancy in the office of Trustee, will appoint, in the manner provided in Section 6.10, a Trustee, so that there shall at all times be a Trustee with respect to each series of Securities hereunder.

Section 3.04. *Paying Agents*. Whenever the Issuer shall appoint a paying agent other than the Trustee with respect to the Securities of any series, it will cause such paying agent to execute and deliver to the Trustee an instrument in which such agent shall agree with the Trustee, subject to the provisions of this Section,

(a) that it will hold all sums received by it as such agent for the payment of the principal of or interest on the Securities of such series (whether such sums have been paid to it by the Issuer or by any other obligor on the Securities of such series) in trust for the benefit of the Holders of the Securities of such series, or Coupons appertaining thereto, if any, or of the Trustee,

(b) that it will give the Trustee notice of any failure by the Issuer (or by any other obligor on the Securities of such series) to make any payment of the principal of or interest on the Securities of such series when the same shall be due and payable, and

(c) that it will pay any such sums so held in trust by it to the Trustee upon the Trustee's written request at any time during the continuance of the failure referred to in clause (b) above.

The Issuer will, on or prior to each due date of the principal of or interest on the Securities of such series, deposit with the paying agent a sum sufficient to pay such principal or interest so becoming due, and (unless such paying agent is the Trustee) the Issuer will promptly notify the Trustee of any failure to take such action.

If the Issuer shall act as its own paying agent with respect to the Securities of any series, it will, on or before each due date of the principal of or interest on the Securities of such series, set aside, segregate and hold in trust for the benefit of the Holders of the Securities of such series or the Coupons appertaining thereto a sum sufficient to pay such principal or interest so becoming due. The Issuer will promptly notify the Trustee of any failure to take such action.

Anything in this Section to the contrary notwithstanding, but subject to Section 10.01, the Issuer may at any time, for the purpose of obtaining a satisfaction and discharge with respect to one or more or all series of Securities hereunder, or for any other reason, pay or cause to be paid to the Trustee all sums held in trust for any such series by the Issuer or any paying agent hereunder, as required by this Section, such sums to be held by the Trustee upon the trusts herein contained.

Anything in this Section to the contrary notwithstanding, the agreement to hold sums in trust as provided in this Section is subject to the provisions of Sections 10.03 and 10.04.

Section 3.05. *Written Statement to Trustee.* The Issuer will furnish to the Trustee on or before March 31 in each year (beginning with March 31, 2006), a brief certificate (which need not comply with Section 11.05) from the principal executive, financial or accounting officer of the Issuer stating that in the course of the performance by the signer of his duties as an officer of the Issuer he would normally have knowledge of any default or non-compliance by the Issuer in the performance of any covenants or conditions contained in this Indenture, stating whether or not he has knowledge of any such default or non-compliance and, if so, specifying each such default or non-compliance of which the signer has knowledge and the nature thereof.

ARTICLE 4
SECURITYHOLDERS LISTS AND REPORTS BY THE ISSUER AND THE TRUSTEE

Section 4.01. *Issuer to Furnish Trustee Information as to Names and Addresses of Securityholders.* If and so long as the Trustee shall not be the Security registrar for the Securities of any series, the Issuer and any other obligor on the Securities will furnish or cause to be furnished to the Trustee a list in such form as the Trustee may reasonably require of the names and addresses of the Holders of the Registered Securities of such series pursuant to Section 312 of the Trust Indenture Act of 1939 (a) semi-annually not more than 15 days after each record date for the payment of interest on such Registered Securities, as hereinabove specified, as of such record date and on dates to be determined pursuant to Section 2.03 for non-interest bearing Registered Securities in each year and (b) at such other times as the Trustee may request in writing, within 30 days after receipt by the Issuer of any such request as of a date not more than 15 days prior to the time such information is furnished.

Section 4.02. [THIS SECTION INTENTIONALLY LEFT BLANK]

Section 4.03. *Reports by the Issuer.* The Issuer covenants to file with the Trustee, within 15 days after the Issuer is required to file the same with the Commission, copies of the annual reports and of the information, documents, and other reports that the Issuer may be required to file with the Commission pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 or pursuant to Section 314 of the Trust Indenture Act of 1939.

Section 4.04. *Reports by the Trustee.* Any Trustee's report required under Section 313(a) of the Trust Indenture Act of 1939 shall be transmitted on or before July 15 in each year beginning July 15, 2005, as provided in Section 313(c) of the Trust Indenture Act of 1939, so long as any Securities are Outstanding hereunder, and shall be dated as of a date convenient to the Trustee no more than 60 days prior thereto.

ARTICLE 5
REMEDIES OF THE TRUSTEE AND SECURITYHOLDERS ON DEFAULT OR EVENT OF DEFAULT

Section 5.01. *Event of Default Defined; Acceleration of Maturity; Waiver of Event of Default.* “**Event of Default**” with respect to Securities of any series wherever used herein, means each one of the following events which shall have occurred and be continuing (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body) unless it is specifically modified in the supplemental indenture, if any, under which such series of Securities is issued:

(a) a court having jurisdiction in the premises shall enter a decree or order for relief in respect of the Issuer in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of the Issuer or for any substantial part of its property or ordering the winding up or liquidation of its affairs, and such decree or order shall remain unstayed and in effect for a period of 60 consecutive days; or

(b) the Issuer shall commence a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or consent to the entry of an order for relief in an involuntary case under any such law, or consent to the appointment or taking possession by a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of the Issuer or for any substantial part of its property, or make any general assignment for the benefit of creditors; or

(c) any other Event of Default provided in the supplemental indenture under which such series of Securities is issued or in the form of Security for such series.

If an Event of Default described in clause (c) (if the Event of Default under clause (c) is with respect to less than all series of Securities then Outstanding) occurs and is continuing, then, and in each and every such case, except for any series of Securities the principal of which shall have already become due and payable, either the Trustee or the Holders of not less than 25% in aggregate principal amount of the Securities of each such affected series then Outstanding hereunder (voting as a single class) by notice in writing to the Issuer (and to the Trustee if given by Securityholders), may declare the entire principal (or, if any of the Securities of any such affected series are Original Issue Discount Securities, such portion of the principal amount as may be specified in the terms of such Securities) of all Securities of all such affected series, and the interest accrued thereon, if any, to be due and payable immediately, and upon any such declaration, the same shall become immediately due and payable. If an Event of

Default described in clause (a), (b) or (c) (if the Event of Default under clause (c) is with respect to all series of Securities then Outstanding) occurs and is continuing, then and in each and every such case, unless the principal of all the Securities shall have already become due and payable, either the Trustee or the Holders of not less than 25% in aggregate principal amount of all the Securities then Outstanding hereunder (treated as one class), by notice in writing to the Issuer (and to the Trustee if given by Securityholders), may declare the entire principal (or, if any Securities are Original Issue Discount Securities, such portion of the principal as may be specified in the terms thereof) of all the Securities then Outstanding, and interest accrued thereon, if any, to be due and payable immediately, and upon any such declaration the same shall become immediately due and payable.

The foregoing provisions, however, are subject to the condition that if, at any time after the principal (or, if the Securities are Original Issue Discount Securities, such portion of the principal as may be specified in the terms thereof) of the Securities of any series (or of all the Securities, as the case may be) shall have been so declared due and payable, and before any judgment or decree for the payment of the moneys due shall have been obtained or entered as hereinafter provided, the Issuer shall pay or shall deposit with the Trustee a sum sufficient to pay all matured installments of interest upon all the Securities of each such series (or of all the Securities, as the case may be) and the principal of any and all Securities of each such series (or of all the Securities, as the case may be) which shall have become due otherwise than by acceleration (with interest upon such principal and, to the extent that payment of such interest is enforceable under applicable law, on overdue installments of interest, at the same rate as the rate of interest or Yield to Maturity (in the case of Original Issue Discount Securities) specified in the Securities of such series (or at the respective rates of interest or Yields to Maturity of all the Securities, as the case may be) to the date of such payment or deposit) and such amount as shall be sufficient to cover reasonable compensation to the Trustee and each predecessor Trustee, its agents, attorneys and counsel, and all other expenses and liabilities incurred, and all advances made, by the Trustee and each predecessor Trustee except as a result of negligence or bad faith, and if any and all Defaults under the Indenture, other than the non-payment of the principal of Securities which shall have become due by acceleration, shall have been cured, waived or otherwise remedied as provided herein — then and in every such case the Holders of a majority in aggregate principal amount of all the Securities of each such series or of all the Securities, in each case voting as a single class, then Outstanding, by written notice to the Issuer and to the Trustee, may waive all defaults with respect to each such series (or with respect to all the Securities, as the case may be) and rescind and annul such declaration and its consequences, but no such waiver or rescission and annulment shall extend to or shall affect any subsequent Default or shall impair any right consequent thereon.

For all purposes under this Indenture, if a portion of the principal of any Original Issue Discount Securities shall have been accelerated and declared due and payable pursuant to the provisions hereof, then, from and after such declaration, unless such declaration has been rescinded and annulled, the principal amount of such Original Issue Discount Securities shall be deemed, for all purposes hereunder, to be such portion of the principal thereof as shall be due and payable as a result of such acceleration, and payment of such portion of the principal thereof as shall be due and payable as a result of such acceleration, together with interest, if any, thereon and all other amounts owing thereunder, shall constitute payment in full of such Original Issue Discount Securities.

Section 5.02. *Collection of Indebtedness by Trustee; Trustee May Prove Debt.* The Issuer covenants that (a) in case default shall be made in the payment of any installment of interest on any of the Securities of any series when such interest shall have become due and payable, and such default shall have continued for a period of 30 days or (b) in case default shall be made in the payment of all or any part of the principal of any of the Securities of any series when the same shall have become due and payable, whether upon maturity of the Securities of such series or upon any redemption or by declaration or otherwise — then upon demand of the Trustee, the Issuer will pay to the Trustee for the benefit of the Holders of the Securities of such series the whole amount that then shall have become due and payable on all Securities of such series, and such Coupons, for principal or interest, as the case may be (with interest to the date of such payment upon the overdue principal and, to the extent that payment of such interest is enforceable under applicable law, on overdue installments of interest at the same rate as the rate of interest or Yield to Maturity (in the case of Original Issue Discount Securities) specified in the Securities of such series); and in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee and each predecessor Trustee, their respective agents, attorneys and counsel, and any expenses and liabilities incurred, and all advances made, by the Trustee and each predecessor Trustee except as a result of its negligence or bad faith.

Until such demand is made by the Trustee, the Issuer may pay the principal of and interest on the Securities of any series to the Holders, whether or not the Securities of such series be overdue.

In case the Issuer shall fail forthwith to pay such amounts upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled and empowered to institute any action or proceedings at law or in equity for the collection of the sums so due and unpaid, and may prosecute any such action or proceedings to judgment or final decree, and may enforce any such judgment or final decree against the Issuer or other obligor upon the Securities and collect in the manner provided by law out of the property of the Issuer or other obligor upon the Securities, wherever situated the moneys adjudged or decreed to be payable.

In case there shall be pending proceedings relative to the Issuer or any other obligor upon the Securities under Title 11 of the United States Code or any other applicable Federal or state bankruptcy, insolvency or other similar law, or in case a receiver, assignee or trustee in bankruptcy or reorganization, liquidator, sequestrator or similar official shall have been appointed for or taken possession of the Issuer or its property or such other obligor, or in case of any other comparable judicial proceedings relative to the Issuer or other obligor upon the Securities, or to the creditors or property of the Issuer or such other obligor, the Trustee, irrespective of whether the principal of the Securities shall then be due and payable as therein expressed or by declaration or otherwise and irrespective of whether the Trustee shall have made any demand pursuant to the provisions of this Section, shall be entitled and empowered, by intervention in such proceedings or otherwise:

(a) to file and prove a claim or claims for the whole amount of principal and interest (or, if the Securities of any series are Original Issue Discount Securities, such portion of the principal amount as may be specified in the terms of such series) owing and unpaid in respect of the Securities of any series, and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for reasonable compensation to the Trustee and each predecessor Trustee, and their respective agents, attorneys and counsel, and for reimbursement of all expenses and liabilities incurred, and all advances made, by the Trustee and each predecessor Trustee, except as a result of negligence or bad faith) and of the Securityholders allowed in any judicial proceedings relative to the Issuer or other obligor upon the Securities, or to the creditors or property of the Issuer or such other obligor,

(b) unless prohibited by applicable law and regulations, to vote on behalf of the holders of the Securities of any series in any election of a trustee or a standby trustee in arrangement, reorganization, liquidation or other bankruptcy or insolvency proceedings or Person performing similar functions in comparable proceedings, and

(c) to collect and receive any moneys or other property payable or deliverable on any such claims, and to distribute all amounts received with respect to the claims of the Securityholders and of the Trustee on their behalf; and any trustee, receiver, or liquidator, custodian or other similar official is hereby authorized by each of the Securityholders to make payments to the Trustee, and, in the event that the Trustee shall consent to the making of payments directly to the Securityholders, to pay to the Trustee such amounts as shall be sufficient to cover reasonable compensation to the Trustee, each predecessor Trustee and their respective agents, attorneys and counsel, and all other expenses and liabilities incurred, and all advances made, by the Trustee and each predecessor Trustee except as a result of negligence or bad faith.

Nothing herein contained shall be deemed to authorize the Trustee to authorize or consent to or vote for or accept or adopt on behalf of any

Securityholder any plan of reorganization, arrangement, adjustment or composition affecting the Securities of any series or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Securityholder in any such proceeding except, as aforesaid, to vote for the election of a trustee in bankruptcy or similar Person.

All rights of action and of asserting claims under this Indenture, or under any of the Securities of any series or Coupons appertaining to such Securities, may be enforced by the Trustee without the possession of any of the Securities of such series or Coupons appertaining to such Securities or the production thereof on any trial or other proceedings relative thereto, and any such action or proceedings instituted by the Trustee shall be brought in its own name as trustee of an express trust, and any recovery of judgment, subject to the payment of the expenses, disbursements and compensation of the Trustee, each predecessor Trustee and their respective agents and attorneys, shall be for the ratable benefit of the Holders of the Securities or Coupons appertaining to such Securities in respect of which such action was taken.

In any proceedings brought by the Trustee (and also any proceedings involving the interpretation of any provision of this Indenture to which the Trustee shall be a party) the Trustee shall be held to represent all the Holders of the Securities or Coupons appertaining to such Securities in respect to which such action was taken, and it shall not be necessary to make any Holders of such Securities or Coupons appertaining to such Securities parties to any such proceedings.

Section 5.03. *Application of Proceeds.* Any moneys collected by the Trustee pursuant to this Article in respect of any series shall, subject to the subordination provisions hereof, be applied in the following order at the date or dates fixed by the Trustee and, in case of the distribution of such moneys on account of principal or interest, upon presentation of the several Securities and Coupons appertaining to such Securities in respect of which monies have been collected and stamping (or otherwise noting) thereon the payment, or issuing Securities of such series in reduced principal amounts in exchange for the presented Securities of like series if only partially paid, or upon surrender thereof if fully paid:

FIRST: To the payment of costs and expenses applicable to such series in respect of which moneys have been collected, including reasonable compensation to the Trustee and each predecessor Trustee and their respective agents and attorneys and of all expenses and liabilities incurred, and all advances made, by the Trustee and each predecessor Trustee except as a result of negligence or bad faith;

SECOND: In case the principal of the Securities of such series in respect of which moneys have been collected shall not have become and be then due and payable, to the payment of interest on the Securities of

such series in default in the order of the maturity of the installments of such interest, with interest (to the extent that such interest has been collected by the Trustee) upon the overdue installments of interest at the same rate as the rate of interest or Yield to Maturity (in the case of Original Issue Discount Securities) specified in such Securities, such payments to be made ratably to the Persons entitled thereto, without discrimination or preference;

THIRD: In case the principal of the Securities of such series in respect of which moneys have been collected shall have become and shall be then due and payable, to the payment of the whole amount then owing and unpaid upon all the Securities of such series for principal and interest, with interest upon the overdue principal, and (to the extent that such interest has been collected by the Trustee) upon overdue installments of interest at the same rate as the rate of interest or Yield to Maturity (in the case of Original Issue Discount Securities) specified in the Securities of such series; and in case such moneys shall be insufficient to pay in full the whole amount so due and unpaid upon the Securities of such series, then to the payment of such principal and interest or Yield to Maturity, without preference or priority of principal over interest or Yield to Maturity, or of interest or Yield to Maturity over principal, or of any installment of interest over any other installment of interest, or of any Security of such series over any other Security of such series, ratably to the aggregate of such principal and accrued and unpaid interest or Yield to Maturity; and

FOURTH: To the payment of the remainder, if any, to the Issuer or any other Person lawfully entitled thereto.

Section 5.04. *Suits for Enforcement.* In case a Default has occurred, has not been waived and is continuing, the Trustee may in its discretion proceed to protect and enforce the rights vested in it by this Indenture by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any of such rights, either at law or in equity or in bankruptcy or otherwise, whether for the specific enforcement of any covenant or agreement contained in this Indenture or in aid of the exercise of any power granted in this Indenture or to enforce any other legal or equitable right vested in the Trustee by this Indenture or by law.

Section 5.05. *Restoration of Rights on Abandonment of Proceedings.* In case the Trustee shall have proceeded to enforce any right under this Indenture and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Trustee, then and in every such case the Issuer and the Trustee shall be restored respectively to their former positions and rights hereunder, and all rights, remedies and powers of the Issuer, the Trustee and the Securityholders shall continue as though no such proceedings had been taken.

Section 5.06. *Limitations on Suits by Securityholders.* No Holder of any Security of any series or of any Coupon appertaining thereto shall have any right by virtue or by availing of any provision of this Indenture to institute any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Indenture, or for the appointment of a trustee, receiver, liquidator, custodian or other similar official or for any other remedy hereunder, unless such Holder previously shall have given to the Trustee written notice of default and of the continuance thereof, as hereinbefore provided, and unless also the Holders of not less than 25% in aggregate principal amount of the Securities of each affected series then Outstanding (treated as a single class) shall have made written request upon the Trustee to institute such action or proceedings in its own name as trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby and the Trustee for 60 days after its receipt of such notice, request and offer of indemnity shall have failed to institute any such action or proceeding and no direction inconsistent with such written request shall have been given to the Trustee pursuant to Section 5.09; it being understood and intended, and being expressly covenanted by the taker and Holder of every Security or Coupon with every other taker and Holder and the Trustee, that no one or more Holders of Securities of any series or Coupons appertaining to such Securities shall have any right in any manner whatever by virtue or by availing of any provision of this Indenture to affect, disturb or prejudice the rights of any other such Holder of Securities or Coupons appertaining to such Securities, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Indenture, except in the manner herein provided and for the equal, ratable and common benefit of all Holders of Securities of the applicable series and Coupons appertaining to such Securities. For the protection and enforcement of the provisions of this Section, each and every Securityholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

Section 5.07. *Unconditional Right of Securityholders to Institute Certain Suits.* Notwithstanding any other provision in this Indenture and any provision of any Security, the right of any Holder of any Security or Coupon to receive payment of the principal of and interest on such Security or Coupon on or after the respective due dates expressed in such Security or Coupon, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

Section 5.08. *Powers and Remedies Cumulative; Delay or Omission Not Waiver of Default.* Except as provided in Section 5.06, no right or remedy herein conferred upon or reserved to the Trustee or to the Holders of Securities or Coupons is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

No delay or omission of the Trustee or of any Holder of Securities or Coupons to exercise any right or power accruing upon any Default occurring and continuing as aforesaid shall impair any such right or power or shall be construed to be a waiver of any such Default or an acquiescence therein; and, subject to Section 5.06, every power and remedy given by this Indenture or by law to the Trustee or to the Holders of Securities or Coupons may be exercised from time to time, and as often as shall be deemed expedient, by the Trustee or by the Holders of Securities or Coupons.

Section 5.09. *Control by Holders of Securities.* The Holders of a majority in aggregate principal amount of the Securities of each series affected (with all such series voting as a single class) at the time Outstanding shall have the right to direct the time, method, and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred on the Trustee with respect to the Securities of such series by this Indenture; *provided* that such direction shall not be otherwise than in accordance with law and the provisions of this Indenture and *provided further* that (subject to the provisions of Section 6.01) the Trustee shall have the right to decline to follow any such direction if the Trustee, being advised by counsel, shall determine that the action or proceeding so directed may not lawfully be taken or if the Trustee in good faith by its board of directors, the executive committee, or a trust committee of directors or Responsible Officers of the Trustee shall determine that the action or proceedings so directed would involve the Trustee in personal liability or if the Trustee in good faith shall so determine that the actions or forbearances specified in or pursuant to such direction would be unduly prejudicial to the interests of Holders of the Securities of all series so affected not joining in the giving of said direction, it being understood that (subject to Section 6.01) the Trustee shall have no duty to ascertain whether or not such actions or forbearances are unduly prejudicial to such Holders.

Nothing in this Indenture shall impair the right of the Trustee in its discretion to take any action deemed proper by the Trustee and which is not inconsistent with such direction or directions by Securityholders.

Section 5.10. *Waiver of Past Defaults.* Prior to the acceleration of the maturity of any Securities as provided in Section 5.01, the Holders of a majority in aggregate principal amount of the Securities of all series at the time Outstanding with respect to which a Default shall have occurred and be continuing (voting as a single class) may on behalf of the Holders of all such Securities waive any past default or Default and its consequences, except a default in the payment of principal or interest (unless such default has been cured and a sum sufficient to pay all matured installments of interest and principal due otherwise than by acceleration has been deposited with the Trustee) or a default in respect of a covenant or provision hereof which cannot be modified or amended

without the consent of the Holder of each Security affected. In the case of any such waiver, the Issuer, the Trustee and the Holders of all such Securities shall be restored to their former positions and rights hereunder, respectively; but no such waiver shall extend to any subsequent or other default or impair any right consequent thereon.

Upon any such waiver, such default shall cease to exist and be deemed to have been cured and not to have occurred, and any Default or Event of Default arising therefrom shall be deemed to have been cured, and not to have occurred for every purpose of this Indenture; but no such waiver shall extend to any subsequent or other Default or Event of Default or impair any right consequent thereon.

Section 5.11. *Trustee to Give Notice of Default, But May Withhold In Certain Circumstances.* The Trustee shall, within ninety days after the occurrence of a default with respect to the Securities of any series, give notice of all defaults with respect to that series known to the Trustee (i) if any Unregistered Securities of a series affected are then Outstanding, to the Holders thereof, (A) by mail to such Holders who have filed their names and addresses with the Trustee within the two years preceding the notice at such addresses as were so furnished to the Trustee and (B) either through the customary notice provisions of the clearing system or systems through which beneficial interests in such Unregistered Securities are owned if such Unregistered Securities are held only in global form or by publication at least once in an Authorized Newspaper in the Borough of Manhattan, The City of New York, and at least once in an Authorized Newspaper in London, and (ii) if any Registered Securities of a series affected are then Outstanding, by mailing notice to the Holders of then Outstanding Registered Securities of each series affected at their addresses as they shall appear on the registry books, unless in each case such defaults shall have been cured before the mailing or publication of such notice (the term “**defaults**” for the purpose of this Section being hereby defined to mean any event or condition which is, or with notice or lapse of time or both would become, a Default or Event of Default); *provided* that, except in the case of default in the payment of the principal of or interest on any of the Securities of such series, or in the payment of any sinking fund installment on such series, the Trustee shall be protected in withholding such notice if and so long as the Trustee in good faith determines that the withholding of such notice is in the interests of the Securityholders of such series.

Section 5.12. *Right of Court to Require Filing of Undertaking to Pay Costs.* All parties to this Indenture agree, and each Holder of any Security or Coupon by his acceptance thereof shall be deemed to have agreed, that any court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture or in any suit against the Trustee for any action taken, suffered or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys’ fees, against any party litigant in such suit, having due regard to the merits and good faith of

the claims or defenses made by such party litigant; but the provisions of this Section shall not apply to any suit instituted by the Trustee, to any suit instituted by any Securityholder or group of Securityholders of any series holding in the aggregate more than 10% in aggregate principal amount of the Securities of such series, or, in the case of any suit relating to or arising under clause (c) of Section 5.01 or clause (c) or (e) of Section 5.06 (if the suit relates to Securities of more than one but less than all series), 10% in aggregate principal amount of Securities then Outstanding and affected thereby, or in the case of any suit relating to or arising under clause (a) or (b) of Section 5.01, 10% in aggregate principal amount of all Securities then Outstanding, or to any suit instituted by any Securityholder for the enforcement of the payment of the principal of or interest on any Security on or after the due date expressed in such Security or any date fixed for redemption.

ARTICLE 6
CONCERNING THE TRUSTEE

Section 6.01. *Duties and Responsibilities of the Trustee; During Default; Prior to Default.* With respect to the Holders of any series of Securities issued hereunder, the Trustee, prior to the occurrence of a Default with respect to the Securities of a particular series and after the curing or waiving of all Defaults which may have occurred with respect to such series, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture. In case a Default with respect to the Securities of a series has occurred (which has not been cured or waived) the Trustee shall exercise with respect to such series of Securities such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct, except that

(a) prior to the occurrence of a Default with respect to the Securities of any series and after the curing or waiving of all such Defaults with respect to such series which may have occurred:

(i) the duties and obligations of the Trustee with respect to the Securities of any series shall be determined solely by the express provisions of this Indenture, and the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(ii) in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the

correctness of the opinions expressed therein, upon any statements, certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture; but in the case of any such statements, certificates or opinions which by any provision hereof are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture;

(b) the Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer or Responsible Officers of the Trustee, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts; and

(c) the Trustee shall not be liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the Holders pursuant to Section 5.09 relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture.

None of the provisions contained in this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties or in the exercise of any of its rights or powers, if there shall be reasonable ground for believing that the repayment of such funds or adequate indemnity against such liability is not reasonably assured to it.

The provisions of this Section 6.01 are in furtherance of and subject to Section 315 of the Trust Indenture Act of 1939.

Section 6.02. *Certain Rights of the Trustee.* In furtherance of and subject to the Trust Indenture Act of 1939, and subject to Section 6.01:

(a) the Trustee may conclusively rely and shall be protected in acting or refraining from acting upon any resolution, Officer's Certificate or any other certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, note, coupon, security or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) any request, direction, order or demand of the Issuer mentioned herein shall be sufficiently evidenced by an Officer's Certificate (unless other evidence in respect thereof be herein specifically prescribed); and any resolution of the Board of Directors may be evidenced to the Trustee by a copy thereof certified by the secretary or an assistant secretary of the Issuer;

(c) the Trustee may consult with counsel of its selection and any written advice or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted to be taken by it hereunder in good faith and in reliance thereon in accordance with such advice or Opinion of Counsel;

(d) the Trustee shall be under no obligation to exercise any of the trusts or powers vested in it by this Indenture at the request, order or direction of any of the Securityholders pursuant to the provisions of this Indenture, unless such Securityholders shall have offered to the Trustee reasonable security or indemnity against the costs, expenses and liabilities which might be incurred therein or thereby;

(e) the Trustee shall not be liable for any action taken or omitted by it in good faith and believed by it to be authorized or within the discretion, rights or powers conferred upon it by this Indenture;

(f) prior to the occurrence of a Default hereunder and after the curing or waiving of all Defaults, the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, appraisal, bond, debenture, note, coupon, security, or other paper or document unless requested in writing so to do by the Holders of not less than a majority in aggregate principal amount of the Securities of all series affected then Outstanding; *provided* that, if the payment within a reasonable time to the Trustee of the costs, expenses or liabilities likely to be incurred by it in the making of such investigation is, in the opinion of the Trustee, not reasonably assured to the Trustee by the security afforded to it by the terms of this Indenture, the Trustee shall require indemnity reasonably satisfactory to it against such expenses or liabilities as a condition to proceeding; the reasonable expenses of every such investigation shall be paid by the Issuer or, if paid by the Trustee or any predecessor Trustee, shall be repaid by the Issuer upon demand; and

(g) the Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents or attorneys not regularly in its employ and the Trustee shall not be responsible for any misconduct or negligence on the part of any such agent or attorney appointed with due care by it hereunder.

Section 6.03. *Trustee Not Responsible for Recitals, Disposition of Securities or Application of Proceeds Thereof.* The recitals contained herein and in the Securities, except the Trustee's certificates of authentication, shall be taken as the statements of the Issuer, and the Trustee assumes no responsibility for the correctness of the same. The Trustee makes no representation as to the validity or sufficiency of this Indenture or of the Securities or Coupons. The Trustee shall not be accountable for the use or application by the Issuer of any of the Securities or of the proceeds thereof.

Section 6.04. *Trustee and Agents May Hold Securities or Coupons; Collections, etc.* The Trustee or any agent of the Issuer or the Trustee, in its

individual or any other capacity, may become the owner or pledgee of Securities or Coupons with the same rights it would have if it were not the Trustee or such agent and may otherwise deal with the Issuer and receive, collect, hold and retain collections from the Issuer with the same rights it would have if it were not the Trustee or such agent.

Section 6.05. *Moneys Held by Trustee.* Subject to the provisions of Section 10.04 hereof, all moneys received by the Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated from other funds except to the extent required by mandatory provisions of law. Neither the Trustee nor any agent of the Issuer or the Trustee shall be under any liability for interest on any moneys received by it hereunder.

Section 6.06. *Compensation and Indemnification of Trustee and Its Prior Claim.* The Issuer covenants and agrees to pay to the Trustee from time to time, and the Trustee shall be entitled to, reasonable compensation (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) and the Issuer covenants and agrees to pay or reimburse the Trustee and each predecessor Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by or on behalf of it in accordance with any of the provisions of this Indenture (including the reasonable compensation and the expenses and disbursements of its counsel and of all agents and other Persons not regularly in its employ) except any such expense, disbursement or advance as may arise from its negligence or bad faith. The Issuer also covenants to indemnify the Trustee and each predecessor Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on its part, arising out of or in connection with the acceptance or administration of this Indenture or the trusts hereunder and its duties hereunder, including the costs and expenses of defending itself against or investigating any claim of liability in the premises. The obligations of the Issuer under this Section to compensate and indemnify the Trustee and each predecessor Trustee and to pay or reimburse the Trustee and each predecessor Trustee for expenses, disbursements and advances shall constitute additional indebtedness hereunder and shall survive the satisfaction and discharge of this Indenture. Such additional indebtedness shall be a senior claim to that of the Securities upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the Holders of particular Securities or Coupons, and the Securities are hereby subordinated to such senior claim.

Section 6.07. *Right of Trustee to Rely on Officer's Certificate, etc.* Subject to Sections 6.01 and 6.02, whenever in the administration of the trusts of this Indenture the Trustee shall deem it necessary or desirable that a matter be proved or established prior to taking or suffering or omitting any action hereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may, in the absence of negligence or bad faith on the part of the Trustee, be deemed to be conclusively proved and established by an

Officer's Certificate delivered to the Trustee, and such certificate, in the absence of negligence or bad faith on the part of the Trustee, shall be full warrant to the Trustee for any action taken, suffered or omitted by it under the provisions of this Indenture upon the faith thereof.

Section 6.08. [THIS SECTION INTENTIONALLY LEFT BLANK]

Section 6.09. *Persons Eligible for Appointment as Trustee.* The Trustee for each series of Securities hereunder shall at all times be a corporation organized and doing business under the laws of the United States of America or of any State or the District of Columbia having a combined capital and surplus of at least \$5,000,000, and which is authorized under such laws to exercise corporate trust powers and is subject to supervision or examination by Federal, State or District of Columbia authority. Such corporation shall have a place of business in the Borough of Manhattan, The City of New York if there be such a corporation in such location willing to act upon reasonable and customary terms and conditions. If such corporation publishes reports of condition at least annually, pursuant to law or to the requirements of the aforesaid supervising or examining authority, then for the purposes of this Section, the combined capital and surplus of such corporation shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. In case at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section, the Trustee shall resign immediately in the manner and with the effect specified in Section 6.10.

The provisions of this Section 6.08 are in furtherance of and subject to Section 310(a) of the Trust Indenture Act of 1939.

Section 6.10. *Resignation and Removal; Appointment of Successor Trustee.* (a) The Trustee, or any trustee or trustees hereafter appointed, may at any time resign with respect to one or more or all series of Securities by giving written notice of resignation to the Issuer (i) if any Unregistered Securities of a series affected are then Outstanding, by giving notice of such resignation to the Holders thereof (A) by mail to such Holders who have filed their names and addresses with the Trustee within the two years preceding the notice at such addresses as were so furnished to the Trustee and (B) either through the customary notice provisions of the clearing system or systems through which beneficial interests in such Unregistered Securities are owned if such Unregistered Securities are held only in global form or by publication at least once in an Authorized Newspaper in the Borough of Manhattan, The City of New York, and at least once in an Authorized Newspaper in London, and (ii) if any Registered Securities of a series affected are then Outstanding, by mailing notice of such resignation to the Holders of then Outstanding Registered Securities of each series affected at their addresses as they shall appear on the registry books. Upon receiving such notice of resignation, the Issuer shall promptly appoint a successor trustee or trustees with respect to the applicable series by written instrument in duplicate, executed by authority of the Board of Directors, one copy of which

instrument shall be delivered to the resigning Trustee and one copy to the successor trustee or trustees. If no successor trustee shall have been so appointed with respect to any series and have accepted appointment within 30 days after the mailing of such notice of resignation, the resigning trustee may petition any court of competent jurisdiction for the appointment of a successor trustee, or any Securityholder who has been a bona fide Holder of a Security or Securities of the applicable series for at least six months may, subject to the provisions of Section 5.12, on behalf of himself and all others similarly situated, petition any such court for the appointment of a successor trustee. Such court may thereupon, after such notice, if any, as it may deem proper and prescribe, appoint a successor trustee.

(b) In case at any time any of the following shall occur:

(i) the Trustee shall fail to comply with the provisions of Section 310(b) of the Trust Indenture Act of 1939 with respect to any series of Securities after written request therefor by the Issuer or by any Securityholder who has been a bona fide Holder of a Security or Securities of such series for at least six months; or

(ii) the Trustee shall cease to be eligible in accordance with the provisions of Section 6.09 and Section 310(a) of the Trust Indenture Act of 1939 and shall fail to resign after written request therefor by the Issuer or by any Securityholder; or

(iii) the Trustee shall become incapable of acting with respect to any series of Securities, or shall be adjudged a bankrupt or insolvent, or a receiver or liquidator of the Trustee or of its property shall be appointed, or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation;

then, in any such case, the Issuer may remove the Trustee with respect to the applicable series of Securities and appoint a successor trustee for such series by written instrument, in duplicate, executed by order of the Board of Directors of the Issuer, one copy of which instrument shall be delivered to the Trustee so removed and one copy to the successor trustee, or, subject to the provisions of Section 315(e) of the Trust Indenture Act of 1939, any Securityholder who has been a bona fide Holder of a Security or Securities of such series for at least six months may on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor trustee with respect to such series. Such court may thereupon, after such notice, if any, as it may deem proper and prescribe, remove the Trustee and appoint a successor trustee.

(c) The Holders of a majority in aggregate principal amount of the Securities of each series at the time outstanding may at any time remove the Trustee with respect to Securities of such series and appoint a successor trustee

with respect to the Securities of such series by delivering to the Trustee so removed, to the successor trustee so appointed and to the Issuer the evidence provided for in Section 7.01 of the action in that regard taken by the Securityholders.

(d) Any resignation or removal of the Trustee with respect to any series and any appointment of a successor trustee with respect to such series pursuant to any of the provisions of this Section 6.10 shall become effective upon acceptance of appointment by the successor trustee as provided in Section 6.11.

Section 6.11. *Acceptance of Appointment by Successor Trustee.* Any successor trustee appointed as provided in Section 6.10 shall execute and deliver to the Issuer and to its predecessor trustee an instrument accepting such appointment hereunder, and thereupon the resignation or removal of the predecessor trustee with respect to all or any applicable series shall become effective and such successor trustee, without any further act, deed or conveyance, shall become vested with all rights, powers, duties and obligations with respect to such series of its predecessor hereunder, with like effect as if originally named as trustee for such series hereunder; but, nevertheless, on the written request of the Issuer or of the successor trustee, upon payment of its charges then unpaid, the trustee ceasing to act shall, subject to Section 10.04, pay over to the successor trustee all moneys at the time held by it hereunder and shall execute and deliver an instrument transferring to such successor trustee all such rights, powers, duties and obligations. Upon request of any such successor trustee, the Issuer shall execute any and all instruments in writing for more fully and certainly vesting in and confirming to such successor trustee all such rights and powers. Any trustee ceasing to act shall, nevertheless, retain a prior claim upon all property or funds held or collected by such trustee to secure any amounts then due it pursuant to the provisions of Section 6.06.

If a successor trustee is appointed with respect to the Securities of one or more (but not all) series, the Issuer, the predecessor trustee and each successor trustee with respect to the Securities of any applicable series shall execute and deliver an indenture supplemental hereto which shall contain such provisions as shall be deemed necessary or desirable to confirm that all the rights, powers, trusts and duties of the predecessor trustee with respect to the Securities of any series as to which the predecessor trustee is not retiring shall continue to be vested in the predecessor trustee, and shall add to or change any of the provisions of this Indenture as shall be necessary to provide for or facilitate the administration of the trusts hereunder by more than one Trustee, it being understood that nothing herein or in such supplemental indenture shall constitute such Trustees co-trustees of the same trust and that each such Trustee shall be trustee of a trust or trusts under separate indentures.

No successor trustee with respect to any series of Securities shall accept appointment as provided in this Section 6.11 unless at the time of such acceptance such successor trustee shall be qualified under Section 310(b) of the Trust Indenture Act of 1939 and eligible under the provisions of Section 6.08.

Upon acceptance of appointment by any successor trustee as provided in this Section 6.11, the Issuer shall give notice thereof (i) if any Unregistered Securities of a series affected are then Outstanding, to the Holders thereof, (A) by mail to such Holders who have filed their names and addresses with the Trustee within the two years preceding the notice at such addresses as were so furnished to the Trustee and (B) either through the customary notice provisions of the clearing system or systems through which beneficial interests in such Unregistered Securities are owned if such Unregistered Securities are held only in global form or by publication at least once in an Authorized Newspaper in the Borough of Manhattan, The City of New York, and at least once in an Authorized Newspaper in London, and (ii) if any Registered Securities of a series affected are then Outstanding, by mailing notice to the Holders of then Outstanding Registered Securities of each series affected at their addresses as they shall appear on the registry books. If the acceptance of appointment is substantially contemporaneous with the resignation, then the notice called for by the preceding sentence may be combined with the notice called for by Section 6.10. If the Issuer fails to give such notice within ten days after acceptance of appointment by the successor trustee, the successor trustee shall cause such notice to be given at the expense of the Issuer.

Section 6.12. *Merger, Conversion, Consolidation or Succession to Business of Trustee.* Any corporation or national association into which the Trustee may be merged or converted or with which it may be consolidated, or any corporation or national association resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation or national association succeeding to all or substantially all of the corporate trust business of the Trustee, shall be the successor of the Trustee hereunder, provided that such corporation or national association shall be qualified under Section 310(b) of the Trust Indenture Act of 1939 and eligible under the provisions of Section 6.08, without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

In case at the time such successor to the Trustee shall succeed to the trusts created by this Indenture any of the Securities of any series shall have been authenticated but not delivered, any such successor to the Trustee may adopt the certificate of authentication of any predecessor Trustee and deliver such Securities so authenticated; and, in case at that time any of the Securities of any series shall not have been authenticated, any successor to the Trustee may authenticate such Securities either in the name of any predecessor hereunder or in the name of the successor Trustee; and in all such cases such certificate shall have the full force which it is anywhere in the Securities of such series or in this Indenture provided that the certificate of the Trustee shall have; *provided* that the right to adopt the certificate of authentication of any predecessor Trustee or to authenticate Securities of any series in the name of any predecessor Trustee shall apply only to its successor or successors by merger, conversion or consolidation.

Section 6.13. *Preferential Collection of Claims Against the Issuer.*

This Section intentionally left blank.

Section 6.14. *Appointment of Authenticating Agent.* As long as any Securities of a series remain Outstanding, the Trustee may, by an instrument in writing, appoint with the approval of the Issuer an authenticating agent (the “**Authenticating Agent**”) which shall be authorized to act on behalf of the Trustee to authenticate Securities, including Securities issued upon exchange, registration of transfer, partial redemption or pursuant to Section 2.09. Securities of each such series authenticated by such Authenticating Agent shall be entitled to the benefits of this Indenture and shall be valid and obligatory for all purposes as if authenticated by the Trustee. Whenever reference is made in this Indenture to the authentication and delivery of Securities of any series by the Trustee or to the Trustee’s Certificate of Authentication, such reference shall be deemed to include authentication and delivery on behalf of the Trustee by an Authenticating Agent for such series and a Certificate of Authentication executed on behalf of the Trustee by such Authenticating Agent. Such Authenticating Agent shall at all times be a corporation organized and doing business under the laws of the United States of America or of any State, authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least \$5,000,000 (determined as provided in Section 6.08 with respect to the Trustee) and subject to supervision or examination by Federal or State authority.

Any corporation into which any Authenticating Agent may be merged or converted, or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which any Authenticating Agent shall be a party, or any corporation succeeding to the corporate agency business of any Authenticating Agent, shall continue to be the Authenticating Agent with respect to all series of Securities for which it served as Authenticating Agent without the execution or filing of any paper or any further act on the part of the Trustee or such Authenticating Agent. Any Authenticating Agent may at any time, and if it shall cease to be eligible shall, resign by giving written notice of resignation to the Trustee and to the Issuer.

Upon receiving such a notice of resignation or upon such a termination, or in case at any time any Authenticating Agent shall cease to be eligible in accordance with the provisions of this Section 6.14 with respect to one or more series of Securities, the Trustee shall upon receipt of an Issuer Order appoint a successor Authenticating Agent and the Issuer shall provide notice of such appointment to all Holders of Securities of such series in the manner and to the extent provided in Section 11.04. Any successor Authenticating Agent upon acceptance of its appointment hereunder shall become vested with all rights, powers, duties and responsibilities of its predecessor hereunder, with like effect as

if originally named as Authenticating Agent. The Issuer agrees to pay to the Authenticating Agent for such series from time to time reasonable compensation. The Authenticating Agent for the Securities of any series shall have no responsibility or liability for any action taken by it as such at the direction of the Trustee.

Sections 6.02, 6.03, 6.04, 6.06, 6.08 and 7.03 shall be applicable to any Authenticating Agent.

ARTICLE 7
CONCERNING THE SECURITYHOLDERS

Section 7.01. *Evidence of Action Taken by Securityholders.* Any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Indenture to be given or taken by a specified percentage in principal amount of the Securityholders of any or all series may be embodied in and evidenced by one or more instruments of substantially similar tenor signed by such specified percentage of Securityholders in person or by agent duly appointed in writing; and, except as herein otherwise expressly provided, such action shall become effective when such instrument or instruments are delivered to the Trustee. Proof of execution of any instrument or of a writing appointing any such agent shall be sufficient for any purpose of this Indenture and (subject to Sections 6.01 and 6.02) conclusive in favor of the Trustee and the Issuer, if made in the manner provided in this Article.

Section 7.02. *Proof of Execution of Instruments and of Holding of Securities.* Subject to Sections 6.01 and 6.02, the execution of any instrument by a Securityholder or his agent or proxy may be proved in the following manner:

(a) The fact and date of the execution by any Holder of any instrument may be proved by the certificate of any notary public or other officer of any jurisdiction authorized to take acknowledgments of deeds or administer oaths that the person executing such instruments acknowledged to him the execution thereof, or by an affidavit of a witness to such execution sworn to before any such notary or other such officer. Where such execution is by or on behalf of any legal entity other than an individual, such certificate or affidavit shall also constitute sufficient proof of the authority of the person executing the same. The fact of the holding by any Holder of an Unregistered Security of any series, and the identifying number of such Security and the date of his holding the same, may be proved by the production of such Security or by a certificate executed by any trust company, bank, banker or recognized securities dealer wherever situated satisfactory to the Trustee, if such certificate shall be deemed by the Trustee to be satisfactory. Each such certificate shall be dated and shall state that on the date thereof a Security of such series bearing a specified identifying number was deposited with or exhibited to such trust company, bank, banker or recognized securities dealer by the Person named in such certificate. Any such certificate may

be issued in respect of one or more Unregistered Securities of one or more series specified therein. The holding by the Person named in any such certificate of any Unregistered Securities of any series specified therein shall be presumed to continue for a period of one year from the date of such certificate unless at the time of any determination of such holding (i) another certificate bearing a later date issued in respect of the same Securities shall be produced, or (ii) the Security of such series specified in such certificate shall be produced by some other Person, or (iii) the Security of such series specified in such certificate shall have ceased to be Outstanding. Subject to Sections 6.01 and 6.02, the fact and date of the execution of any such instrument and the amount and numbers of Securities of any series held by the Person so executing such instrument and the amount and numbers of any Security or Securities for such series may also be proven in accordance with such reasonable rules and regulations as may be prescribed by the Trustee for such series or in any other manner which the Trustee for such series may deem sufficient.

(b) In the case of Registered Securities, the ownership of such Securities shall be proved by the Security register or by a certificate of the Security registrar.

The Issuer may set a record date for purposes of determining the identity of Holders of Registered Securities of any series entitled to vote or consent to any action referred to in Section 7.01, which record date may be set at any time or from time to time by notice to the Trustee, for any date or dates (in the case of any adjournment or reconsideration) not more than 60 days nor less than five days prior to the proposed date of such vote or consent, and thereafter, notwithstanding any other provisions hereof, with respect to Registered Securities of any series, only Holders of Registered Securities of such series of record on such record date shall be entitled to so vote or give such consent or revoke such vote or consent.

Section 7.03. *Holders to Be Treated as Owners.* The Issuer, the Trustee and any agent of the Issuer or the Trustee may deem and treat the Person in whose name any Security shall be registered upon the Security register for such series as the absolute owner of such Security (whether or not such Security shall be overdue and notwithstanding any notation of ownership or other writing thereon) for the purpose of receiving payment of or on account of the principal of and, subject to the provisions of this Indenture, interest on such Security and for all other purposes; and neither the Issuer nor the Trustee nor any agent of the Issuer or the Trustee shall be affected by any notice to the contrary. The Issuer, the Trustee and any agent of the Issuer or the Trustee may treat the Holder of any Unregistered Security and the Holder of any Coupon as the absolute owner of such Unregistered Security or Coupon (whether or not such Unregistered Security or Coupon shall be overdue) for the purpose of receiving payment thereof or on account thereof and for all other purposes and neither the Issuer, the Trustee, nor any agent of the Issuer or the Trustee shall be affected by any notice to the contrary. All such payments so made to any such Person, or upon his order, shall be valid, and, to the extent of the sum or sums so paid, effectual to satisfy and discharge the liability for moneys payable upon any such Unregistered Security or Coupon.

Section 7.04. *Securities Owned by Issuer Deemed not Outstanding.* In determining whether the Holders of the requisite aggregate principal amount of Outstanding Securities of any or all series have concurred in any direction, consent or waiver under this Indenture, Securities which are owned by the Issuer or any other obligor on the Securities with respect to which such determination is being made or by any Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Issuer or any other obligor on the Securities with respect to which such determination is being made shall be disregarded and deemed not to be Outstanding for the purpose of any such determination, except that for the purpose of determining whether the Trustee shall be protected in relying on any such direction, consent or waiver only Securities which the Trustee knows are so owned shall be so disregarded. Securities so owned which have been pledged in good faith may be regarded as Outstanding if the pledgee establishes to the satisfaction of the Trustee the pledgee's right so to act with respect to such Securities and that the pledgee is not the Issuer or any other obligor upon the Securities or any Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Issuer or any other obligor on the Securities. In case of a dispute as to such right, the advice of counsel shall be full protection in respect of any decision made by the Trustee in accordance with such advice. Upon request of the Trustee, the Issuer shall furnish to the Trustee promptly an Officer's Certificate listing and identifying all Securities, if any, known by the Issuer to be owned or held by or for the account of any of the above-described Persons; and, subject to Sections 6.01 and 6.02, the Trustee shall be entitled to accept such Officer's Certificate as conclusive evidence of the facts therein set forth and of the fact that all Securities not listed therein are Outstanding for the purpose of any such determination.

Section 7.05. *Right of Revocation of Action Taken.* At any time prior to (but not after) the evidencing to the Trustee, as provided in Section 7.01, of the taking of any action by the Holders of the percentage in aggregate principal amount of the Securities of any or all series, as the case may be, specified in this Indenture in connection with such action, any Holder of a Security the serial number of which is shown by the evidence to be included among the serial numbers of the Securities the Holders of which have consented to such action may, by filing written notice at the Corporate Trust Office and upon proof of holding as provided in this Article, revoke such action so far as concerns such Security. Except as aforesaid any such action taken by the Holder of any Security shall be conclusive and binding upon such Holder and upon all future Holders and owners of such Security and of any Securities issued in exchange or substitution therefor or on registration of transfer thereof, irrespective of whether or not any notation in regard thereto is made upon any such Security. Any action taken by the Holders of the percentage in aggregate principal amount of the Securities of any or all series, as the case may be, specified in this Indenture in connection with such action shall be conclusively binding upon the Issuer, the Trustee and the Holders of all the Securities affected by such action.

ARTICLE 8
SUPPLEMENTAL INDENTURES

Section 8.01. *Supplemental Indentures Without Consent of Securityholders*. The Issuer, when authorized by a resolution of its Board of Directors (which resolution may provide general terms or parameters for such action and may provide that the specific terms of such action may be determined in accordance with or pursuant to an Issuer Order), and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental hereto for one or more of the following purposes:

- (a) to convey, transfer, assign, mortgage or pledge to the Trustee as security for the Securities of one or more series any property or assets;
 - (b) to evidence the succession of another corporation to the Issuer, or successive successions, and the assumption by the successor corporation of the covenants, agreements and obligations of the Issuer pursuant to Article 9;
 - (c) to add to the covenants of the Issuer such further covenants, restrictions, conditions or provisions as the Issuer and the Trustee shall consider to be for the protection of the Holders of Securities or Coupons, and to make the occurrence, or the occurrence and continuance, of a default in any such additional covenants, restrictions, conditions or provisions a Default or an Event of Default permitting the enforcement of all or any of the several remedies provided in this Indenture as herein set forth; *provided* that in respect of any such additional covenant, restriction, condition or provision such supplemental indenture may provide for a particular period of grace after default (which period may be shorter or longer than that allowed in the case of other defaults) or may provide for an immediate enforcement upon such a Default or Event of Default or may limit the remedies available to the Trustee upon such a Default or Event of Default or may limit the right of the Holders of a majority in aggregate principal amount of the Securities of such series to waive such a Default or Event of Default;
 - (d) to cure any ambiguity or to correct or supplement any provision contained herein or in any supplemental indenture which may be defective or inconsistent with any other provision contained herein or in any supplemental indenture, or to make any other provisions as the Issuer may deem necessary or desirable, *provided* that no such action shall adversely affect the interests of the Holders of the Securities or Coupons;
 - (e) to establish the forms or terms of Securities of any series or of the Coupons appertaining to such Securities as permitted by Sections 2.01 and 2.03;
- and

(f) to evidence and provide for the acceptance of appointment hereunder by a successor trustee with respect to the Securities of one or more series and to add to or change any of the provisions of this Indenture as shall be necessary to provide for or facilitate the administration of the trusts hereunder by more than one trustee, pursuant to the requirements of Section 6.11.

The Trustee is hereby authorized to join with the Issuer in the execution of any such supplemental indenture, to make any further appropriate agreements and stipulations which may be therein contained and to accept the conveyance, transfer, assignment, mortgage or pledge of any property thereunder, but the Trustee shall not be obligated to enter into any such supplemental indenture which affects the Trustee's own rights, duties or immunities under this Indenture or otherwise.

Any supplemental indenture authorized by the provisions of this Section may be executed without the consent of the Holders of any of the Securities at the time outstanding, notwithstanding any of the provisions of Section 8.02.

Section 8.02. *Supplemental Indentures with Consent of Securityholders.* With the consent (evidenced as provided in Article 7) of the Holders of not less than a majority in aggregate principal amount of the Securities at the time Outstanding of all series affected by such supplemental indenture (voting as one class), the Issuer, when authorized by a resolution of its Board of Directors (which resolution may provide general terms or parameters for such action and may provide that the specific terms of such action may be determined in accordance with or pursuant to an Issuer Order), and the Trustee may, from time to time and at any time, enter into an indenture or indentures supplemental hereto for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of modifying in any manner the rights of the Holders of the Securities of each such series or of the Coupons appertaining to such Securities; *provided* that no such supplemental indenture shall (a) (i) extend the final maturity of any Security, (ii) reduce the principal amount thereof, (iii) reduce the rate or extend the time of payment of interest thereon, (iv) reduce any amount payable on redemption thereof, (v) make the principal thereof (including any amount in respect of original issue discount), or interest thereon payable in any coin or currency other than that provided in the Securities and Coupons or in accordance with the terms thereof, (vi) modify or amend any provisions for converting any currency into any other currency as provided in the Securities or Coupons or in accordance with the terms thereof, (vii) reduce the amount of the principal of an Original Issue Discount Security that would be due and payable upon an acceleration of the maturity thereof pursuant to Section 5.01 or the amount thereof provable in bankruptcy pursuant to Section 5.02, (viii) modify or amend any provisions relating to the conversion or exchange of the Securities or Coupons for securities of the Issuer or of other entities or other property (or the cash value thereof), including the determination of the amount of securities or other property (or cash) into which the Securities shall be converted or

exchanged, other than as provided in the antidilution provisions or other similar adjustment provisions of the Securities or Coupons or otherwise in accordance with the terms thereof, (ix) alter the provisions of Section 11.11 or Section 11.12 or impair or affect the right of any Securityholder to institute suit for the payment thereof or, if the Securities provide therefor, any right of repayment at the option of the Securityholder, in each case without the consent of the Holder of each Security so affected, or (b) reduce the aforesaid percentage of Securities of any series, the consent of the Holders of which is required for any such supplemental indenture, without the consent of the Holders of each Security so affected.

A supplemental indenture which changes or eliminates any covenant or other provision of this Indenture which has expressly been included solely for the benefit of one or more particular series of Securities, or which modifies the rights of Holders of Securities of such series, or of Coupons appertaining to such Securities, with respect to such covenant or provision, shall be deemed not to affect the rights under this Indenture of the Holders of Securities of any other series or of the Coupons appertaining to such Securities.

Upon the request of the Issuer, accompanied by a copy of a resolution of the Board of Directors (which resolution may provide general terms or parameters for such action and may provide that the specific terms of such action may be determined in accordance with or pursuant to an Issuer Order) certified by the secretary or an assistant secretary of the Issuer authorizing the execution of any such supplemental indenture, and upon the filing with the Trustee of evidence of the consent of the Holders of the Securities as aforesaid and other documents, if any, required by Section 7.01, the Trustee shall join with the Issuer in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may in its discretion, but shall not be obligated to, enter into such supplemental indenture.

It shall not be necessary for the consent of the Securityholders under this Section to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such consent shall approve the substance thereof.

Promptly after the execution by the Issuer and the Trustee of any supplemental indenture pursuant to the provisions of this Section, the Trustee shall give notice thereof (i) if any Unregistered Securities of a series affected are then Outstanding, to the Holders thereof, (A) by mail to such Holders who have filed their names and addresses with the Trustee within the two years preceding the notice at such addresses as were so furnished to the Trustee and (B) either through the customary notice provisions of the clearing system or systems through which beneficial interests in such Unregistered Securities are owned if such Unregistered Securities are held only in global form or by publication at least once in an Authorized Newspaper in the Borough of Manhattan, The City of New York, and at least once in an Authorized Newspaper in London, and (ii) if any Registered Securities of a series affected are then Outstanding, by mailing

notice thereof by first class mail to the Holders of then Outstanding Registered Securities of each series affected at their addresses as they shall appear on the registry books, and in each case such notice shall set forth in general terms the substance of such supplemental indenture. Any failure of the Issuer to give such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such supplemental indenture.

Section 8.03. *Effect of Supplemental Indenture.* Upon the execution of any supplemental indenture pursuant to the provisions hereof, this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitations of rights, obligations, duties and immunities under this Indenture of the Trustee, the Issuer and the Holders of Securities of each series affected thereby shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments, and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

Section 8.04. *Documents to Be Given to Trustee.* The Trustee, subject to the provisions of Sections 6.01 and 6.02, shall receive an Officer's Certificate and an Opinion of Counsel as conclusive evidence that any supplemental indenture executed pursuant to this Article 8 complies with the applicable provisions of this Indenture.

Section 8.05. *Notation on Securities in Respect of Supplemental Indentures.* Securities of any series authenticated and delivered after the execution of any supplemental indenture pursuant to the provisions of this Article may bear a notation in form approved by the Trustee for such series as to any matter provided for by such supplemental indenture or as to any action taken by Securityholders. If the Issuer or the Trustee shall so determine, new Securities of any series so modified as to conform, in the opinion of the Trustee and the Board of Directors, to any modification of this Indenture contained in any such supplemental indenture may be prepared by the Issuer, authenticated by the Trustee and delivered in exchange for the Securities of such series then Outstanding.

Section 8.06. *Subordination Unimpaired.* This Indenture may not be amended to alter the subordination of any of the Outstanding Securities without the written consent of each holder of Senior Indebtedness then outstanding that would be adversely affected thereby.

ARTICLE 9 CONSOLIDATION, MERGER, SALE OR CONVEYANCE

Section 9.01. *Covenant Not to Merge, Consolidate, Sell or Convey Property Except Under Certain Conditions.* The Issuer covenants that it will not

merge or consolidate with any other Person or sell, lease or convey all or substantially all of its assets to any other Person, unless (a) either the Issuer shall be the continuing corporation, or the successor corporation or the Person which acquires by sale, lease or conveyance substantially all the assets of the Issuer (if other than the Issuer) shall be a corporation organized under the laws of the United States of America or any State thereof or the District of Columbia and shall expressly assume the due and punctual payment of the principal of and interest on all the Securities and Coupons, if any, according to their tenor, and the due and punctual performance and observance of all of the covenants and conditions of this Indenture to be performed or observed by the Issuer, by supplemental indenture satisfactory to the Trustee, executed and delivered to the Trustee by such corporation, and (b) the Issuer, such Person or such successor corporation, as the case may be, shall not, immediately after such merger or consolidation, or such sale, lease or conveyance, be in default in the performance of any such covenant or condition.

Section 9.02. *Successor Corporation Substituted.* In case of any such consolidation, merger, sale, lease or conveyance, and following such an assumption by the successor corporation, such successor corporation shall succeed to and be substituted for the Issuer, with the same effect as if it had been named herein. Such successor corporation may cause to be signed, and may issue either in its own name or in the name of the Issuer prior to such succession any or all of the Securities issuable hereunder which together with any Coupons appertaining thereto theretofore shall not have been signed by the Issuer and delivered to the Trustee; and, upon the order of such successor corporation, instead of the Issuer, and subject to all the terms, conditions and limitations in this Indenture prescribed, the Trustee shall authenticate and shall deliver any Securities together with any Coupons appertaining thereto which previously shall have been signed and delivered by the officers of the Issuer to the Trustee for authentication, and any Securities which such successor corporation thereafter shall cause to be signed and delivered to the Trustee for that purpose. All of the Securities so issued together with any Coupons appertaining thereto shall in all respects have the same legal rank and benefit under this Indenture as the Securities theretofore or thereafter issued in accordance with the terms of this Indenture as though all of such Securities had been issued at the date of the execution hereof.

In case of any such consolidation, merger, sale, lease or conveyance such changes in phrasing and form (but not in substance) may be made in the Securities and Coupons thereafter to be issued as may be appropriate.

In the event of any such sale or conveyance (other than a conveyance by way of lease) the Issuer or any successor corporation which shall theretofore have become such in the manner described in this Article shall be discharged from all obligations and covenants under this Indenture and the Securities and may be liquidated and dissolved.

Section 9.03. *Opinion of Counsel Delivered to Trustee.* The Trustee, subject to the provisions of Sections 6.01 and 6.02, may receive an Opinion of Counsel as conclusive evidence that any such consolidation, merger, sale, lease or conveyance, and any such assumption, and any such liquidation or dissolution, complies with the applicable provisions of this Indenture.

ARTICLE 10
SATISFACTION AND DISCHARGE OF INDENTURE; UNCLAIMED MONEYS

Section 10.01. *Satisfaction and Discharge of Indenture.* (a) If at any time (i) the Issuer shall have paid or caused to be paid the principal of and interest on all the Securities of any series Outstanding hereunder and all unmatured Coupons appertaining thereto (other than Securities of such series and Coupons appertaining thereto which have been destroyed, lost or stolen and which have been replaced or paid as provided in Section 2.09) as and when the same shall have become due and payable, or (ii) the Issuer shall have delivered to the Trustee for cancellation all Securities of any series theretofore authenticated and all unmatured Coupons appertaining thereto (other than any Securities of such series and Coupons appertaining thereto which shall have been destroyed, lost or stolen and which shall have been replaced or paid as provided in Section 2.09) or (iii) in the case of any series of Securities where the exact amount (including the currency of payment) of principal of and interest due on which can be determined at the time of making the deposit referred to in clause (B) below, (A) all the Securities of such series and all unmatured Coupons appertaining thereto not theretofore delivered to the Trustee for cancellation shall have become due and payable, or are by their terms to become due and payable within one year or are to be called for redemption within one year under arrangements satisfactory to the Trustee for the giving of notice of redemption, and (B) the Issuer shall have irrevocably deposited or caused to be deposited with the Trustee as trust funds the entire amount in cash (other than moneys repaid by the Trustee or any paying agent to the Issuer in accordance with Section 10.04) or, in the case of any series of Securities the payments on which may only be made in Dollars, direct obligations of the United States of America, backed by its full faith and credit (“**U.S. Government Obligations**”), maturing as to principal and interest at such times and in such amounts as will insure the availability of cash, or a combination thereof, sufficient in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay (1) the principal and interest on all Securities of such series and Coupons appertaining thereto on each date that such principal or interest is due and payable and (2) any mandatory sinking fund payments on the dates on which such payments are due and payable in accordance with the terms of the Indenture and the Securities of such series; and if, in any such case, the Issuer shall also pay or cause to be paid all other sums payable hereunder by the Issuer with respect to the Securities of such series, then this Indenture shall cease to be of further effect with respect to the Securities of such series and the Coupons appertaining thereto

(except as to (i) rights of registration of transfer and exchange of Securities of such Series and of Coupons appertaining thereto and the Issuer's right of optional redemption, if any, (ii) substitution of mutilated, defaced, destroyed, lost or stolen Securities or Coupons, (iii) rights of holders of Securities and Coupons appertaining thereto to receive payments of principal thereof and interest thereon, upon the original stated due dates therefor (but not upon acceleration), and remaining rights of the Holders to receive mandatory sinking fund payments, if any, (iv) the rights, obligations, duties and immunities of the Trustee hereunder, (v) the rights of the Holders of Securities of such series and Coupons appertaining thereto as beneficiaries hereof with respect to the property so deposited with the Trustee payable to all or any of them, and (vi) the obligations of the Issuer under Section 3.02) and the Trustee, on demand of the Issuer accompanied by an Officer's Certificate and an Opinion of Counsel and at the cost and expense of the Issuer, shall execute proper instruments acknowledging such satisfaction of and discharging this Indenture as to such series; *provided* that the rights of Holders of the Securities and Coupons to receive amounts in respect of principal of and interest on the Securities and Coupons held by them shall not be delayed longer than required by then-applicable mandatory rules or policies of any securities exchange upon which the Securities are listed. The Issuer agrees to reimburse the Trustee for any costs or expenses thereafter reasonably and properly incurred and to compensate the Trustee for any services thereafter reasonably and properly rendered by the Trustee in connection with this Indenture or the Securities of such series.

(b) The following provisions shall apply to the Securities of each series unless specifically otherwise provided in a Board Resolution, Officer's Certificate or indenture supplemental hereto provided pursuant to Section 2.03. In addition to discharge of the Indenture pursuant to the next preceding paragraph, in the case of any series of Securities the exact amounts (including the currency of payment) of principal of and interest due on which can be determined at the time of making the deposit referred to in clause (i) below, the Issuer shall be deemed to have paid and discharged the entire indebtedness on all the Securities of such a series and the Coupons appertaining thereto on the 91st day after the date of the deposit referred to in clause (i) below, and the provisions of this Indenture with respect to the Securities of such series and Coupons appertaining thereto shall no longer be in effect (except as to (A) rights of registration of transfer and exchange of Securities of such series and of Coupons appertaining thereto and the Issuer's right of optional redemption, if any, (B) substitution of mutilated, defaced, destroyed, lost or stolen Securities or Coupons, (C) rights of Holders of Securities and Coupons appertaining thereto to receive payments of principal thereof and interest thereon, upon the original stated due dates therefor (but not upon acceleration), and remaining rights of the Holders to receive mandatory sinking fund payments, if any, (D) the rights, obligations, duties and immunities of the Trustee hereunder, (E) the rights of the Holders of Securities of such series and Coupons appertaining thereto as beneficiaries hereof with respect to the property so deposited with the Trustee payable to all or any of them and (F) the obligations

of the Issuer under Section 3.02) and the Trustee, at the expense of the Issuer, shall at the Issuer's request, execute proper instruments acknowledging the same, if

(i) with reference to this provision the Issuer has irrevocably deposited or caused to be irrevocably deposited with the Trustee as trust funds in trust, specifically pledged as security for, and dedicated solely to, the benefit of the Holders of the Securities of such series and Coupons appertaining thereto (A) cash in an amount, or (B) in the case of any series of Securities the payments on which may only be made in Dollars, U.S. Government Obligations, maturing as to principal and interest at such times and in such amounts as will insure the availability of cash or (C) a combination thereof, sufficient, in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay (1) the principal and interest on all Securities of such series and Coupons appertaining thereto on each date that such principal or interest is due and payable and (2) any mandatory sinking fund payments on the dates on which such payments are due and payable in accordance with the terms of the Indenture and the Securities of such series;

(ii) such deposit will not result in a breach or violation of, or constitute a default under, any agreement or instrument to which the Issuer is a party or by which it is bound;

(iii) the Issuer has delivered to the Trustee an Opinion of Counsel based on the fact that (x) the Issuer has received from, or there has been published by, the Internal Revenue Service a ruling or (y) since the date hereof, there has been a change in the applicable Federal income tax law, in either case to the effect that, and such opinion shall confirm that, the Holders of the Securities of such series and Coupons appertaining thereto will not recognize income, gain or loss for Federal income tax purposes as a result of such deposit, defeasance and discharge and will be subject to Federal income tax on the same amount and in the same manner and at the same times, as would have been the case if such deposit, defeasance and discharge had not occurred;

(iv) the Issuer has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent provided for relating to the defeasance contemplated by this provision have been complied with;

(v) no event or condition shall exist that, pursuant to the provisions of Section 13.01, would prevent the Issuer from making payments of the principal of or interest on the Securities of such series and Coupons appertaining thereto on the date of such deposit or at any time during the period ending on the 91st day after the date of such deposit (it being understood that this condition shall not be deemed satisfied until the expiration of such period); and

(vi) the Issuer has delivered to the Trustee an Opinion of Counsel to the effect that (x) the trust funds will not be subject to any rights of holders of Senior Indebtedness, including without limitation those arising under Article 13 of this Indenture, and (y) after the 91st day following the deposit, the trust funds will not be subject to the effect of any applicable bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally, except that if a court were to rule under any such law in any case or proceeding that the trust funds remained property of the Issuer, no opinion is given as to the effect of such laws on the trust funds except the following: (A) assuming such trust funds remained in the Trustee's possession prior to such court ruling to the extent not paid to Holders of Securities of such series and Coupons appertaining thereto, the Trustee will hold, for the benefit of such Holders, a valid and perfected security interest in such trust funds that is not avoidable in bankruptcy or otherwise, (B) such Holders will be entitled to receive adequate protection of their interests in such trust funds if such trust funds are used, and (C) no property, rights in property or other interests granted to the Trustee or such Holders in exchange for or with respect to any of such funds will be subject to any prior rights of holders of Senior Indebtedness, including without limitation those arising under Article 13 of this Indenture.

(c) The Issuer shall be released from its obligations under Section 9.01 with respect to the Securities of any Series, and any Coupons appertaining thereto, Outstanding on and after the date the conditions set forth below are satisfied (hereinafter, "**covenant defeasance**"). For this purpose, such covenant defeasance means that, with respect to the Outstanding Securities of any Series, the Issuer may omit to comply with and shall have no liability in respect of any term, condition or limitation set forth in such Section, whether directly or indirectly by reason of any reference elsewhere herein to such Section or by reason of any reference in such Section to any other provision herein or in any other document and such omission to comply shall not constitute a Default or an Event of Default, but the remainder of this Indenture and such Securities and Coupons shall be unaffected thereby. The following shall be the conditions to application of this subsection (c) of this Section 10.01:

(i) The Issuer has irrevocably deposited or caused to be deposited with the Trustee as trust funds in trust for the purpose of making the following payments, specifically pledged as security for, and dedicated solely to, the benefit of the holders of the Securities of such series and Coupons appertaining thereto, (A) cash in an amount, or (B) in the case of any series of Securities the payments on which may only be made in Dollars, U.S. Government Obligations maturing as to principal and interest at such times and in such amounts as will insure the availability of

cash or (C) a combination thereof, sufficient, in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay (1) the principal and interest on all Securities of such series and Coupons appertaining thereto and (2) any mandatory sinking fund payments on the day on which such payments are due and payable in accordance with the terms of the Indenture and the Securities of such series.

(ii) No Default or Event of Default or event which with notice or lapse of time or both would become a Default or an Event of Default with respect to the Securities shall have occurred and be continuing on the date of such deposit or, insofar as subsections 5.01(a) and 5.01(b) are concerned, at any time during the period ending on the 91st day after the date of such deposit (it being understood that this condition shall not be deemed satisfied until the expiration of such period).

(iii) Such covenant defeasance shall not cause the Trustee to have a conflicting interest for purposes of the Trust Indenture Act of 1939 with respect to any securities of the Issuer.

(iv) Such covenant defeasance shall not result in a breach or violation of, or constitute a default under, this Indenture or any other agreement or instrument to which the Issuer is a party or by which it is bound.

(v) Such covenant defeasance shall not cause any Securities then listed on any registered national securities exchange under the Securities Exchange Act of 1934, as amended, to be delisted.

(vi) No event or condition shall exist that, pursuant to the provisions of Section 13.01, would prevent the Issuer from making payments of the principal of or interest on the Securities of such series and Coupons appertaining thereto on the date of such deposit or at any time during the period ending on the 91st day after the date of such deposit (it being understood that this condition shall not be deemed satisfied until the expiration of such period).

(vii) The Issuer shall have delivered to the Trustee an Officer's Certificate and Opinion of Counsel to the effect that the Holders of the Securities of such series and Coupons appertaining thereto will not recognize income, gain or loss for Federal income tax purposes as a result of such covenant defeasance and will be subject to Federal income tax on the same amounts, in the same manner and at the same times as would have been the case if such covenant defeasance had not occurred.

(viii) The Issuer shall have delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent provided for relating to the covenant defeasance contemplated by this provision have been complied with.

(ix) The Issuer has delivered to the Trustee an Opinion of Counsel to the effect that (x) the trust funds will not be subject to any rights of holders of Senior Indebtedness, including without limitation those arising under Article 13 of this Indenture, and (y) after the 91st day following the deposit, the trust funds will not be subject to the effect of any applicable bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally, except that if a court were to rule under any such law in any case or proceeding that the trust funds remained property of the Issuer, no opinion is given as to the effect of such laws on the trust funds except the following: (A) assuming such trust funds remained in the Trustee's possession prior to such court ruling to the extent not paid to Holders of Securities of such series and Coupons appertaining thereto, the Trustee will hold, for the benefit of such Holders, a valid and perfected security interest in such trust funds that is not avoidable in bankruptcy or otherwise, (B) such Holders will be entitled to receive adequate protection of their interests in such trust funds if such trust funds are used, and (C) no property, rights in property or other interests granted to the Trustee or such Holders in exchange for or with respect to any of such funds will be subject to any prior rights of holders of Senior Indebtedness, including without limitation those arising under Article 13 of this Indenture.

Section 10.02. *Application by Trustee of Funds Deposited for Payment of Securities.* Subject to Section 10.04, all moneys deposited with the Trustee (or other trustee) pursuant to Section 10.01 shall be held in trust and applied by it to the payment, either directly or through any paying agent (including the Issuer acting as its own paying agent), to the Holders of the particular Securities of such series and of Coupons appertaining thereto for the payment or redemption of which such moneys have been deposited with the Trustee, of all sums due and to become due thereon for principal and interest; but such money need not be segregated from other funds except to the extent required by law.

Section 10.03. *Repayment of Moneys Held by Paying Agent.* In connection with the satisfaction and discharge of this Indenture with respect to Securities of any series, all moneys then held by any paying agent under the provisions of this Indenture with respect to such series of Securities shall, upon demand of the Issuer, be repaid to it or paid to the Trustee and thereupon such paying agent shall be released from all further liability with respect to such moneys.

Section 10.04. *Return of Moneys Held by Trustee and Paying Agent Unclaimed for Two Years.* Any moneys deposited with or paid to the Trustee or any paying agent for the payment of the principal of or interest on any Security of any series or Coupons attached thereto and not applied but remaining unclaimed

for two years after the date upon which such principal or interest shall have become due and payable, shall, upon the written request of the Issuer and unless otherwise required by mandatory provisions of applicable escheat or abandoned or unclaimed property law, be repaid to the Issuer by the Trustee for such series or such paying agent, and the Holder of the Securities of such series and of any Coupons appertaining thereto shall, unless otherwise required by mandatory provisions of applicable escheat or abandoned or unclaimed property laws, thereafter look only to the Issuer for any payment which such Holder may be entitled to collect, and all liability of the Trustee or any paying agent with respect to such moneys shall thereupon cease; *provided, however*, that the Trustee or such paying agent, before being required to make any such repayment with respect to moneys deposited with it for any payment (a) in respect of Registered Securities of any series, shall at the expense of the Issuer, mail by first-class mail to Holders of such Securities at their addresses as they shall appear on the Security register, and (b) in respect of Unregistered Securities of any series, shall at the expense of the Issuer either give through the customary notice provisions of the clearing system or systems through which beneficial interests in such Unregistered Securities are owned if such Unregistered Securities are held only in global form or cause to be published once, in an Authorized Newspaper in the Borough of Manhattan, The City of New York and once in an Authorized Newspaper in London, notice, that such moneys remain and that, after a date specified therein, which shall not be less than thirty days from the date of such mailing or publication, any unclaimed balance of such money then remaining will be repaid to the Issuer.

Section 10.05. *Indemnity for U.S. Government Obligations.* The Issuer shall pay and indemnify the Trustee against any tax, fee or other charge imposed on or assessed against the U.S. Government Obligations deposited pursuant to Section 10.01 or the principal or interest received in respect of such obligations.

ARTICLE 11 MISCELLANEOUS PROVISIONS

Section 11.01. *Incorporators, Stockholders, Officers and Directors of Issuer Exempt from Individual Liability.* No recourse under or upon any obligation, covenant or agreement contained in this Indenture, or in any Security, or because of any indebtedness evidenced thereby, shall be had against any incorporator, as such or against any past, present or future stockholder, officer or director, as such, of the Issuer or of any successor, either directly or through the Issuer or any successor, under any rule of law, statute or constitutional provision or by the enforcement of any assessment or by any legal or equitable proceeding or otherwise, all such liability being expressly waived and released by the acceptance of the Securities and the Coupons appertaining thereto by the Holders thereof and as part of the consideration for the issue of the Securities and the Coupons appertaining thereto.

Section 11.02. *Provisions of Indenture for the Sole Benefit of Parties and Holders of Securities and Coupons.* Nothing in this Indenture, in the Securities or in the Coupons appertaining thereto, expressed or implied, shall give or be construed to give to any person, firm or corporation, other than the parties hereto and their successors and the holders of Senior Indebtedness and the Holders of the Securities or Coupons, if any, any legal or equitable right, remedy or claim under this Indenture or under any covenant or provision herein contained, all such covenants and provisions being for the sole benefit of the parties hereto and their successors, the holders of the Senior Indebtedness and the Holders of the Securities or Coupons, if any.

Section 11.03. *Successors and Assigns of Issuer Bound by Indenture.* All the covenants, stipulations, promises and agreements in this Indenture contained by or in behalf of the Issuer shall bind its successors and assigns, whether so expressed or not.

Section 11.04. *Notices and Demands on Issuer, Trustee and Holders of Securities and Coupons.* Any notice or demand which by any provision of this Indenture is required or permitted to be given or served by the Trustee or by the Holders of Securities or Coupons to or on the Issuer may be given or served by being deposited postage prepaid, first-class mail (except as otherwise specifically provided herein) addressed (until another address of the Issuer is filed by the Issuer with the Trustee) to E*TRADE Financial Corporation, 671 North Glebe Road, Arlington, Virginia 22203, Attention: General Counsel. Any notice, direction, request or demand by the Issuer or any Holder of Securities or Coupons to or upon the Trustee shall be deemed to have been sufficiently given or served by being deposited postage prepaid, first-class mail (except as otherwise specifically provided herein) addressed (until another address of the Trustee is filed by the Trustee with the Issuer) to The Bank of New York, 101 Barclay Street, Floor 8W, New York, New York 10286, Attention: Corporate Trust Administration.

Where this Indenture provides for notice to Holders of Registered Securities, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to each Holder entitled thereto, at his last address as it appears in the Security register. In any case where notice to such Holders is given by mail, neither the failure to mail such notice, nor any defect in any notice so mailed, to any particular Holder shall affect the sufficiency of such notice with respect to other Holders. Where this Indenture provides for notice in any manner, such notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and such waiver shall be the equivalent of such notice. Waivers of notice by Holders shall be filed with the Trustee, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

In case, by reason of the suspension of or irregularities in regular mail service, it shall be impracticable to mail notice to the Issuer when such notice is

required to be given pursuant to any provision of this Indenture, then any manner of giving such notice as shall be reasonably satisfactory to the Trustee shall be deemed to be a sufficient giving of such notice.

Section 11.05. *Officer's Certificates and Opinions of Counsel; Statements to Be Contained Therein.* Upon any application or demand by the Issuer to the Trustee to take any action under any of the provisions of this Indenture, the Issuer shall furnish to the Trustee an Officer's Certificate stating that all conditions precedent provided for in this Indenture relating to the proposed action have been complied with and an Opinion of Counsel stating that in the opinion of such counsel all such conditions precedent have been complied with, except that in the case of any such application or demand as to which the furnishing of such documents is specifically required by any provision of this Indenture relating to such particular application or demand, no additional certificate or opinion need be furnished.

Each certificate or opinion provided for in this Indenture and delivered to the Trustee with respect to compliance with a condition or covenant provided for in this Indenture shall include (a) a statement that the person making such certificate or opinion has read such covenant or condition, (b) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based, (c) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an opinion as to whether or not such covenant or condition has been complied with and (d) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.

Any certificate, statement or opinion of an officer of the Issuer may be based, insofar as it relates to legal matters, upon a certificate or opinion of or representations by counsel, unless such officer knows that the certificate or opinion or representations with respect to the matters upon which his certificate, statement or opinion may be based as aforesaid are erroneous, or in the exercise of reasonable care should know that the same are erroneous. Any certificate, statement or opinion of counsel may be based, insofar as it relates to factual matters, information with respect to which is in the possession of the Issuer, upon the certificate, statement or opinion of or representations by an officer or officers of the Issuer, unless such counsel knows that the certificate, statement or opinion or representations with respect to the matters upon which his certificate, statement or opinion may be based as aforesaid are erroneous, or in the exercise of reasonable care should know that the same are erroneous.

Any certificate, statement or opinion of an officer of the Issuer or of counsel may be based, insofar as it relates to accounting matters, upon a certificate or opinion of or representations by an accountant or firm of accountants in the employ of the Issuer, unless such officer or counsel, as the case may be, knows that the certificate or opinion or representations with respect to the

accounting matters upon which his certificate, statement or opinion may be based as aforesaid are erroneous, or in the exercise of reasonable care should know that the same are erroneous.

Any certificate or opinion of any independent firm of public accountants filed with and directed to the Trustee shall contain a statement that such firm is independent.

Section 11.06. *Payments Due on Saturdays, Sundays and Holidays.* If the date of maturity of interest on or principal of the Securities of any series or any Coupons appertaining thereto or the date fixed for redemption or repayment of any such Security or Coupon shall not be a Business Day, then payment of interest or principal need not be made on such date, but may be made on the next succeeding Business Day with the same force and effect as if made on the date of maturity or the date fixed for redemption, and no interest shall accrue for the period after such date.

Section 11.07. *Conflict of Any Provision of Indenture with Trust Indenture Act of 1939.* If and to the extent that any provision of this Indenture limits, qualifies or conflicts with the duties imposed by, or with another provision (an “**incorporated provision**”) included in this Indenture by operation of, Sections 310 to 318, inclusive, of the Trust Indenture Act of 1939, such imposed duties or incorporated provision shall control.

Section 11.08. *New York Law to Govern.* This Indenture and each Security and Coupon shall be deemed to be a contract under the laws of the State of New York, and for all purposes shall be construed in accordance with the laws of such State, except as may otherwise be required by mandatory provisions of law.

Section 11.09. *Counterparts.* This Indenture may be executed in any number of counterparts, each of which shall be an original; but such counterparts shall together constitute but one and the same instrument.

Section 11.10. *Effect of Headings.* The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof.

Section 11.11. *Securities in a Foreign Currency.* Unless otherwise specified in an Officer’s Certificate delivered pursuant to Section 2.03 of this Indenture with respect to a particular series of Securities, whenever for purposes of this Indenture any action may be taken by the Holders of a specified percentage in aggregate principal amount of Securities of all series or all series affected by a particular action at the time Outstanding and, at such time, there are Outstanding Securities of any series which are denominated in a coin or currency other than Dollars, then the principal amount of Securities of such series which shall be deemed to be Outstanding for the purpose of taking such action shall be that

amount of Dollars that could be obtained for such amount at the Market Exchange Rate. For purposes of this Section 11.11, Market Exchange Rate shall mean the noon Dollar buying rate in New York City for cable transfers of that currency published by the Federal Reserve Bank of New York. If such Market Exchange Rate is not available for any reason with respect to such currency, the Trustee shall use, in its sole discretion and without liability on its part, such quotation of the Federal Reserve Bank of New York as of the most recent available date, or quotations from one or more major banks in The City of New York or in the country of issue of the currency in question, or such other quotations as the Trustee shall deem appropriate. The provisions of this paragraph shall apply in determining the equivalent principal amount in respect of Securities of a series denominated in a currency other than Dollars in connection with any action taken by Holders of Securities pursuant to the terms of this Indenture.

All decisions and determinations of the Trustee regarding the Market Exchange Rate or any alternative determination provided for in the preceding paragraph shall be in its sole discretion and shall, in the absence of manifest error, be conclusive to the extent permitted by law for all purposes and irrevocably binding upon the Issuer and all Holders.

Section 11.12. *Judgment Currency*. The Issuer agrees, to the fullest extent that it may effectively do so under applicable law, that (a) if for the purpose of obtaining judgment in any court it is necessary to convert the sum due in respect of the principal of or interest on the Securities of any series (the “**Required Currency**”) into a currency in which a judgment will be rendered (the “**Judgment Currency**”), the rate of exchange used shall be the rate at which in accordance with normal banking procedures the Trustee could purchase in The City of New York the Required Currency with the Judgment Currency on the day on which final unappealable judgment is entered, unless such day is not a New York Banking Day, then, to the extent permitted by applicable law, the rate of exchange used shall be the rate at which in accordance with normal banking procedures the Trustee could purchase in The City of New York the Required Currency with the Judgment Currency on the New York Banking Day preceding the day on which a final unappealable judgment is entered, and (b) its obligations under this Indenture to make payments in the Required Currency (i) shall not be discharged or satisfied by any tender, or any recovery pursuant to any judgment (whether or not entered in accordance with subsection (a)), in any currency other than the Required Currency, except to the extent that such tender or recovery shall result in the actual receipt, by the payee, of the full amount of the Required Currency expressed to be payable in respect of such payments, (ii) shall be enforceable as an alternative or additional cause of action for the purpose of recovering in the Required Currency the amount, if any, by which such actual receipt shall fall short of the full amount of the Required Currency so expressed to be payable and (iii) shall not be affected by judgment being obtained for any other sum due under this Indenture. For purposes of the foregoing, “**New York Banking Day**” means any day except a Saturday, Sunday or a legal holiday in The City of New York or a day on which banking institutions in The City of New York are authorized or required by law or executive order to close.

ARTICLE 12
REDEMPTION OF SECURITIES AND SINKING FUNDS

Section 12.01. *Applicability of Article.* The provisions of this Article shall be applicable to the Securities of any series which are redeemable before their maturity or to any sinking fund for the retirement of Securities of a series except as otherwise specified as contemplated by Section 2.03 for Securities of such series.

Section 12.02. *Notice of Redemption; Partial Redemptions.* Notice of redemption to the Holders of Registered Securities of any series to be redeemed as a whole or in part at the option of the Issuer shall be given by mailing notice of such redemption by first class mail, postage prepaid, to such Holders of Securities of such series at their last addresses as they shall appear upon the registry books at least 30 days and not more than 60 days prior to the date fixed for redemption, or within such other redemption notice period as has been designated for any Securities of such series pursuant to Section 2.03 or 2.04 (the "**Redemption Notice Period**"). Notice of redemption to the Holders of Unregistered Securities to be redeemed as a whole or in part, who have filed their names and addresses with the Trustee within two years preceding such notice of redemption, shall be given by mailing notice of such redemption, by first class mail, postage prepaid, at least 30 and not more than 60 days prior to the date fixed for redemption or within any applicable Redemption Notice Period to such Holders at such addresses as were so furnished to the Trustee (and, in the case of any such notice given by the Issuer, the Trustee shall make such information available to the Issuer for such purpose). Notice of redemption to all other Holders of Unregistered Securities shall be published in an Authorized Newspaper in the Borough of Manhattan, The City of New York and in an Authorized Newspaper in London, in each case, once in each of three successive calendar weeks, the first publication to be not less than 30 nor more than 60 days prior to the date fixed for redemption or within any applicable Redemption Notice Period; *provided* that notice to Holders of Unregistered Securities held only in global form may be made, at the option of the Issuer, through the customary notice provisions of the clearing system or systems through which beneficial interests in such Unregistered Securities are owned. Any notice which is mailed in the manner herein provided shall be conclusively presumed to have been duly given, whether or not the Holder receives the notice. Failure to give notice by mail, or any defect in the notice to the Holder of any Security of a series designated for redemption as a whole or in part shall not affect the validity of the proceedings for the redemption of any other Security of such series.

The notice of redemption to each such Holder shall specify the principal amount of each Security of such series held by such Holder to be redeemed, the date fixed for redemption, the redemption price (or if not then ascertainable, the manner of calculation thereof), the place or places of payment, that payment will be made upon presentation and surrender of such Securities and, in the case of Securities with Coupons attached thereto, of all Coupons appertaining thereto maturing after the date fixed for redemption, that such redemption is pursuant to the mandatory or optional sinking fund, or both, if such be the case, that interest accrued to the date fixed for redemption will be paid as specified in such notice and that on and after said date interest thereon or on the portions thereof to be redeemed will cease to accrue. In case any Security of a series is to be redeemed in part only the notice of redemption shall state the portion of the principal amount thereof to be redeemed and shall state that on and after the date fixed for redemption, upon surrender of such Security, a new Security or Securities of such series in principal amount equal to the unredeemed portion thereof will be issued.

The notice of redemption of Securities of any series to be redeemed at the option of the Issuer shall be given by the Issuer or, at the Issuer's request, by the Trustee in the name and at the expense of the Issuer.

On or before the redemption date specified in the notice of redemption given as provided in this Section, the Issuer will deposit with the Trustee or with one or more paying agents (or, if the Issuer is acting as its own paying agent, set aside, segregate and hold in trust as provided in Section 3.04) an amount of money or other property sufficient to redeem on the redemption date all the Securities of such series so called for redemption at the appropriate redemption price, together with accrued interest to the date fixed for redemption. The Issuer will deliver to the Trustee at least 70 days prior to the date fixed for redemption or at least 10 days prior to the first day of any applicable Redemption Notice Period an Officer's Certificate stating the aggregate principal amount of Securities to be redeemed. In case of a redemption at the election of the Issuer prior to the expiration of any restriction on such redemption, the Issuer shall deliver to the Trustee, prior to the giving of any notice of redemption to Holders pursuant to this Section, an Officer's Certificate stating that such restriction has been complied with.

If less than all the Securities of a series are to be redeemed, the Trustee shall select, in such manner as it shall deem appropriate and fair, Securities of such Series to be redeemed in whole or in part. Securities may be redeemed in part in multiples equal to the minimum authorized denomination for Securities of such series or any multiple thereof. The Trustee shall promptly notify the Issuer in writing of the Securities of such series selected for redemption and, in the case of any Securities of such series selected for partial redemption, the principal amount thereof to be redeemed. For all purposes of this Indenture, unless the context otherwise requires, all provisions relating to the redemption of Securities of any series shall relate, in the case of any Security redeemed or to be redeemed only in part, to the portion of the principal amount of such Security which has been or is to be redeemed.

Section 12.03. *Payment of Securities Called for Redemption.* If notice of redemption has been given as above provided, the Securities or portions of Securities specified in such notice shall become due and payable on the date and at the place stated in such notice at the applicable redemption price, together with interest accrued to the date fixed for redemption, and on and after said date (unless the Issuer shall default in the payment of such Securities at the redemption price, together with interest accrued to said date) interest on the Securities or portions of Securities so called for redemption shall cease to accrue, and the unmatured Coupons, if any, appertaining thereto shall be void, and, except as provided in Sections 6.05 and 10.04, such Securities shall cease from and after the date fixed for redemption to be entitled to any benefit or security under this Indenture, and the Holders thereof shall have no right in respect of such Securities except the right to receive the redemption price thereof and unpaid interest to the date fixed for redemption. On presentation and surrender of such Securities at a place of payment specified in said notice, together with all Coupons, if any, appertaining thereto maturing after the date fixed for redemption, said Securities or the specified portions thereof shall be paid and redeemed by the Issuer at the applicable redemption price, together with interest accrued thereon to the date fixed for redemption; *provided* that payment of interest becoming due on or prior to the date fixed for redemption shall be payable in the case of Securities with Coupons attached thereto, to the Holders of the Coupons for such interest upon surrender thereof, and in the case of Registered Securities, to the Holders of such Registered Securities registered as such on the relevant record date subject to the terms and provisions of Sections 2.03 and 2.07 hereof.

If any Security called for redemption shall not be so paid upon surrender thereof for redemption, the principal shall, until paid or duly provided for, bear interest from the date fixed for redemption at the rate of interest or Yield to Maturity (in the case of an Original Issue Discount Security) borne by such Security.

If any Security with Coupons attached thereto is surrendered for redemption and is not accompanied by all appurtenant Coupons maturing after the date fixed for redemption, the surrender of such missing Coupon or Coupons may be waived by the Issuer and the Trustee, if there be furnished to each of them such security or indemnity as they may require to save each of them harmless.

Upon presentation of any Security redeemed in part only, the Issuer shall execute and the Trustee shall authenticate and deliver to or on the order of the Holder thereof, at the expense of the Issuer, a new Security or Securities of such series, of authorized denominations, in principal amount equal to the unredeemed portion of the Security so presented.

Section 12.04. *Exclusion of Certain Securities from Eligibility for Selection for Redemption.* Securities shall be excluded from eligibility for selection for redemption if they are identified by registration and certificate number in an Officer's Certificate delivered to the Trustee at least 40 days prior to the last date on which notice of redemption may be given as being owned of record and beneficially by, and not pledged or hypothecated by either (a) the Issuer or (b) an entity specifically identified in such written statement as directly or indirectly controlling or controlled by or under direct or indirect common control with the Issuer.

Section 12.05. *Mandatory and Optional Sinking Funds.* The minimum amount of any sinking fund payment provided for by the terms of the Securities of any series is herein referred to as a "mandatory sinking fund payment, and any payment in excess of such minimum amount provided for by the terms of the Securities of any series is herein referred to as an "optional sinking fund payment". The date on which a sinking fund payment is to be made is herein referred to as the "sinking fund payment date".

In lieu of making all or any part of any mandatory sinking fund payment with respect to any series of Securities in cash, the Issuer may at its option (a) deliver to the Trustee Securities of such series theretofore purchased or otherwise acquired (except upon redemption pursuant to the mandatory sinking fund) by the Issuer or receive credit for Securities of such series (not previously so credited) theretofore purchased or otherwise acquired (except as aforesaid) by the Issuer and delivered to the Trustee for cancellation pursuant to Section 2.10, (b) receive credit for optional sinking fund payments (not previously so credited) made pursuant to this Section, or (c) receive credit for Securities of such series (not previously so credited) redeemed by the Issuer through any optional redemption provision contained in the terms of such series. Securities so delivered or credited shall be received or credited by the Trustee at the sinking fund redemption price specified in such Securities.

On or before the 60th day next preceding each sinking fund payment date or the 30th day next preceding the last day of any applicable Redemption Notice Period relating to a sinking fund payment date for any series, the Issuer will deliver to the Trustee an Officer's Certificate (which need not contain the statements required by Section 11.05) (a) specifying the portion of the mandatory sinking fund payment to be satisfied by payment of cash and the portion to be satisfied by credit of Securities of such series and the basis for such credit, (b) stating that none of the Securities of such series has theretofore been so credited, (c) stating that no defaults in the payment of interest or Defaults or Events of Default with respect to such series have occurred (which have not been waived or cured) and are continuing and (d) stating whether or not the Issuer intends to exercise its right to make an optional sinking fund payment with respect to such series and, if so, specifying the amount of such optional sinking fund payment which the Issuer intends to pay on or before the next succeeding sinking fund payment date. Any Securities of such series to be credited and required to be

delivered to the Trustee in order for the Issuer to be entitled to credit therefor as aforesaid which have not theretofore been delivered to the Trustee shall be delivered for cancellation pursuant to Section 2.10 to the Trustee with such Officer's Certificate (or reasonably promptly thereafter if acceptable to the Trustee). Such Officer's Certificate shall be irrevocable and upon its receipt by the Trustee the Issuer shall become unconditionally obligated to make all the cash payments or payments therein referred to, if any, on or before the next succeeding sinking fund payment date. Failure of the Issuer, on or before any such 60th day or 30th day, if applicable, to deliver such Officer's Certificate and Securities specified in this paragraph, if any, shall not constitute a default but shall constitute, on and as of such date, the irrevocable election of the Issuer (i) that the mandatory sinking fund payment for such series due on the next succeeding sinking fund payment date shall be paid entirely in cash without the option to deliver or credit Securities of such series in respect thereof and (ii) that the Issuer will make no optional sinking fund payment with respect to such series as provided in this Section.

If the sinking fund payment or payments (mandatory or optional or both) to be made in cash on the next succeeding sinking fund payment date plus any unused balance of any preceding sinking fund payments made in cash shall exceed \$50,000 (or the equivalent thereof in any Foreign Currency) or a lesser sum in Dollars (or the equivalent thereof in any Foreign Currency) if the Issuer shall so request with respect to the Securities of any particular series, such cash shall be applied on the next succeeding sinking fund payment date to the redemption of Securities of such series at the sinking fund redemption price together with accrued interest to the date fixed for redemption. If such amount shall be \$50,000 (or the equivalent thereof in any Foreign Currency) or less and the Issuer makes no such request then it shall be carried over until a sum in excess of \$50,000 (or the equivalent thereof in any Foreign Currency) is available. The Trustee shall select, in the manner provided in Section 12.02, for redemption on such sinking fund payment date a sufficient principal amount of Securities of such series to absorb said cash, as nearly as may be, and shall (if requested in writing by the Issuer) inform the Issuer of the serial numbers of the Securities of such series (or portions thereof) so selected. Securities shall be excluded from eligibility for redemption under this Section if they are identified by registration and certificate number in an Officer's Certificate delivered to the Trustee at least 60 days prior to the sinking fund payment date or at least 30 days prior to the last day of any applicable Redemption Notice Period relating to a sinking fund payment date as being owned of record and beneficially by, and not pledged or hypothecated by either (a) the Issuer or (b) an entity specifically identified in such Officer's Certificate as directly or indirectly controlling or controlled by or under direct or indirect common control with the Issuer. The Trustee, in the name and at the expense of the Issuer (or the Issuer, if it shall so request the Trustee in writing) shall cause notice of redemption of the Securities of such series to be given in substantially the manner provided in Section 12.02 (and with the effect provided in Section 12.03) for the redemption of Securities of such series in part at the

option of the Issuer. The amount of any sinking fund payments not so applied or allocated to the redemption of Securities of such series shall be added to the next cash sinking fund payment for such series and, together with such payment, shall be applied in accordance with the provisions of this Section. Any and all sinking fund moneys held on the stated maturity date of the Securities of any particular series (or earlier, if such maturity is accelerated), which are not held for the payment or redemption of particular Securities of such series shall be applied, together with other moneys, if necessary, sufficient for the purpose, to the payment of the principal of, and interest on, the Securities of such series at maturity.

On or before each sinking fund payment date, the Issuer shall pay to the Trustee in cash or shall otherwise provide for the payment of all interest accrued to the date fixed for redemption on Securities to be redeemed on the next following sinking fund payment date.

The Trustee shall not redeem or cause to be redeemed any Securities of a series with sinking fund moneys or give any notice of redemption of Securities for such series by operation of the sinking fund during the continuance of a default in payment of interest on such Securities or of any Default except that, where the giving of notice of redemption of any Securities shall theretofore have been made, the Trustee shall redeem or cause to be redeemed such Securities, provided that it shall have received from the Issuer a sum sufficient for such redemption. Except as aforesaid, any moneys in the sinking fund for such series at the time when any such default or Default shall occur, and any moneys thereafter paid into the sinking fund, shall, during the continuance of such default or Default, be deemed to have been collected under Article 5 and held for the payment of all such Securities. In case such Default shall have been waived as provided in Section 5.10 or the default cured on or before the sixtieth day preceding the sinking fund payment date in any year, such moneys shall thereafter be applied on the next succeeding sinking fund payment date in accordance with this Section to the redemption of such Securities.

ARTICLE 13 SUBORDINATION

Section 13.01. *Securities and Coupons Subordinated to Senior Indebtedness.* The Issuer covenants and agrees, and each Holder of a Security or Coupon, by his acceptance thereof, likewise covenants and agrees, that the indebtedness represented by the Securities and any Coupons and the payment of the principal of and interest on each and all of the Securities and of any Coupons is hereby expressly subordinated, to the extent and in the manner hereinafter set forth, in right of payment to the prior payment in full of Senior Indebtedness.

In the event (a) of any insolvency or bankruptcy proceedings or any receivership, liquidation, reorganization or other similar proceedings in respect of

the Issuer or a substantial part of its property, or of any proceedings for liquidation, dissolution or other winding up of the Issuer, whether or not involving insolvency or bankruptcy or (b) subject to the provisions of Section 13.02 that (i) a default shall have occurred with respect to the payment of principal of or interest on or other monetary amounts due and payable on any Senior Indebtedness, or (ii) there shall have occurred a default (other than a default in the payment of principal or interest or other monetary amounts due and payable) in respect of any Senior Indebtedness, or in the instrument under which the same is outstanding, permitting the holder or holders thereof to accelerate the maturity thereof (with notice or lapse of time, or both) and the Company and the Trustee receive written notice (a "**Payment Blockage Notice**") from a Person permitted to give such Payment Blockage Notice under the instrument evidencing the Senior Indebtedness, and, in the cases of subclauses (i) and (ii) of this clause (b), such default (x) shall not have been cured or waived or shall not have ceased to exist and (y) shall have continued beyond the period of grace, if any, in respect thereof, then:

(i) the holders of all Senior Indebtedness shall first be entitled to receive payment of the full amount due thereon, or provision shall be made for such payment in money or money's worth, before the Holders of any of the Securities or Coupons are entitled to receive a payment on account of the principal of or interest on the indebtedness evidenced by the Securities or of the Coupons, including, without limitation, any payments made pursuant to Article 12;

(ii) any payment by, or distribution of assets of, the Issuer of any kind or character, whether in cash, property or securities, to which the Holders of any of the Securities or Coupons or the Trustee would be entitled except for the provisions of this Article shall be paid or delivered by the Person making such payment or distribution, whether a trustee in bankruptcy, a receiver or liquidating trustee or otherwise, directly to the holders of such Senior Indebtedness or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Indebtedness may have been issued, ratably according to the aggregate amounts remaining unpaid on account of such Senior Indebtedness held or represented by each, to the extent necessary to make payment in full of all Senior Indebtedness remaining unpaid after giving effect to any concurrent payment or distribution (or provision therefor) to the holders of such Senior Indebtedness, before any payment or distribution is made to the holders of the indebtedness evidenced by the Securities or Coupons or to the Trustee under this instrument; and

(iii) in the event that, notwithstanding the foregoing, any payment by, or distribution of assets of, the Issuer of any kind or character, whether in cash, property or securities, in respect of principal of or interest on the Securities or in connection with any repurchase by the

Issuer of the Securities, shall be received by the Trustee or the Holders of any of the Securities or Coupons before all Senior Indebtedness is paid in full, or provision made for such payment in money or money's worth, such payment or distribution in respect of principal of or interest on the Securities or in connection with any repurchase by the Issuer of the Securities shall be paid over to the holders of such Senior Indebtedness or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any such Senior Indebtedness may have been issued, ratably as aforesaid, for application to the payment of all Senior Indebtedness remaining unpaid until all such Senior Indebtedness shall have been paid in full, after giving effect to any concurrent payment or distribution (or provision therefor) to the holders of such Senior Indebtedness.

Notwithstanding the foregoing, at any time after the 91st day following the date of deposit of cash or, in the case of Securities payable only in Dollars, U.S. Government Obligations pursuant to Section 10.01(b) or 10.01(c) (provided all other conditions set out in such Section shall have been satisfied) the funds so deposited and any interest thereon will not be subject to any rights of holders of Senior Indebtedness including, without limitation, those arising under this Article 13.

Section 13.02. *Disputes with Holders of Certain Senior Indebtedness.* Any failure by the Issuer to make any payment on or perform any other obligation under Senior Indebtedness, other than any indebtedness incurred by the Issuer or assumed or guaranteed, directly or indirectly, by the Issuer for money borrowed (or any deferral, renewal, extension or refunding thereof) or any indebtedness or obligation as to which the provisions of this Section shall have been waived by the Issuer in the instrument or instruments by which the Issuer incurred, assumed, guaranteed or otherwise created such indebtedness or obligation, shall not be deemed a default under Section 13.01(b) if (a) the Issuer shall be disputing its obligation to make such payment or perform such obligation and (b) either (i) no final judgment relating to such dispute shall have been issued against the Issuer which is in full force and effect and is not subject to further review, including a judgment that has become final by reason of the expiration of the time within which a party may seek further appeal or review, and (ii) in the event of a judgment that is subject to further review or appeal has been issued, the Issuer shall in good faith be prosecuting an appeal or other proceeding for review and a stay of execution shall have been obtained pending such appeal or review.

Section 13.03. *Subrogation.* Subject to the payment in full of all Senior Indebtedness, the Holders of the Securities and any Coupons shall be subrogated (equally and ratably with the holders of all obligations of the Issuer which by their express terms are subordinated to Senior Indebtedness of the Issuer to the same extent as the Securities are subordinated and which are entitled to like rights of subrogation) to the rights of the holders of Senior Indebtedness to receive payments or distributions of cash, property or securities of the Issuer applicable to

the Senior Indebtedness until all amounts owing on the Securities and any Coupons shall be paid in full, and as between the Issuer, its creditors other than holders of such Senior Indebtedness and the Holders, no such payment or distribution made to the holders of Senior Indebtedness by virtue of this Article that otherwise would have been made to the Holders shall be deemed to be a payment by the Issuer on account of such Senior Indebtedness, it being understood that the provisions of this Article are and are intended solely for the purpose of defining the relative rights of the Holders, on the one hand, and the holders of Senior Indebtedness, on the other hand.

Section 13.04. *Obligation of Issuer Unconditional.* Nothing contained in this Article or elsewhere in this Indenture or in the Securities or any Coupons is intended to or shall impair, as among the Issuer, its creditors other than the holders of Senior Indebtedness and the Holders, the obligation of the Issuer, which is absolute and unconditional, to pay to the Holders the principal of and interest on the Securities and the amounts owed pursuant to any Coupons as and when the same shall become due and payable in accordance with their terms, or is intended to or shall affect the relative rights of the Holders and creditors of the Issuer other than the holders of Senior Indebtedness, nor shall anything herein or therein prevent the Trustee or any Holder from exercising all remedies otherwise permitted by applicable law upon default under this Indenture, subject to the rights, if any, under this Article of the holders of Senior Indebtedness in respect of cash, property or securities of the Issuer received upon the exercise of any such remedy.

Upon payment or distribution of assets of the Issuer referred to in this Article, the Trustee and the Holders shall be entitled to rely upon any order or decree made by any court of competent jurisdiction in which any such dissolution, winding up, liquidation or reorganization proceeding affecting the affairs of the Issuer is pending or upon a certificate of the trustee in bankruptcy, receiver, assignee for the benefit of creditors, liquidating trustee or agent or other Person making any payment or distribution, delivered to the Trustee or to the Holders, for the purpose of ascertaining the Persons entitled to participate in such payment or distribution, the holders of the Senior Indebtedness and other indebtedness of the Issuer, the amount thereof or payable thereon, the amount paid or distributed thereon and all other facts pertinent thereto or to this Article.

Section 13.05. *Payments on Securities and Coupons Permitted.* Nothing contained in this Article or elsewhere in this Indenture or in the Securities or Coupons shall affect the obligations of the Issuer to make, or prevent the Issuer from making, payment of the principal of or interest on the Securities and of any Coupons in accordance with the provisions hereof and thereof, except as otherwise provided in this Article.

Section 13.06. *Effectuation of Subordination by Trustee.* Each holder of Securities or Coupons, by his acceptance thereof, authorizes and directs the Trustee on his behalf to take such action as may be necessary or appropriate to effectuate the subordination provided in this Article and appoints the Trustee his attorney-in-fact for any and all such purposes.

Section 13.07. *Knowledge of Trustee.* Notwithstanding the provisions of this Article or any other provisions of this Indenture, the Trustee shall not be charged with knowledge of the existence of any facts that would prohibit the making of any payment of moneys to or by the Trustee, or the taking of any other action by the Trustee, unless and until the Trustee shall have received written notice thereof mailed or delivered to the Trustee at its Corporate Trust Office from the Issuer, any Holder, any paying agent or the holder or representative of any class of Senior Indebtedness; provided that if at least three Business Days prior to the date upon which by the terms hereof any such moneys may become payable for any purpose (including, without limitation, the payment of the principal or interest on any Security or interest on any Coupon) the Trustee shall not have received with respect to such moneys the notice provided for in this Section, then, anything herein contained to the contrary notwithstanding, the Trustee shall have full power and authority to receive such moneys and to apply the same to the purpose for which they were received and shall not be affected by any notice to the contrary that may be received by it within three Business Days prior to or on or after such date.

Section 13.08. *Trustee May Hold Senior Indebtedness.* The Trustee shall be entitled to all the rights set forth in this Article with respect to any Senior Indebtedness at the time held by it, to the same extent as any other holder of Senior Indebtedness, and nothing in Section 6.03 or elsewhere in this Indenture shall deprive the Trustee of any of its rights as such holder.

Section 13.09. *Rights of Holders of Senior Indebtedness Not Impaired.* No right of any present or future holder of any Senior Indebtedness to enforce the subordination herein shall at any time or in any way be prejudiced or impaired by any act or failure to act on the part of the Issuer or by any noncompliance by the Issuer with the terms, provisions and covenants of this Indenture, regardless of any knowledge thereof any such holder may have or be otherwise charged with.

With respect to the holders of Senior Indebtedness, (a) the duties and obligations of the Trustee shall be determined solely by the express provisions of this Indenture, (b) the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Indenture, (c) no implied covenants or obligations shall be read into this Indenture against the Trustee and (d) the Trustee shall not be deemed to be a fiduciary as to such holders.

Section 13.10. *Article Applicable to Paying Agents.* In case at any time any paying agent other than the Trustee shall have been appointed by the Issuer and be then acting hereunder, the term "Trustee" as used in this Article shall in such case (unless the context shall require otherwise) be construed as extending to and including such paying agent within its meaning as fully for all intents and

purposes as if such paying agent were named in this Article in addition to or in place of the Trustee, *provided, however*, that Sections 13.07 and 13.08 shall not apply to the Issuer if it acts as its own paying agent.

Section 13.11. *Trustee; Compensation Not Prejudiced.* Nothing in this Article shall apply to claims of, or payments to, the Trustee pursuant to Section 6.06.

IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed, and their respective corporate seals to be hereunto affixed and attested, all as of November 22, 2005.

E*TRADE FINANCIAL CORPORATION

By: /s/ Robert J. Simmons

Name: Robert J. Simmons

Title: Chief Financial Officer

THE BANK OF NEW YORK, Trustee

By: /s/ Stacey B. Poindexter

Name: Stacey B. Poindexter

Title: Assistant Vice President

E*TRADE FINANCIAL CORPORATION

and

**THE BANK OF NEW YORK,
as Trustee**

SUPPLEMENTAL INDENTURE NO. 1

Dated as of November 22, 2005

THIS SUPPLEMENTAL INDENTURE No. 1 (this "**Supplemental Indenture No. 1**"), dated as of November 22, 2005, is between E*TRADE FINANCIAL CORPORATION, a Delaware corporation (the "**Company**"), and THE BANK OF NEW YORK, a New York banking corporation, as Trustee (the "**Trustee**").

RECITALS

WHEREAS, the Company has concurrently herewith executed and delivered to the Trustee an Indenture dated as of November 22, 2005, between the Company and the Trustee (the "**Base Indenture**") and together with this Supplemental Indenture No. 1, the "**Indenture**"), providing for the issuance from time to time of one or more series of the Company's Securities;

WHEREAS, Section 8.01(e) of the Base Indenture provides for the Company and the Trustee to enter into an indenture supplemental to the Base Indenture to establish the forms or terms of Securities of any series as permitted by Section 2.01 or Section 2.03 of the Base Indenture;

WHEREAS, pursuant to Section 2.03 of the Base Indenture, the Company wishes to provide for the issuance of a new series of Securities to be known as its 6.125% Subordinated Notes due 2018 (the "**Subordinated Notes**"), the form and terms of such Subordinated Notes and the terms, provisions and conditions thereof to be set forth as provided in this Supplemental Indenture No. 1; and

WHEREAS, the Company has requested that the Trustee execute and deliver this Supplemental Indenture No. 1, and all requirements necessary to make this Supplemental Indenture No. 1 a valid, binding and enforceable instrument in accordance with its terms, and to make the Subordinated Notes, when executed by the Company and authenticated and delivered by the Trustee, the valid, binding and enforceable obligations of the Company, have been done and performed, and the execution and delivery of this Supplemental Indenture No. 1 has been duly authorized in all respects.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I DEFINITIONS

Section 1.01 Relation to Base Indenture. This Supplemental Indenture No. 1 constitutes an integral part of the Base Indenture.

Section 1.02 Definition of Terms. For all purposes of this Supplemental Indenture No. 1:

(a) Capitalized terms used herein without definition shall have the meanings set forth in the Base Indenture, or, if not defined in the Base Indenture, in the Purchase Contract and Pledge Agreement or the Remarketing Agreement;

(b) a term defined anywhere in this Supplemental Indenture No. 1 has the same meaning throughout;

(c) the singular includes the plural and vice versa;

(d) headings are for convenience of reference only and do not affect interpretation;

(e) the following terms have the meanings given to them in this Section 1.02(e):

“**Accounting Event**” means the receipt by the audit committee of the Company’s Board of Directors of a written report in accordance with Statement on Auditing Standards (“SAS”) No. 97, “Amendment to SAS No. 50—Reports on the Application of Accounting Principles,” from the Company’s independent auditors, provided at the request of management, to the effect that, as a result of a change in accounting rules after the date of original issuance of the Subordinated Notes, the Company must either (a) account for the Purchase Contracts as derivatives under SFAS 133 (or otherwise mark-to-market or measure the fair value of all or any portion of the Purchase Contracts with changes appearing in the Company’s income statement) or (b) account for the Units using the if-converted method under SFAS 128, and that such accounting treatment will cease to apply upon redemption of the Subordinated Notes.

“**Applicable Ownership Interest in Subordinated Notes**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Applicable Principal Amount**” means the aggregate principal amount of the Subordinated Notes underlying the Applicable Ownership Interest in Subordinated Notes that are components of the Corporate Units on the Special Event Redemption Date.

“**Beneficial Owner**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Board of Directors**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Business Day**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Cash Merger Early Settlement**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Cash Settlement**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Collateral Account**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Collateral Agent**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Collateral Substitution**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Corporate Unit**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Coupon Rate**” has the meaning set forth in Section 2.05(a).

“**Custodial Agent**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Deferral Period**,” with respect to the Subordinated Notes, means any period (or any extension thereof) during which the Company elects to extend the interest payment on the Subordinated Notes pursuant to Section 2.06; provided that a Deferral Period may not extend beyond the earlier of the Maturity Date or the Purchase Contract Settlement Date of the Subordinated Notes and must end on an Interest Payment Date.

“**Depository**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Depository Participant**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Early Settlement**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Failed Initial Remarketing**” means a Failed Remarketing on the Initial Remarketing Date.

“**Failed Remarketing**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Failed Second Remarketing**” means a Failed Remarketing on the Second Remarketing Date.

“**Final Remarketing Date**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Global Subordinated Notes**” has the meaning set forth in Section 2.04.

“**Initial Remarketing Date**” has the meaning set forth in the Remarketing Agreement.

“**Interest Payment Date**” means a Quarterly Interest Payment Date or a Semiannual Interest Payment Date.

“**Interest Period**” means, with respect to any Interest Payment Date, the period from and including the immediately preceding Interest Payment Date on which interest was paid or duly provided for (or if none, the date hereof) to, but excluding, such Interest Payment Date.

“**Maturity Date**” has the meaning set forth in Section 2.02.

“**Note Payment**” has the meaning set forth in Section 9.01.

“**Optional Redemption**” means the redemption of the Subordinated Notes pursuant to the terms of Section 3.02.

“**Optional Redemption Date**” has the meaning set forth in Section 3.02.

“**Payment Blockage Notice**” has the meaning set forth in Section 9.01.

“**Payment Blockage Period**” has the meaning set forth in Section 9.01.

“**Person**” means a legal person, including any individual, corporation, estate, partnership, joint venture, association, joint-stock company, limited liability company, trust, unincorporated organization or government or any agency or political subdivision thereof or any other entity of whatever nature.

“**Pledged Applicable Ownership Interests in Subordinated Notes**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Purchase Contract**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Purchase Contract Agent**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Purchase Contract and Pledge Agreement**” means the Purchase Contract and Pledge Agreement, dated as of November 22, 2005, among the Company, The Bank of New York, as Purchase Contract Agent, and attorney-in-fact for Holders of the Purchase Contract, and The Bank of New York, as Collateral Agent, Custodial Agent and Securities Intermediary, as amended from time to time.

“**Purchase Contract Settlement Date**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Put Price**” has the meaning set forth in Section 8.05(a).

“**Put Right**” has the meaning set forth in Section 8.05(a).

“**Quarterly Interest Payment Date**” has the meaning set forth in Section 2.05(b)(i).

“**Quotation Agent**” means any primary U.S. government securities dealer selected by the Company.

“**Record Date**” means, with respect to any Interest Payment Date for the Subordinated Notes, the first day of the calendar month in which such Interest Payment Date falls regardless of whether such day is a Business Day.

“**Redemption**” means either an Optional Redemption or a Special Event Redemption.

“**Redemption Amount**” means, for each Subordinated Note, an amount equal to the product of the principal amount of such Subordinated Note and a fraction, the numerator of which is the Treasury Portfolio Purchase Price and the denominator of which is the Applicable Principal Amount; *provided* that in no event shall the Redemption Amount for any Subordinated Note be less than the principal amount of such Subordinated Note.

“**Redemption Date**” means either the Optional Redemption Date or Special Event Redemption Date.

“**Redemption Price**” shall mean, for each Subordinated Note, (i) in the event of a Special Event Redemption, the Redemption Amount and (ii) in the event of an Optional Redemption, the principal amount, in each case plus any accrued and unpaid interest (including any interest deferred pursuant to Section 2.06) on such Subordinated Note to, but excluding, the applicable Redemption Date.

“**Remarketed Subordinated Notes**” has the meaning set forth in the Remarketing Agreement.

“**Remarketing**” has the meaning set forth in the Remarketing Agreement.

“**Remarketing Agent**” means Morgan Stanley & Co. Incorporated, or any successor thereto or replacement Remarketing Agent appointed by the Company pursuant to the Remarketing Agreement.

“**Remarketing Agreement**” means the Remarketing Agreement, dated as of November 22, 2005, among the Company, Morgan Stanley & Co. Incorporated, as Remarketing Agent and The Bank of New York, as Purchase Contract Agent, as amended from time to time.

“**Remarketing Date**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Remarketing Fee**” has the meaning set forth in the Remarketing Agreement.

“**Remarketing Price**” has the meaning set forth in the Remarketing Agreement.

“**Reset Rate**” has the meaning set forth in the Remarketing Agreement.

“**Second Remarketing Date**” has the meaning set forth in the Remarketing Agreement.

“**Semiannual Interest Payment Date**” has the meaning set forth in Section 2.05(b)(ii).

“**Senior Indebtedness**” means the principal, premium, if any, and interest on and any other payments due pursuant to any of the following, whether outstanding as of the date of the indenture or incurred or created thereafter: (a) all of the indebtedness of the Company for money borrowed (including any indebtedness secured by a mortgage, conditional sales contract or other lien which is given the vender or another party to secure all or part of the purchase price of the property subject to the lien, or which lien is existing on the property at the time of the acquisition of the property), (b) all of the indebtedness of the Company evidenced by notes, debentures, bonds or other securities sold by the Company for money, (c) all of the lease obligations of the Company which are capitalized on its books in accordance with generally accepted accounting principles, (d) all indebtedness of others or lease obligations of the kind described above assumed by or guaranteed in any manner by the Company or in effect guaranteed by the Company through an agreement to purchase, contingent or otherwise and (e) all renewals, extensions or refundings of indebtedness or lease obligations of the kind described above; provided that Senior Indebtedness shall not include (w) the Company’s 6% Convertible Subordinated Notes due 2007, (x) indebtedness for trade payables or constituting the deferred purchase price of assets or services incurred in the ordinary cause of business, (y) any other obligations of the kind described above that expressly provide that they are subordinated to or not superior in right of payment to the Subordinated Notes, and (z) indebtedness owed to any of the Company’s majority-owned subsidiaries.

“**Separate Subordinated Notes**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Significant Subsidiary**” has the same meaning as the definition of that term set forth in Rule 1-02 of Regulation S-X as promulgated by the Securities and Exchange Commission.

“**Special Event**” shall mean either a Tax Event or an Accounting Event.

“**Special Event Redemption**” means a redemption effected in connection with and as a result of the occurrence of a Special Event pursuant to Section 3.01.

“**Special Event Redemption Date**” has the meaning set forth in Section 3.01.

“**Successful Remarketing**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Tax Event**” means the receipt by the Company of an opinion of counsel, rendered by a law firm having a recognized national tax practice, to the effect that, as a result of any amendment to, change in or announced proposed change in the laws (or any regulations thereunder) of the United States or any political subdivision or taxing authority thereof or therein,

or as a result of any official administrative decision, pronouncement, judicial decision or action interpreting or applying such laws or regulations, which amendment or change is effective or which proposed change, pronouncement, action or decision is announced on or after the date of issuance of the Subordinated Notes, there is more than an insubstantial increase in the risk that interest payable by the Company on the Subordinated Notes is not, or within 90 days of the date of such opinion, will not be, deductible by the Company, in whole or in part, for United States federal income tax purposes.

“**Termination Event**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

“**Treasury Portfolio**” means a portfolio of U.S. Treasury securities (or principal or interest strips thereof) that mature on or prior to November 17, 2008 in an aggregate amount at maturity equal to the Applicable Principal Amount and with respect to each scheduled Interest Payment Date on the Subordinated Notes that occurs after the Special Event Redemption Date, to and including the Purchase Contract Settlement Date, U.S. Treasury securities (or principal or interest strips thereof) that mature on or prior to the Business Day immediately preceding such scheduled Interest Payment Date in an aggregate amount at maturity equal to the aggregate interest payment (assuming no reset of the interest rate) that would be due on the Applicable Principal Amount of the Subordinated Notes on such date.

“**Treasury Portfolio Purchase Price**” means the lowest aggregate ask-side price quoted by a primary U.S. government securities dealer to the Quotation Agent between 9:00 a.m. and 11:00 a.m., New York City time, on the third Business Day immediately preceding the Special Event Redemption Date for the purchase of the Treasury Portfolio for settlement on the Special Event Redemption Date.

“**Treasury Unit**” has the meaning set forth in the Purchase Contract and Pledge Agreement.

The terms “**Company**,” “**Trustee**,” “**Indenture**,” “**Base Indenture**,” “**Supplemental Indenture No. 1**” and “**Subordinated Notes**” shall have the respective meanings set forth in the recitals to this Supplemental Indenture No. 1 and the paragraph preceding such recitals.

ARTICLE II GENERAL TERMS AND CONDITIONS OF THE SUBORDINATED NOTES

Section 2.01 Designation and Principal Amount. There is hereby authorized a series of Securities designated as 6.125% Subordinated Notes due 2018 limited in aggregate principal amount to \$450,000,000. The Subordinated Notes may be issued from time to time upon written order of the Company for the authentication and delivery of Subordinated Notes pursuant to Section 2.03 of the Base Indenture.

Section 2.02 Maturity. Unless a Special Event Redemption occurs prior to the Maturity Date (defined below), the date upon which the Subordinated Notes shall become due and payable at final maturity, together with any accrued and unpaid interest, is November 18, 2018 (the “**Maturity Date**”).

Section 2.03 Form, Payment and Appointment. Except as provided in Section 2.04, the Subordinated Notes shall be issued in fully registered, certificated form, bearing identical terms. Principal of and interest on the Subordinated Notes will be payable, the transfer of such Subordinated Notes will be registrable, and such Subordinated Notes will be exchangeable for Subordinated Notes of a like aggregate principal amount bearing identical terms and provisions, at the office or agency of the Company maintained for such purpose in the Borough of Manhattan, The City of New York, which shall initially be the corporate trust office of the Trustee; *provided, however*, that payment of interest may be made at the option of the Company by check mailed to the holder at such address as shall appear in the Security register or by wire transfer to an account appropriately designated by the holder entitled to payment. Payments with respect to any Global Subordinated Note will be made by wire transfer to the Depository.

No service charge shall be made for any registration of transfer or exchange of the Subordinated Notes, but the Company may require payment from the holder of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection therewith.

The Paying Agent and security registrar for the Subordinated Notes shall initially be the Trustee.

The Subordinated Notes shall be issuable in denominations of \$1,000 and integral multiples of \$1,000 in excess thereof; *provided, however*, that upon the release by the Collateral Agent of Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes (other than any release of Subordinated Notes underlying Pledged Applicable Ownership Interests in Subordinated Notes in connection with (i) the creation of Treasury Units by Collateral Substitution, (ii) a Successful Remarketing, (iii) Cash Merger Early Settlement, (iv) Early Settlement with separate cash or (v) Cash Settlement, in accordance with Section 3.13, Section 5.02(b), Section 5.04, Section 5.07 or Section 5.02(a) of the Purchase Contract and Pledge Agreement, as the case may be), the Subordinated Notes shall be issuable in denominations of \$25 and integral multiples of \$25 in excess thereof, and the Company shall issue Subordinated Notes in any such denominations if requested by the Purchase Contract Agent on behalf of any holder or Beneficial Owner.

Section 2.04 Global Subordinated Notes. Subordinated Notes corresponding to Applicable Ownership Interests in Subordinated Notes that are no longer a component of the Corporate Units and are released from the Collateral Account will be issued in permanent global form (a “**Global Subordinated Note**”), and if issued as one or more Global Subordinated Notes, the Depository shall be The Depository Trust Company or such other depository as any officer of the Company may from time to time designate. Upon the creation of Treasury Units, or the re-creation of Corporate Units, an appropriate annotation shall be made on the Schedule of Increases and Decreases on the Global Subordinated Notes held by the Depository. Except as otherwise provided in the Indenture, or except upon recreation of Corporate Units, notes represented by the Global Subordinated Notes will not be exchangeable for, and will not

otherwise be issuable as, Subordinated Notes in certificated form. Unless and until such Global Subordinated Note is exchanged for Subordinated Notes in certificated form, Global Subordinated Notes may be transferred, in whole but not in part, and any payments on the Subordinated Notes shall be made, only to the Depository or a nominee of the Depository, or to a successor Depository selected or approved by the Company or to a nominee of such successor Depository.

Section 2.05 Interest. (a) The Subordinated Notes will bear interest initially at the rate of 6.125% per year (the “**Coupon Rate**”) from and including November 22, 2005 to, but excluding, the Maturity Date, or in the event of a Successful Remarketing, the Purchase Contract Settlement Date. In the event of a Successful Remarketing of the Subordinated Notes, the Coupon Rate will be reset by the Remarketing Agent to the Reset Rate with effect from the Purchase Contract Settlement Date, as set forth in Section 8.03. If the Coupon Rate is so reset, the Subordinated Notes will bear interest at the Reset Rate from and including the Purchase Contract Settlement Date to, but excluding, the Maturity Date. The Subordinated Notes shall bear interest, to the extent permitted by law, on any overdue principal and interest at the Coupon Rate, unless a Successful Remarketing shall have occurred, in which case interest on such amounts shall accrue at the Reset Rate from and after the Purchase Contract Settlement Date, in each case, compounded quarterly through the Purchase Contract Settlement Date and compounded semi-annually, thereafter.

(b) (i) Prior to and on the Purchase Contract Settlement Date, interest on the Subordinated Notes shall be payable quarterly in arrears on February 18, May 18, August 18 and November 18 of each year (each, a “**Quarterly Interest Payment Date**”), commencing February 18, 2006, to the Person in whose name the relevant Subordinated Notes are registered at the close of business on the Record Date for such Interest Payment Date.

(ii) After the Purchase Contract Settlement Date and following a successful Remarketing, interest on the Subordinated Notes shall be payable semi-annually in arrears on May 18 and November 18 of each year (each, a “**Semiannual Interest Payment Date**”), commencing May 18, 2009, to the Person in whose name the relevant Subordinated Notes are registered at the close of business on the Record Date for such Interest Payment Date.

(c) The amount of interest payable for any full Interest Period will be computed on the basis of a 360-day year consisting of twelve 30-day months. The amount of interest payable for any period shorter than a full Interest Period for which interest is computed will be computed on the basis of a 30-day month and, for any period less than a month, on the basis of the actual number of days elapsed per 30-day month. In the event that any scheduled Interest Payment Date falls on a day that is not a Business Day, then payment of interest payable on such Interest Payment Date will be made on the next succeeding day that is a Business Day (and without any interest or other payment in respect of any such delay).

Section 2.06 Interest Deferral (a) Notwithstanding the provisions of Section 2.05 or any other provision herein to the contrary, the Company shall have the right, in its sole and absolute discretion at any time and from time to time while the Subordinated Notes are

outstanding prior to the Purchase Contract Settlement Date, to defer payments of interest by extending the date on which interest is paid for the Subordinated Notes; *provided* that such Deferral Period (or any extension thereof) may not extend beyond the earlier of the Purchase Contract Settlement Date or Redemption Date of any Subordinated Note, and must end on an Interest Payment Date; *provided further* that at the end of each Deferral Period the Company shall pay all interest then accrued and unpaid (together with interest thereon to the extent permitted by applicable law at the rate accruing on such Subordinated Notes). Prior to the termination of a Deferral Period, the Company may further extend such Deferral Period for the Subordinated Notes, provided that such Deferral Period together with all such previous and further extensions may not end on a date other than an Interest Payment Date or extend beyond the earlier of a Purchase Contract Settlement Date or Redemption Date of any Subordinated Note.

(b) The Company shall give the Trustee written notice of the Company's election to begin a Deferral Period for the Subordinated Notes and any extension thereof at least five Business Days prior to the earlier of:

(i) the date interest on the Subordinated Notes would have been payable except for the election to begin or extend the Deferral Period; and

(ii) the date the Company is required to give notice to the New York Stock Exchange or any other applicable self-regulatory organization or to holders of the Subordinated Notes of the Record Date or the date cash distributions are payable;

provided that such notice shall be delivered not less than five Business Days prior to the Record Date referred to in clause (ii) above; *provided further* that in no event shall such notice of the Company's election be sent more than 15 Business Days prior to the date on which payment of all amounts then due is scheduled to occur.

The Trustee shall give notice (a form of which shall be provided by the Company to the Trustee) of the Company's election to begin or extend a Deferral Period to the Holders by first class mail, postage prepaid.

The Company may at any time irrevocably waive its right to defer interest on the Subordinated Notes for any specified period (including the remaining term of the Subordinated Notes).

(c) Restricted Payments Limitations.

While a Deferral Period is in effect, the Company may not

(i) declare or pay any dividends or distributions on, or redeem, purchase, acquire or make a liquidation payment with respect to, any shares of the Company's capital stock, or

(ii) make any payment of principal of, or interest or premium, if any, on, or repay, repurchase or redeem any other debt securities issued by the

Company that rank equally with or junior to the Subordinated Notes (other than with respect to the Company's 6% Convertible Subordinated Notes due 2007).

The provisions of this Section 2.06(c) shall not prevent the Company from engaging in any of the following transactions:

(i) any repurchase, redemption or other acquisition of shares of the Company's capital stock in connection with (1) any employment contract, benefit plan or other similar arrangement with or for the benefit of any one or more employees, officers, directors, consultants or independent contractors, (2) a dividend reinvestment or stockholder purchase plan, or (3) the issuance of the Company's capital stock, or securities convertible into or exercisable for such capital stock, as consideration in an acquisition transaction entered into prior to the applicable Event of Default, Default or extension period, as the case may be;

(ii) any exchange, redemption or conversion of any class or series of the Company's capital stock, or the capital stock of one of the Company's subsidiaries, for any other class or series of the Company's capital stock, or of any class or series of the Company's indebtedness for any class or series of the Company's capital stock;

(iii) any purchase of, or payment of cash in lieu of, fractional interests in shares of the Company's capital stock pursuant to the conversion or exchange provisions of such capital stock or the securities being converted or exchanged; and

(iv) any declaration of a dividend in connection with any rights plan, or the issuance of rights, stock or other property under any rights plan, or the redemption or repurchase of rights pursuant thereto; or any dividend in the form of stock, warrants, options or other rights where the dividend stock or stock issuable upon exercise of such warrants, options or other rights is the same stock as that on which the dividend is being paid or ranks equally with or junior to such stock.

(d) All accrued and unpaid interest, including interest thereon, will be due and payable on the earlier of the Purchase Contract Settlement Date or the Redemption Date for any Subordinated Note and may not be further deferred. The Company may defer payments of interest for subsequent periods, subject to the other requirements specified herein, until the Maturity Date of the Subordinated Notes. Deferred payments of interest to which holders are entitled will accrue additional interest from the relevant Interest Payment Date during any deferral period, at the rate of 6.125%, unless a Successful Remarketing shall have occurred, in which case interest on such deferred payments of interest shall accrue at the Reset Rate from and after the Purchase Contract Settlement Date, in each case, compounded quarterly through the Purchase Contract Settlement Date and compounded semi-annually, thereafter.

(e) At the end of a Deferral Period, and as a condition to the Company's release from the limitations under Section 2.06(c) hereunder, the Company must pay all interest then accrued and unpaid, together with interest on the accrued and unpaid interest, to the extent permitted by applicable law.

(f) Upon the termination of any Deferral Period, and the payment of all amounts then due, the Company may begin a new Deferral Period, subject to the limitations described in this Section 2.06. No interest shall be due and payable during a Deferral Period except at the end thereof.

Section 2.07 No Defeasance. Section 10.01(c) of the Base Indenture shall not apply to the Subordinated Notes.

Section 2.08 No Sinking Fund or Repayment at Option of the Holder. The Subordinated Notes are not entitled to the benefit of any sinking fund and Section 12.05 of the Base Indenture shall not apply to the Subordinated Notes.

Section 2.09 Paying Agent. The Company initially appoints the Trustee as the Paying Agent for the Subordinated Notes.

ARTICLE III REDEMPTION OF THE SUBORDINATED NOTES

Section 3.01 Special Event Redemption. If a Special Event shall occur and be continuing prior to the earlier of the date of a Successful Remarketing and the Purchase Contract Settlement Date, the Company may, at its option, redeem the Subordinated Notes in whole, but not in part, on any Interest Payment Date, at a price per Subordinated Note equal to the Redemption Price, payable on the date of redemption (the “**Special Event Redemption Date**”); *provided* that the Redemption Price shall not include any accrued and unpaid interest corresponding to such Interest Payment Date, or any interest deferred pursuant to Section 2.06, and the full amount of such interest shall be payable to the Person in whose name the Subordinated Notes are registered at the close of business on the relevant Record Date.

In connection with any Special Event Redemption, in exchange for any Subordinated Notes surrendered for redemption on or after the relevant Special Event Redemption Date, the Trustee shall pay an amount equal to the Redemption Amount of such Redemption Price (a) to the Collateral Agent, in the case of Subordinated Notes that underlie the Applicable Ownership Interests in Subordinated Notes included in Corporate Units, which amount shall be applied by the Collateral Agent in accordance with the terms of the Purchase Contract and Pledge Agreement, and (b) to the holders of the Separate Subordinated Notes, in the case of Separate Subordinated Notes.

Section 3.02 Optional Redemption. The Company may redeem the Subordinated Notes, in whole or in part, on a date not earlier than the later of (i) the second anniversary of the Purchase Contract Settlement Date, or (ii) five years after commencement of any Deferral Period then in effect at a price per Subordinated Note equal to the Redemption Price, payable on the date of redemption (the “**Optional Redemption Date**”).

The Company may at any time irrevocably waive its right to redeem the Subordinated Notes for any specified period (including the remaining term of the Subordinated Notes). The Company may not redeem the Subordinated Notes if the Subordinated Notes have been accelerated and such acceleration has not been rescinded or unless all accrued and unpaid interest has been paid in full on all outstanding Subordinated Notes for all Interest Periods terminating on or prior to the Redemption Date.

Section 3.03 Notice of Redemption. Notice of any Redemption will be mailed by the Company (with a copy to the Trustee) at least 30 days but not more than 60 days before the Redemption Date to the holders of Subordinated Notes. In addition, the Company shall notify the Collateral Agent in writing that the Company intends to redeem the Subordinated Notes on the Redemption Date and, in the case of a Special Event Redemption, that a Special Event has occurred. If the Company elects to redeem the Subordinated Notes in connection with a Special Event Redemption, the Company shall appoint the Quotation Agent to assist the Company in determining the Treasury Portfolio Purchase Price.

Section 3.04 Effect of Redemption. Unless the Company defaults in the payment of the Redemption Price, on and after the Redemption Date, (a) interest shall cease to accrue on the Subordinated Notes immediately prior to the close of business on the Redemption Date, (b) the Subordinated Notes shall become due and payable at the Redemption Price, and (c) the Subordinated Notes shall be void and all rights of the holders in respect of the Subordinated Notes shall terminate and lapse (other than the right to receive the Redemption Price upon surrender of such Subordinated Notes but without interest on such Redemption Price). Following the notice of a Redemption, neither the Company nor the Trustee shall be required to register the transfer of or exchange the Subordinated Notes to be redeemed. The redemption provisions of Article 12 of the Base Indenture shall not apply to the Subordinated Notes.

Section 3.05 Redemption Procedures. On or prior to the Redemption Date, the Company shall deposit with the Trustee immediately available funds in an amount sufficient to pay, on the Redemption Date, the aggregate Redemption Price for all outstanding Subordinated Notes. If the Company gives an irrevocable notice of redemption with respect to the Subordinated Notes pursuant to Section 3.03 in connection with an Optional Redemption, and (2) the Company has paid to the Trustee a sufficient amount of cash in connection with the related Redemption or Maturity Date of the Subordinated Notes, then, on the Redemption Date, the Trustee will irrevocably deposit with the Depository funds sufficient to pay the Redemption Price for the Subordinated Notes being redeemed. The Company will also give the Depository irrevocable instructions and authority to pay the Redemption Price in immediately available funds to the holders of beneficial interests in the Global Subordinated Notes. If any Redemption Date is not a Business Day, then the Redemption Amount will be payable on the next Business Day (and without any interest or other payment in respect of any such delay). However, if payment on the next Business Day causes payment of the Redemption Amount to be in the next calendar year, then payment will be on the immediately preceding Business Day, in each case with the same force and effect as if made on that payment date. Interest to be paid on or before the Redemption Date for any Subordinated Notes called for Redemption shall be payable to the holders on the Record Dates for the related Interest Payment Dates. If less than all of the Subordinated Notes are redeemed, such Subordinated Notes shall be redeemed *pro rata* in accordance with the Depository's internal procedures.

Section 3.06 No Other Redemption. Except as set forth in this Article III, the Subordinated Notes shall not be redeemable by the Company prior to the Maturity Date.

**ARTICLE IV
FORM OF SUBORDINATED NOTE**

Section 4.01 Form of Subordinated Note. The Subordinated Notes and the Trustee's Certificate of Authentication to be endorsed thereon are to be substantially in the forms attached as Exhibit A hereto, with such changes therein as the officers of the Company executing the Subordinated Notes (by manual or facsimile signature) may approve, such approval to be conclusively evidenced by their execution thereof.

**ARTICLE V
ORIGINAL ISSUE OF SUBORDINATED NOTES**

Section 5.01 Original Issue of Subordinated Notes. Subordinated Notes in the aggregate principal amount of \$450,000,000 may from time to time, upon execution of this Supplemental Indenture No. 1, be executed by the Company and delivered to the Trustee for authentication, and the Trustee shall thereupon authenticate and deliver said Subordinated Notes to or upon the written order of the Company pursuant to Section 2.04 of the Base Indenture without any further action by the Company (other than as required by the Base Indenture).

**ARTICLE VI
SUPPLEMENTAL INDENTURES**

Section 6.01 Supplemental Indentures with Consent of holders of Subordinated Notes. As set forth in Section 8.02 of the Base Indenture, with the consent of the holders of a majority in the aggregate principal amount of Subordinated Notes affected by such supplemental indenture at the time outstanding, the Company and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental thereto or to the Base Indenture for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of the Base Indenture or this Supplemental Indenture No. 1 or of modifying in any manner the rights of the holders of the Subordinated Notes; *provided, however*, that, in addition to clauses (a) and (b) of Section 8.02 of the Base Indenture, no such indenture or supplemental indenture shall (a) reduce the percentage in principal amount of the Subordinated Notes, the holders of which are required to consent to any waiver of any past Default or Event of Default, (b) modify the terms of the Put Right or (c) modify the interest rate reset or Remarketing provisions of the Subordinated Notes, without, in the case of each of the foregoing clauses (a), (b) and (c), the consent of the holder of each Subordinated Note affected.

Section 6.02 Supplemental Indentures without Consent of holders of Subordinated Notes. As set forth in Section 8.01 of the Base Indenture, the Company and the Trustee may from time to time and at any time enter into an indenture or indentures supplemental thereto or to the Base

Indenture for the purpose of adding certain provisions or changing certain provisions of the Base Indenture or this Supplemental Indenture No. 1 without the consent of the holders of the Subordinated Notes. In addition to clauses (a) through (f) of Section 8.01 of the Base Indenture, the Company and the Trustee may enter into a supplemental indenture to modify the terms of the Subordinated Notes (x) to cure any ambiguity or correct any inconsistency (*provided* that any amendment made solely to conform the provisions of this Supplemental Indenture No. 1 to the “Description of Notes” contained in the prospectus supplement related to the offering of the Corporate Units of which the Subordinated Notes form a part shall not be deemed to adversely affect the interests of the holder of Subordinated Notes) and (y) in connection with the Remarketing, in each case to be effective on and after the Purchase Contract Settlement Date to provide for the Subordinated Notes to (i) rank senior, senior-subordinate or have any other ranking greater than the ranking of the Subordinated Notes on the date of this Supplemental Indenture No. 1; and (ii) mature at any time earlier than November 18, 2018, *provided* that the Subordinated Notes may not mature earlier than November 18, 2010; *provided further* that in the case of clause (y)(i) and clause (y)(ii) above, that notice of such modification of the terms must be provided to holders of the Subordinated Notes prior to such time (which notice, if applicable, may be in the form of the prospectus used for the Remarketing of the Subordinated Notes delivered to the holders of the Subordinated Notes). Furthermore, as provided in Section 2.05(b)(2), following a successful Remarketing, interest will be payable on a semi-annual basis.

ARTICLE VII MISCELLANEOUS

Section 7.01 Ratification of Indenture. The Indenture, as supplemented by this Supplemental Indenture No. 1, is in all respects ratified and confirmed, and this Supplemental Indenture No. 1 shall be deemed part of the Indenture in the manner and to the extent herein and therein provided.

Section 7.02 Trustee Not Responsible for Recitals. The recitals herein contained are made by the Company and not by the Trustee, and the Trustee assumes no responsibility for the correctness thereof. The Trustee makes no representation as to the validity or sufficiency of this Supplemental Indenture No. 1.

Section 7.03 New York Law To Govern. THIS SUPPLEMENTAL INDENTURE NO. 1 AND EACH SUBORDINATED NOTE SHALL BE DEEMED TO BE CONTRACTS MADE UNDER THE LAWS OF THE STATE OF NEW YORK AND SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICTS OF LAW PROVISIONS THEREOF TO THE EXTENT A DIFFERENT LAW WOULD GOVERN AS A RESULT.

Section 7.04 Separability. In case any one or more of the provisions contained in this Supplemental Indenture No. 1 or in the Subordinated Notes shall for any reason be held to be invalid, illegal or unenforceable in any respect, then, to the extent permitted by law, such invalidity, illegality or unenforceability shall not affect any other provisions of this Supplemental Indenture No. 1 or of the Subordinated Notes, but this Supplemental

Indenture No. 1 and the Subordinated Notes shall be construed as if such invalid or illegal or unenforceable provision had never been contained herein or therein.

Section 7.05 Counterparts. This Supplemental Indenture No. 1 may be executed in any number of counterparts each of which shall be an original, but such counterparts shall together constitute but one and the same instrument.

ARTICLE VIII REMARKETING

Section 8.01 Remarketing Procedures. (a) Unless a Special Event Redemption or a Termination Event has occurred prior to the Initial Remarketing Date, the Company shall engage the Remarketing Agent pursuant to the Remarketing Agreement for the Remarketing of the Subordinated Notes. The Company will request, not later than 20 Business Days prior to the Initial Remarketing Date, that the Depositary or its nominee notify the Beneficial Owners or Depositary Participants holding Separate Subordinated Notes, Corporate Units and Treasury Units of the procedures to be followed in the Remarketing, including, in the case of a Failed Final Remarketing, the procedures that must be followed by a holder of Separate Subordinated Notes if such holder wishes to exercise its Put Right or by a holder of Applicable Ownership Interests in Subordinated Notes if such holder elects not to exercise its Put Right.

(b) Each holder of Separate Subordinated Notes may elect to have the Separate Subordinated Notes held by such holder remarketed in any Remarketing. A holder making such an election must, pursuant to the Purchase Contract and Pledge Agreement, notify the Collateral Agent through a notice of election and deliver such Separate Subordinated Notes to the Collateral Agent prior to 5:00 p.m., New York City time, on the seventh Business Day immediately preceding the Purchase Contract Settlement Date (but no earlier than the Interest Payment Date immediately preceding the Initial Remarketing Date). The Collateral Agent shall hold the Separate Subordinated Notes in a separate account from the Collateral Account in which the pledged Subordinated Notes shall be held. Any such notice and delivery may be withdrawn prior to 5:00 p.m., New York City time, on the seventh Business Day immediately preceding the Purchase Contract Settlement Date in accordance with the provisions set forth in the Purchase Contract and Pledge Agreement. Any such notice and delivery not withdrawn by such time will be irrevocable with respect to each Remarketing. Pursuant to Section 5.02 of the Purchase Contract and Pledge Agreement, promptly after 11:00 a.m., New York City time, on the Business Day immediately preceding the Initial Remarketing Date, the Custodial Agent, based on the notices and deliveries received by it prior to such time, shall notify the Remarketing Agent of the principal amount of Separate Subordinated Notes tendered for remarketing and shall cause such Separate Subordinated Notes to be presented to the Remarketing Agent. Under Section 5.02 of the Purchase Contract and Pledge Agreement, Subordinated Notes that underlie Applicable Ownership Interests in Subordinated Notes included in Corporate Units will be deemed tendered for Remarketing and will be remarketed in accordance with the terms of the Remarketing Agreement.

(c) The right of each holder of Remarketed Subordinated Notes to have such Subordinated Notes remarketed and sold on any Remarketing Date shall be subject to the conditions that (i) the Remarketing Agent conducts a Remarketing pursuant to the terms of the Remarketing Agreement on such Remarketing Date, (ii) neither a Special Event Redemption nor a Termination Event has occurred prior to such Remarketing Date, (iii) the Remarketing Agent is able to find a purchaser or purchasers for Remarketed Subordinated Notes at the Remarketing Price based on the Reset Rate and (iv) the purchaser or purchasers deliver the purchase price therefor to the Remarketing Agent as and when required.

(d) Neither the Trustee, the Company nor the Remarketing Agent shall be obligated in any case to provide funds to make payment upon tender of Subordinated Notes for remarketing.

Section 8.02 Remarketing. (a) Unless a Special Event Redemption or a Termination Event has occurred prior to the Initial Remarketing Date, on the Initial Remarketing Date, the Remarketing Agent shall, pursuant and subject to the terms of the Remarketing Agreement, use its reasonable efforts to remarket the Remarketed Subordinated Notes at the Remarketing Price.

(b) In the case of a Failed Initial Remarketing, on the Second Remarketing Date, the Remarketing Agent shall use its reasonable efforts to remarket the Remarketed Subordinated Notes at the Remarketing Price. In the case of a Failed Second Remarketing, on the Final Remarketing Date, the Remarketing Agent shall use its reasonable efforts to remarket the Remarketed Subordinated Notes at the Remarketing Price. It is understood and agreed that Remarketing on any Remarketing Date will be considered successful and no further attempts will be made if the resulting proceeds are at least equal to the Remarketing Price.

Section 8.03 Reset Rate. (a) In connection with each Remarketing, the Remarketing Agent shall determine the Reset Rate (rounded to the nearest one-thousandth (0.001) of one percent per annum).

(b) Anything herein to the contrary notwithstanding, the Reset Rate shall in no event exceed the maximum rate permitted by applicable law.

(c) In the event of a Failed Remarketing or if no Applicable Ownership Interests in Subordinated Notes are included in Corporate Units and none of the holders of the Separate Subordinated Notes elect to have their Subordinated Notes remarketed in any Remarketing, the applicable interest rate on the Subordinated Notes will not be reset and will continue to be the Coupon Rate.

(d) In the event of a Successful Remarketing, the Coupon Rate shall be reset on the Purchase Contract Settlement Date to the Reset Rate as determined by the Remarketing Agent under the Remarketing Agreement, and the Company shall issue a press release containing such Reset Rate and publish such information on its website.

Section 8.04 Failed Remarketing. If, by 4:00 p.m., New York City time, on any Remarketing Date, despite using reasonable efforts, the Remarketing Agent is unable to remarket all of the Remarketed Subordinated Notes at the Remarketing Price pursuant to the terms and conditions hereof and of the Remarketing Agreement or the Remarketing has not occurred because a condition precedent to the Remarketing has not been fulfilled, a Failed Remarketing shall be deemed to have occurred.

Section 8.05 Put Right.

(a) Subject to paragraph (b) hereof, if there has not been a Successful Remarketing on or prior to the Final Remarketing Date, holders of Subordinated Notes will, subject to this Section 8.05, have the right (the “**Put Right**”) to require the Company to purchase such Subordinated Notes on the Purchase Contract Settlement Date, at a price per Subordinated Note equal to the principal amount of the applicable Subordinated Note (the “**Put Price**”).

(b) The Put Right of holders of Applicable Ownership Interests in Subordinated Notes that are part of Corporate Units will be deemed to be automatically exercised unless such holders (1) prior to 5:00 p.m., New York City time, on the second Business Day immediately preceding the Purchase Contract Settlement Date, provide written notice to the Purchase Contract Agent of their intention to settle the related Purchase Contract with separate cash, and (2) on or prior to 5:00 p.m., New York City time, on the Business Day prior to the Purchase Contract Settlement Date, deliver to the Collateral Agent \$25 in cash per Purchase Contract, in each case pursuant to the Purchase Contract Agreement. Holders that satisfy conditions (1) and (2) above shall be deemed to have elected to pay the Purchase Price for the shares of Common Stock to be issued under the related Purchase Contract from the proceeds of the Put Right in full satisfaction of such holders’ obligations under the Purchase Contracts.

(c) The Put Right of a holder of a Separate Subordinated Note shall only be exercisable upon delivery of a notice to the Trustee by such holder on or prior to the second Business Day immediately preceding the Purchase Contract Settlement Date. On or prior to the Purchase Contract Settlement Date, the Company shall deposit with the Trustee immediately available funds in an amount sufficient to pay, on the Purchase Contract Settlement Date, the aggregate Put Price of all Separate Subordinated Notes with respect to which a holder has exercised a Put Right. In exchange for any Separate Subordinated Notes surrendered pursuant to the Put Right, the Trustee shall distribute the Put Price to the holders of such Separate Subordinated Notes.

ARTICLE IX
ADDITIONAL EVENTS OF DEFAULT

Section 9.01 Additional Events of Default. In addition to the events listed as Events of Default in Section 5.01 of the Base Indenture, the following shall be additional Events of Default with respect to the Subordinated Notes:

(a) subject to the Company's right to defer payments of interest under Section 2.06 hereunder, the Company fails to pay interest on the Subordinated Notes for thirty days past the applicable due date;

(b) the Company fails to pay the principal amount of, or premium, if any, on the Subordinated Notes when due (whether at the Maturity Date, as a result of a Put Right or otherwise);

(c) the Company fails to observe or perform any other covenant or agreement in the Indenture, which continues for 60 days after written notice from the Trustee or holders of at least 25% of the outstanding principal amount of the Subordinated Notes as provided in the Indenture;

(d) there occurs with respect to any issue or issues of indebtedness of the Company or any Significant Subsidiary of the Company having an outstanding principal amount of \$20 million or more in the aggregate for all such issues of all such persons, (i) an event of default that has caused the holder thereof to declare such indebtedness to be due and payable prior to its stated maturity and such indebtedness has not been discharged in full or such acceleration has not been rescinded or annulled within 45 days of such acceleration or (ii) a failure to make a principal payment at the final (but not any interim) fixed maturity and such defaulted payment shall not have been made, waived or extended;

(e) a court having jurisdiction in the premises shall enter a decree or order for relief in respect of a Significant Subsidiary of the Company in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of such Significant Subsidiary or for any substantial part of its property or ordering the winding up or liquidation of its affairs, and such decree or order shall remain unstayed and in effect for a period of 60 consecutive days; or

(f) a Significant Subsidiary of the Company shall commence a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or consent to the entry of an order for relief in an involuntary case under any such law, or consent to the appointment or taking possession by a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of such Significant Subsidiary or for any substantial part of its property, or make any general assignment for the benefit of creditors.

ARTICLE X SUBORDINATION

Section 10.01 Subordination. The subordination provisions contained in Article 13 of the Base Indenture shall apply to the Subordinated Notes except as otherwise provided in this Supplemental Indenture No. 1. For purposes of the Subordinated Notes and the provisions of this Article X, "Senior Indebtedness" shall be as defined in Section 1.02 of this Supplemental Indenture No. 1.

In the event of any inconsistency in the provisions of this Article X (including relevant definitions hereto) and Article 13 of the Base Indenture, the provisions of this Supplemental Indenture No. 1 shall govern the Subordinated Notes.

In the case of any event of the type described in clause (b)(i) of the second paragraph of Section 13.01 of the Base Indenture, the Company may resume payments and distributions on the Subordinated Notes on the date in which the relevant default is cured or waived or ceases to exist. In the case of any event of the type described in clause (b)(ii) of the second paragraph of Section 13.01 of the Base Indenture, the Company may resume payments and distributions on the Subordinated Notes on the earlier of (x) the date in which the relevant default is cured or waived or ceases to exist and (y) 179 days after the receipt of the relevant Payment Blockage Notice. The Trustee shall deliver a copy of the Payment Blockage Notice to the Company promptly upon receipt thereof.

No new Payment Blockage Period for any event of the type described in clause (b)(ii) of the second paragraph of Section 13.01 of the Base Indenture may be commenced unless (a) 365 calendar days have elapsed since the Company's receipt of the prior Payment Blockage Notice and (b) all scheduled payments on the Subordinated Notes have been paid in full, and the Trustee or the holders of the Subordinated Notes shall have not begun proceedings to enforce the right of the holders to receive payments. No default that existed with respect to Senior Indebtedness on the date of delivery of any Payment Blockage Notice (whether or not such event is with respect to the same issue of Senior Indebtedness) may be, or be made, the basis for a subsequent Payment Blockage Notice.

ARTICLE XI TAX TREATMENT

Section 11.01 Tax Treatment. The Company agrees, and by acceptance of a Corporate Unit or a Separate Subordinated Note, each holder will be deemed to have agreed (1) to treat each beneficial owner of a Corporate Unit as the owner of the Applicable Ownership Interest in Subordinated Notes constituting a part of such Corporate Unit for U.S. federal income tax purposes and (2) not to treat the Subordinated Notes as contingent payment debt instruments for U.S. federal income tax purposes.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture No. 1 to be duly executed, as of the day and year first written above.

E*TRADE FINANCIAL CORPORATION

By: /s/ Robert J. Simmons

Name: Robert J. Simmons

Title: Chief Financial Officer

THE BANK OF NEW YORK, as Trustee

By: /s/ Stacey B. Poindexter

Name: Stacey B. Poindexter

Title: Assistant Vice President

[IF THIS SUBORDINATED NOTE IS TO BE A GLOBAL SECURITY, INSERT:]

THIS SUBORDINATED NOTE IS A GLOBAL SECURITY WITHIN THE MEANING OF THE INDENTURE HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF THE DEPOSITORY TRUST COMPANY OR A NOMINEE OF THE DEPOSITORY TRUST COMPANY. THIS SUBORDINATED NOTE IS EXCHANGEABLE FOR SECURITIES REGISTERED IN THE NAME OF A PERSON OTHER THAN THE DEPOSITORY TRUST COMPANY OR ITS NOMINEE ONLY IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE INDENTURE AND MAY NOT BE TRANSFERRED EXCEPT AS A WHOLE BY THE DEPOSITORY TRUST COMPANY TO A NOMINEE OF THE DEPOSITORY TRUST COMPANY OR BY A NOMINEE OF THE DEPOSITORY TRUST COMPANY TO THE DEPOSITORY TRUST COMPANY OR ANOTHER NOMINEE OF THE DEPOSITORY TRUST COMPANY.

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION (“**DTC**”), TO THE ISSUER OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE, OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE, OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

E*TRADE FINANCIAL CORPORATION

6.125% Subordinated Notes due November 18, 2018

CUSIP No.:269246 AN 4
ISIN NUMBER: US269246AN40
\$0

E*TRADE Financial Corporation, a corporation organized and existing under the laws of Delaware (hereinafter called the “**Company**”, which term includes any successor corporation under the Indenture hereinafter referred to), for value received, hereby promises to pay to Cede & Co., or registered assigns, the principal sum as set forth in the Schedule of Increases or Decreases in Subordinated Note attached hereto, which amount shall not exceed \$450,000,000, on November 18, 2018 (such date is hereinafter referred to as the “**Maturity Date**”), and to pay interest thereon from the original issuance date or the most recent Interest Payment Date to which interest has been paid or duly provided for, quarterly in arrears on February 18, May 18, August 18, and November 18 of each year (each, a “**Quarterly Interest Payment Date**”), commencing February 18, 2006 at the rate of 6.125% per annum through the Purchase Contract

Settlement Date, and thereafter semi-annually in arrears on May 18 and November 18 of each year (each, a “**Semiannual Interest Payment Date**”), commencing May 18, 2009, at the Reset Rate, or if there has not been a Successful Remarketing prior to the Purchase Contract Settlement Date, at the Coupon Rate, on the basis of a 360-day year consisting of twelve 30-day months, until the principal hereof is paid or duly provided for or made available for payment. The Subordinated Notes shall bear interest, to the extent permitted by law, on any overdue principal and interest at the Coupon Rate, unless a Successful Remarketing shall have occurred, in which case interest on such amounts shall accrue at the Reset Rate from and after the Purchase Contract Settlement Date, in each case, compounded quarterly through the Purchase Contract Settlement Date and compounded semi-annually thereafter. The Reset Rate, if any, shall be established pursuant to the terms of the Indenture (as such term is defined on the reverse of this Subordinated Note) and the Remarketing Agreement. The amount of interest payable for any period shorter than a full Interest Period for which interest is computed will be computed on the basis of a 30-day month and, for any period less than a month, on the basis of the actual number of days elapsed per 30-day month. The interest so payable, and punctually paid or duly provided for, on any Interest Payment Date will, as provided in the Indenture, be paid to the Person in whose name this Subordinated Note (or one or more predecessor Subordinated Notes) is registered at the close of business on the Record Date for such Interest Payment Date.

Except as set forth above, payment of the principal of and interest on this Subordinated Note will be made at the office or agency of the Company maintained for that purpose in The Borough of Manhattan, The City of New York, which shall initially be the corporate trust office of the Trustee, in such coin or currency of the United States of America as at the time of payment is legal tender for payment of public and private debts; *provided, however*, that payment of interest may be made at the option of the Company by check mailed to the holder at such address as shall appear in the security register or by wire transfer to an account appropriately designated by the holder entitled to payment. Payments with respect to any Global Subordinated Note will be made by wire transfer to the Depository.

Reference is hereby made to the further provisions of this Subordinated Note set forth on the reverse hereof, which further provisions shall for all purposes have the same effect as if set forth at this place.

Unless the certificate of authentication hereon has been executed by the Trustee referred to on the reverse hereof by manual signature, this Subordinated Note shall not be entitled to any benefit under the Indenture or be valid or obligatory for any purpose.

IN WITNESS WHEREOF, the Company has caused this instrument to be duly executed under its corporate seal.

Dated: November 22, 2005

E*TRADE FINANCIAL CORPORATION

Name: _____

Name: Robert J. Simmons

Title: Chief Financial Officer

TRUSTEE'S CERTIFICATE OF AUTHENTICATION

This is one of the Subordinated Notes referred to in the within mentioned Indenture.

Dated: November 22, 2005

THE BANK OF NEW YORK,
as Trustee

By: _____
Authorized Signatory

REVERSE OF SUBORDINATED NOTE

This Subordinated Note is one of a duly authorized issue of securities of the Company (herein called the “**Subordinated Notes**”), issued and to be issued in one or more series under an Indenture (the “**Base Indenture**”), dated as of November 22, 2005, between the Company and The Bank of New York, as Trustee (herein called the “**Trustee**”, which term includes any successor trustee), as amended and supplemented by Supplemental Indenture No. 1, dated as of November 22, 2005, between the Company and the Trustee (the “**Supplemental Indenture No. 1**” and, together with the Base Indenture, the “**Indenture**”), to which Indenture reference is hereby made for a statement of the respective rights, limitations of rights, duties and immunities thereunder of the Company, the Trustee and the holders of the Subordinated Notes and of the terms upon which the Subordinated Notes are, and are to be, authenticated and delivered. This Subordinated Note is one of the series designated on the face hereof, limited in aggregate principal amount to \$450,000,000.

All terms used in this Subordinated Note that are defined in the Indenture shall have the meaning assigned to them in the Indenture.

If a Special Event shall occur and be continuing prior to the earlier of the date of a Successful Remarketing and the Purchase Contract Settlement Date, the Company may, at its option, redeem the Subordinated Notes of this series in whole, but not in part, on any Interest Payment Date, at a price per Subordinated Note equal to the Redemption Price as set forth in the Indenture. In addition, the Company may redeem the Subordinated Notes, in whole or in part, on a date not earlier than the later of (i) the second anniversary of the Purchase Contract Settlement Date, or (ii) five years after commencement of any Deferral Period then in effect at a price per Subordinated Note equal to the Redemption Price, as set forth in the Indenture. Except as set forth in this paragraph and in Article III of Supplemental Indenture No. 1, the Company may not redeem the Subordinated Notes at its option prior to the Maturity Date.

Pursuant to Section 8.05 of Supplemental Indenture No. 1, if there has not been a Successful Remarketing on or prior to the Final Remarketing Date, holders of Subordinated Notes will have the right (the “**Put Right**”) to require the Company to purchase such Subordinated Notes on the Purchase Contract Settlement Date, in the case of Separate Subordinated Notes upon a notice to the Trustee on or prior to the second Business Day prior to the Purchase Contract Settlement Date, at a price per Subordinated Note equal to the principal amount of the applicable Subordinated Note (the “**Put Price**”).

The Company shall have the right, in its sole and absolute discretion at any time and from time to time while the Subordinated Notes are outstanding prior to the Purchase Contract Settlement Date, to defer payments of interest by extending the interest payment for the Subordinated Notes, *provided* that such Deferral Period (or any extension thereof) may not extend beyond the Purchase Contract Settlement Date or Redemption Date of any Subordinated Note, and must end on an Interest Payment Date or, if the Subordinated Notes are redeemed, on an Interest Payment Date or the Redemption Date for the Subordinated Notes, and *provided further* that at the end of each Deferral Period the Company shall pay all interest then accrued

and unpaid (together with interest thereon to the extent permitted by applicable law at the rate accruing on such Subordinated Notes). Prior to the termination of a Deferral Period, the Company may further extend the interest payment for the Subordinated Notes, *provided* that such Deferral Period together with all such previous and further extensions end on a date other than an Interest Payment Date or extend beyond the earlier of a Purchase Contract Settlement Date or Redemption Date of any Subordinated Note.

The Subordinated Notes are not entitled to the benefit of any sinking fund and will not be subject to defeasance or covenant defeasance.

If an Event of Default with respect to Subordinated Notes shall occur and be continuing, the principal of the Subordinated Notes of this series may be declared due and payable in the manner and with the effect provided in the Indenture.

The Indenture permits, with certain exceptions as therein provided, the entry into one or more supplemental indentures for purposes of amending or modifying the rights and obligations of the Company and the rights of the holders of the Subordinated Notes under the Indenture or Supplemental Indenture No. 1 at any time by the Company and the Trustee with the consent of the holders of a majority in principal amount of the Subordinated Notes at the time outstanding. The Indenture also contains provisions permitting the holders of specified percentages in principal amount of the Subordinated Notes at the time outstanding, on behalf of the holders of all Subordinated Notes, to waive compliance by the Company with certain provisions of the Indenture and certain past defaults under the Indenture and the consequences thereof. Any such consent or waiver by the holder of this Subordinated Note shall be conclusive and binding upon such holder and upon all future holders of this Subordinated Note and of any Subordinated Note issued upon the registration of transfer hereof or in exchange herefor or in lieu hereof, whether or not notation of such consent or waiver is made upon this Subordinated Note.

Subordinated Notes are issuable only in registered form without coupons in denominations of \$1,000 and any integral multiple thereof, except as provided in Section 2.03 of Supplemental Indenture No. 1.

Except as provided in Section 2.04, of Supplemental Indenture No. 1, the Subordinated Notes shall be issued in fully registered, certificated form, bearing identical terms. Principal of and interest on the Subordinated Notes will be payable, the transfer of such Subordinated Notes will be registrable, and such Subordinated Notes will be exchangeable for Subordinated Notes of a like aggregate principal amount bearing identical terms and provisions, at the office or agency of the Company maintained for such purpose in the Borough of Manhattan, The City of New York.

No service charge shall be made for any registration of transfer or exchange of the Subordinated Notes, but the Company may require payment from the holder of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection therewith.

Pursuant to Section 2.04 of Supplemental Indenture No.1, Subordinated Notes corresponding to Applicable Ownership Interests in Subordinated Notes that are no longer a component of the Corporate Units and are released from the Collateral Account will be issued as

Global Subordinated Notes. Except as otherwise provided in the Indenture, or except upon recreation of Corporate Units, Subordinated Notes represented by Global Subordinated Notes will not be exchangeable for, and will not otherwise be issuable as, Subordinated Notes in certificated form. Unless and until such Global Subordinated Notes are exchanged for Subordinated Notes in certificated form, Global Subordinated Notes may be transferred, in whole but not in part, and any payments on the Subordinated Notes shall be made, only to the Depositary or a nominee of the Depositary, or to a successor Depositary selected or approved by the Company or to a nominee of such successor Depositary.

The Trustee and any agent of the Company or the Trustee may treat the Person in whose name this Subordinated Note is registered as the owner hereof for all purposes, whether or not this Subordinated Note is overdue, and neither the Company, the Trustee nor any such agent shall be affected by notice to the contrary.

The Company agrees, and by acceptance of a Corporate Unit or a Separate Subordinated Note, each holder will be deemed to have agreed (1) to treat each beneficial owner of a Corporate Unit as the owner of the Applicable Ownership Interest in Subordinated Notes constituting a part of such Corporate Unit for U.S. federal income tax purposes and (2) not to treat the Subordinated Notes as contingent payment debt instruments for U.S. federal income tax purposes.

THIS SUBORDINATED NOTE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICTS OF LAW PROVISIONS THEREOF TO THE EXTENT A DIFFERENT LAW WOULD GOVERN AS A RESULT.

ASSIGNMENT

FOR VALUE RECEIVED, the undersigned assigns and transfers this Subordinated Note to:

(Insert assignee's social security or tax identification number)

(Insert address and zip code of assignee)

and irrevocably appoints

agent to transfer this Subordinated Note on the books of the Company. The agent may substitute another to act for him or her.

Date: _____

Signature:

Signature Guarantee: _____

(Sign exactly as your name appears on the other side of this Subordinated Note)

SIGNATURE GUARANTEE

Signatures must be guaranteed by an “eligible guarantor institution” meeting the requirements of the Registrar, which requirements include membership or participation in the Security Transfer Agent Medallion Program (“**STAMP**”) or such other “signature guarantee program” as may be determined by the Registrar in addition to, or in substitution for, STAMP, all in accordance with the Securities Exchange Act of 1934, as amended.

By: _____
Name:
Title:

as Trustee
By: _____
Name
Title:

Attest:

By: _____
Name:
Title:

SCHEDULE OF INCREASES OR DECREASES IN SUBORDINATED NOTE

The initial principal amount of this Subordinated Note is \$0. The following increases or decreases in a part of this Subordinated Note have been made:

<u>Date</u>	<u>Amount of decrease in principal amount of this Subordinated Note</u>	<u>Amount of increase in principal amount of this Subordinated Note</u>	<u>Principal amount of this Subordinated Note following such decrease (or increase)</u>	<u>Signature of authorized signatory of Trustee</u>

**E*TRADE Financial Corporation
as Issuer**

And

**The Bank of New York
as Trustee**

Indenture

Dated as of November 22, 2005

7⁷/₈% Senior Notes Due 2015

ARTICLE I
DEFINITIONS AND INCORPORATION BY REFERENCE

Section 1.01.	Definitions	2
Section 1.02.	Incorporation by Reference of Trust Indenture Act	28
Section 1.03.	Rules of Construction	29

ARTICLE II
THE NOTES

Section 2.01.	Form, Dating and Denominations	29
Section 2.02.	Execution and Authentication	30
Section 2.03.	Registrar, Paying Agent and Authenticating Agent; Paying Agent to Hold Money in Trust	30
Section 2.04.	Replacement Notes	31
Section 2.05.	Outstanding Notes	31
Section 2.06.	Temporary Notes	32
Section 2.07.	Cancellation	32
Section 2.08.	CUSIP and CINS Numbers	33
Section 2.09.	Registration, Transfer and Exchange	33
Section 2.10.	Restrictions on Transfer and Exchange	36

ARTICLE III
REDEMPTION; OFFER TO PURCHASE

Section 3.01.	Optional Redemption	36
Section 3.02.	Redemption with Proceeds of Public Equity Offering	36
Section 3.03.	Method and Effect of Redemption	36

ARTICLE IV
COVENANTS

Section 4.01.	Payment of Notes	38
Section 4.02.	Maintenance of Office or Agency	38
Section 4.03.	Limitation on Indebtedness and Issuances of Preferred Stock	39
Section 4.04.	Limitation on Restricted Payments	41
Section 4.05.	Limitation on Dividend and Other Payment Restrictions Affecting Restricted Subsidiaries or Regulated Subsidiaries	46
Section 4.06.	Limitation on the Issuance and Sale of Capital Stock of Restricted Subsidiaries or Regulated Subsidiaries	48
Section 4.07.	Future Subsidiary Guarantees	48
Section 4.08.	Limitation on Transactions with Shareholders and Affiliates	49
Section 4.09.	Limitation on Liens	51

Section 4.10.	Limitation on Sale-leaseback Transactions	52
Section 4.11.	Limitation on Asset Sales	53
Section 4.12.	Repurchase of Notes Upon a Change of Control	55
Section 4.13.	Limitation on Lines of Business	55
Section 4.14.	Effectiveness of Covenants	55
Section 4.15.	SEC Reports and Reports to Holders	55
Section 4.16.	Payments of Taxes and Other Claims	56
Section 4.17.	Compliance Certificates	56
Section 4.18.	Waiver of Stay, Extension or Usury Laws	57

ARTICLE V

CONSOLIDATION, MERGER OR SALE OF ASSETS

Section 5.01.	Consolidation, Merger and Sale of Assets	57
Section 5.02.	Successor Substituted	58

ARTICLE VI

EVENTS OF DEFAULT AND REMEDIES

Section 6.01.	Events of Default	59
Section 6.02.	Acceleration	61
Section 6.03.	Control by Majority	61
Section 6.04.	Limitation on Suits	62
Section 6.05.	Rights of Holders to Receive Payment	62
Section 6.06.	Collection Suit by Trustee	63
Section 6.07.	Trustee May File Proofs of Claim	63
Section 6.08.	Priorities	63
Section 6.09.	Undertaking for Costs	64
Section 6.10.	Restoration of Rights and Remedies	64
Section 6.11.	Rights and Remedies Cumulative	64
Section 6.12.	Delay or Omission Not Waiver	64

ARTICLE VII

THE TRUSTEE

Section 7.01.	General	65
Section 7.02.	Certain Rights of Trustee	65
Section 7.03.	Individual Rights of Trustee	67
Section 7.04.	Trustee's Disclaimer	67
Section 7.05.	Notice of Default	67
Section 7.06.	Reports by Trustee to Holders	67
Section 7.07.	Compensation and Indemnity	68
Section 7.08.	Replacement of Trustee	68
Section 7.09.	Successor Trustee by Merger	69
Section 7.10.	Eligibility	69
Section 7.11.	Money Held in Trust	70

ARTICLE VIII
DEFEASANCE AND DISCHARGE

Section 8.01.	Discharge of Company's Obligations	70
Section 8.02.	Legal Defeasance	71
Section 8.03.	Covenant Defeasance	72
Section 8.04.	Application of Trust Money	73
Section 8.05.	Repayment to Company	73
Section 8.06.	Reinstatement	73

ARTICLE IX
AMENDMENTS, SUPPLEMENTS AND WAIVERS

Section 9.01.	Amendments Without Consent of Holders	73
Section 9.02.	Amendments with Consent of Holders	74
Section 9.03.	Effect of Consent	75
Section 9.04.	Trustee's Rights and Obligations	76
Section 9.05.	Conformity with Trust Indenture Act	76
Section 9.06.	Payments for Consents	76

ARTICLE X
GUARANTEES

Section 10.01.	Guarantees	76
Section 10.02.	Limitation on Subsidiary Guarantor Liability	77
Section 10.03.	Execution and Delivery of the Guarantee	78
Section 10.04.	Guarantors May Consolidate, etc., on Certain Terms	78
Section 10.05.	Releases Following Certain Events	79

ARTICLE XI
MISCELLANEOUS

Section 11.01.	Trust Indenture Act of 1939	80
Section 11.02.	Noteholder Communications; Noteholder Actions	80
Section 11.03.	Notices	81
Section 11.04.	Certificate and Opinion as to Conditions Precedent	81
Section 11.05.	Statements Required in Certificate or Opinion	82
Section 11.06.	Payment Date Other Than a Business Day	82
Section 11.07.	Governing Law	82
Section 11.08.	No Adverse Interpretation of Other Agreements	82
Section 11.09.	Successors	82
Section 11.10.	Duplicate Originals	83
Section 11.11.	Separability	83
Section 11.12.	Table of Contents and Headings	83
Section 11.13.	No Liability of Directors, Officers, Employees, Incorporators, Members and Stockholders	83

EXHIBITS	
EXHIBIT A	Form of Note
EXHIBIT B	Form of Supplemental Indenture
EXHIBIT C	DTC Legend

INDENTURE, dated as of November 22, 2005, between E*TRADE Financial Corporation, a Delaware corporation, as the Company and The Bank of New York, a New York banking corporation, as Trustee.

RECITALS

The Company has duly authorized the execution and delivery of the Indenture to provide for the issuance of up to \$300,000,000 aggregate principal amount of the Company's 7⁷/₈% Senior Notes Due 2015 (the "**Notes**"). All things necessary to make the Indenture a valid agreement of the Company, in accordance with its terms, have been done, and the Company has done all things necessary to make the Notes, when executed by the Company and authenticated and delivered by the Trustee and duly issued by the Company, the valid obligations of the Company as hereinafter provided.

This Indenture is subject to, and will be governed by, the provisions of the Trust Indenture Act that are required to be a part of and govern indentures qualified under the Trust Indenture Act.

THIS INDENTURE WITNESSETH

For and in consideration of the premises and the purchase of the Notes by the Holders thereof, the parties hereto covenant and agree, for the equal and proportionate benefit of all Holders, as follows:

ARTICLE I
DEFINITIONS AND INCORPORATION BY REFERENCE

Section 1.01. *Definitions*

“*2011 Notes*” means 8% Senior Notes due 2011 issued by the Company pursuant to the 2011 Notes Indenture, together with any exchange notes issued therefor.

“*2013 Notes*” means 7³/₈% Senior Notes due 2013 issued by the Company pursuant to the 2013 Notes Indenture, together with any exchange notes issued therefor.

“*Acquired Indebtedness*” means Indebtedness of a Person existing at the time such Person becomes a Restricted Subsidiary or Indebtedness of a Restricted Subsidiary assumed in connection with an Asset Acquisition by such Restricted Subsidiary; provided such Indebtedness was not Incurred in connection with or in contemplation of such Person becoming a Restricted Subsidiary or such Asset Acquisition.

“*Additional Notes*” means any notes issued under the Indenture in addition to the Original Notes, having the same terms in all respects as the Original Notes except that interest will accrue on the Additional Notes from their date of issuance.

“*Adjusted Consolidated Net Income*” means, for any period, the aggregate net income (or loss) of the Company and its Restricted Subsidiaries and Regulated Subsidiaries for such period determined in conformity with GAAP; provided that the following items shall be excluded in computing Adjusted Consolidated Net Income (without duplication):

(1) the net income (or loss) of any Person that is not a Restricted Subsidiary or Regulated Subsidiary, except that the Company’s equity in the net income of any such Person for such period (to the extent not otherwise excluded pursuant to clauses (2) through (6) below) will be included up to the aggregate amount of cash actually distributed by such Person during such period to the Company or to its Restricted Subsidiaries or Regulated Subsidiaries (less minority interest therein) as a dividend or other distribution;

(2) the net income (or loss) of any Person accrued prior to the date it becomes a Restricted Subsidiary or Regulated Subsidiary or is merged into or consolidated with the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries or all or substantially all of the property and assets of such Person are acquired by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries;

(3) the net income of any Restricted Subsidiary to the extent that the declaration or payment of dividends or similar distributions by such Restricted Subsidiary of such net income is not at the time permitted by the operation of the terms of its charter or any agreement, instrument, judgment, decree, order, statute, rule or governmental regulation applicable to such Restricted Subsidiary;

(4) the net income of any Regulated Subsidiary (x) to the extent that the declaration or payment of dividends or similar distributions by such Regulated Subsidiary of such net income is not at the time permitted by the operation of the terms of its charter or any agreement or instrument with a Person, other than such Regulated Subsidiaries applicable regulatory authorities, or any judgment or decree applicable to such Regulated Subsidiary (y) other than to the extent that such Regulated Subsidiary reasonably believes, in good faith, that such net income could be distributed, declared or paid as a dividend or similar distribution without causing such Regulated Subsidiary to fail to be at least "adequately capitalized" as defined in the regulations of applicable regulatory authorities, or to meet minimum capital requirements imposed by applicable regulatory authorities;

(5) any gains or losses (on an after-tax basis) attributable to Asset Sales or Regulated Sales;

(6) solely for purposes of calculating the amount of Restricted Payments that may be made pursuant to clause (c) of Section 4.04, any amount paid or accrued as dividends on Preferred Stock of the Company owned by Persons other than the Company and any of its Restricted Subsidiaries and Regulated Subsidiaries;

(7) all extraordinary gains and, solely for purposes of calculating the Consolidated Fixed Charge Coverage Ratio, extraordinary losses;

(8) the cumulative effect of changes in accounting principles; and

(9) the net after-tax effect of impairment charges related to goodwill and other intangible assets.

"*Affiliate*" means, as applied to any Person, any other Person directly or indirectly controlling, controlled by, or under direct or indirect common control with, such Person. For purposes of this definition, "control" (including, with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as applied to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

“*Agent Member*” means a member of, or a participant in, the Depository.

“*Asset Acquisition*” means (1) an investment by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries in any other Person pursuant to which such Person shall become a Restricted Subsidiary or a Regulated Subsidiary or shall be merged into or consolidated with the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries; provided that such Person’s primary business is a Related Business or (2) an acquisition by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries of the property and assets of any Person other than the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries that constitute substantially all of a division or line of business of such Person that is a Related Business.

“*Asset Sale*” means any sale, transfer or other disposition (including by way of merger, consolidation or Sale-Leaseback Transaction) in one transaction or a series of related transactions by the Company or any of its Restricted Subsidiaries to any Person other than the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries of:

(1) all or any of the Capital Stock of any Restricted Subsidiary;

(2) all or substantially all of the property and assets of an operating unit or business of the Company or any of its Restricted Subsidiaries; or

(3) any other property and assets (other than the Capital Stock or other Investment in an Unrestricted Subsidiary) of the Company or any of its Restricted Subsidiaries outside the ordinary course of business of the Company or such Restricted Subsidiary and,

in each case, that is not governed by the provisions of the Indenture applicable to mergers, consolidations and sales of assets of the Company; provided that “*Asset Sale*” shall not include:

(a) sales or other dispositions of Investment Securities, inventory, receivables and other current assets;

(b) sales, transfers or other dispositions of assets constituting a Permitted Investment or Restricted Payment permitted to be made under Section 4.04;

(c) sales, transfers or other dispositions of assets with a fair market value not in excess of \$2.5 million in any transaction or series of related transactions;

(d) any sale, transfer, assignment or other disposition of any property equipment that has become damaged, worn out, obsolete or otherwise unsuitable for use in connection with the business of the Company or its Restricted Subsidiaries;

(e) an issuance of Capital Stock by a Restricted Subsidiary or the sale, transfer or other disposition by the Company or a Restricted Subsidiary of the Capital Stock of a Restricted Subsidiary or Regulated Subsidiary, in each case to the Company, a Wholly Owned Restricted Subsidiary or a Wholly Owned Regulated Subsidiary; or

(f) Permitted Liens, or foreclosure on assets as a result of Liens permitted under Section 4.09.

“*Authenticating Agent*” refers to a Person engaged to authenticate the Notes in the stead of the Trustee.

“*Average Life*” means, at any date of determination with respect to any debt security, the quotient obtained by dividing (1) the sum of the products of (a) the number of years from such date of determination to the dates of each successive scheduled principal payment of such debt security and (b) the amount of such principal payment by (2) the sum of all such principal payments.

“*Bank Regulated Subsidiary*” means (i) ETB Holdings, Inc. (provided that such entity is a savings and loan holding company, as defined under the Home Owners’ Loan Act, as amended, or a bank holding company, as defined under the Bank Holding Company Act, as amended, but in no event shall such entity mean, or include, the Company), (ii) any direct or indirect insured depository institution subsidiary of the Company that is regulated by foreign, federal or state banking regulators, including, without limitation, the OTS and the FDIC or (iii) any Subsidiary of a Bank Regulated Subsidiary all of the Common Stock of which is owned by such Bank Regulated Subsidiary and the sole purpose of which is to issue trust preferred or similar securities where the proceeds of the sale of such securities are invested in such Bank Regulated Subsidiary and where such proceeds would be treated as Tier I capital were such Bank Regulated Subsidiary a bank holding company regulated by the Board of Governors of the Federal Reserve System.

“*Board of Directors*” means, with respect to any Person, the Board of Directors of such Person or any duly authorized committee of such Board of Directors, or any other group performing comparable functions.

“*Broker Dealer Regulated Subsidiary*” means any direct or indirect subsidiary of the Company that is registered as a broker dealer pursuant to Section 15 of the Exchange Act or that is regulated as a broker dealer or underwriter under any foreign securities law.

“*Business Day*” means any day except a Saturday, Sunday or other day on which commercial banks in New York City or in the city where the Corporate Trust Office of the Trustee is located are authorized by law to close.

“*Capital Stock*” means, with respect to any Person, any and all shares, interests, participations or other equivalents (however designated, whether voting or non-voting) in equity of such Person, whether outstanding on the Closing Date or issued thereafter, including, without limitation, all Common Stock and Preferred Stock.

“*Capitalized Lease*” means, as applied to any Person, any lease of any property (whether real, personal or mixed) of which the discounted present value of the rental obligations of such Person as lessee, in conformity with GAAP, is required to be capitalized on the balance sheet of such Person.

“*Capitalized Lease Obligations*” means the discounted present value of the rental obligations under a Capitalized Lease.

“*Certificated Note*” means a Note in registered individual form without interest coupons.

“*Change of Control*” means such time as:

(1) a “person” or “group” (within the meaning of Sections 13(d) and 14(d)(2) of the Exchange Act), becomes the ultimate “beneficial owner” (as defined in Rule 13d-3 under the Exchange Act) of more than 50% of the total voting power of the Voting Stock of the Company on a fully diluted basis; or

(2) individuals who on the Closing Date constitute the Board of Directors (together with any new directors whose election by the Board of Directors or whose nomination by the Board of Directors for election by the Company’s stockholders was approved by a vote of at least a majority of the members of the Board of Directors then in office who either were members of the Board of Directors on the Closing Date or whose election or nomination for election was previously so approved) cease for any reason to constitute a majority of the members of the Board of Directors then in office.

“*Closing Date*” means November 22, 2005, the date on which the Notes are originally issued.

“*Common Stock*” means, with respect to any Person, any and all shares, interests, participations or other equivalents (however designated, whether voting or non-voting) of such Person’s equity, other than Preferred Stock of such Person, whether outstanding on the Closing Date or issued thereafter, including, without limitation, all series and classes of such common stock.

“*Company*” means the party named as such in the first paragraph of the Indenture or any successor obligor under the Indenture and the Notes pursuant to Article 5.

“*Consolidated EBITDA*” means, for any period, Adjusted Consolidated Net Income for such period plus, to the extent such amount was deducted in calculating such Adjusted Consolidated Net Income:

- (1) Consolidated Interest Expense;
- (2) income taxes;
- (3) depreciation expense;
- (4) amortization expense; and

(5) all other non-cash items reducing Adjusted Consolidated Net Income (other than items that will require cash payments and for which an accrual or reserve is, or is required by GAAP to be, made), less all non-cash items increasing Adjusted Consolidated Net Income, all as determined on a consolidated basis for the Company, its Restricted Subsidiaries and its Regulated Subsidiaries in conformity with GAAP;

provided that, if any Restricted Subsidiary or Regulated Subsidiary is not a Wholly Owned Restricted Subsidiary, or Wholly Owned Regulated Subsidiary, as the case may be, Consolidated EBITDA shall be reduced (to the extent not otherwise reduced in accordance with GAAP) by an amount equal to (A) the amount of the Adjusted Consolidated Net Income attributable to such Restricted Subsidiary or Regulated Subsidiary multiplied by (B) the percentage of Common Stock of such Restricted Subsidiary or Regulated Subsidiary not owned on the last day of such period by the Company or any of its Restricted Subsidiaries or any of its Wholly Owned Regulated Subsidiaries.

“*Consolidated Fixed Charge Coverage Ratio*” means, with respect to any Person, the ratio of Consolidated EBITDA of such Person during the most recent four full fiscal quarters (the “Four Quarter Period”), for which financial statements are available, ending on or prior to the date of the transaction giving rise to the need to calculate the Consolidated Fixed Charge Coverage Ratio (the “Transaction Date”), to Consolidated Fixed Charges of such Person for the Four Quarter Period. In addition to and without limitation of the foregoing, for purposes of this definition, Consolidated EBITDA and Consolidated Fixed Charges shall be calculated after giving effect on a pro forma basis for the period of such calculation to:

- (1) the incurrence or repayment of any Indebtedness of such Person or any of its Restricted Subsidiaries or Regulated Subsidiaries (and the application of the proceeds thereof) giving rise to the need to make such calculation and any incurrence or repayment of other Indebtedness

(and the application of the proceeds thereof), other than the incurrence or repayment of Indebtedness in the ordinary course of business for working capital purposes pursuant to working capital facilities, occurring during the Four Quarter Period or at any time subsequent to the last day of the Four Quarter Period and on or prior to the Transaction Date, as if such incurrence or repayment, as the case may be (and the application of the proceeds thereof), occurred on the first day of the Four Quarter Period; and

(2) any Asset Sales or Asset Acquisitions (including, without limitation, any Asset Acquisition giving rise to the need to make such calculation as a result of such Person or one of its Restricted Subsidiaries or Regulated Subsidiaries (including any Person who becomes a Restricted Subsidiary or Regulated Subsidiaries as a result of the Asset Acquisition) incurring, assuming or otherwise being liable for Acquired Indebtedness and also including any Consolidated EBITDA attributable to the assets which are the subject of the Asset Acquisition or Asset Sale during the Four Quarter Period) occurring during the Four Quarter Period or at any time subsequent to the last day of the Four Quarter Period and on or prior to the Transaction Date, as if such Asset Sale or Asset Acquisition (including the incurrence, assumption or liability for any such Acquired Indebtedness) occurred on the first day of the Four Quarter Period.

If such Person or any of its Restricted Subsidiaries or Regulated Subsidiaries directly or indirectly guarantees Indebtedness of a third Person, the preceding sentence shall give effect to the incurrence of such guaranteed Indebtedness as if such Person or any Restricted Subsidiary of such Person had directly incurred or otherwise assumed such guaranteed Indebtedness. Furthermore, in calculating "Consolidated Fixed Charges":

(1) interest on outstanding Indebtedness determined on a fluctuating basis as of the Transaction Date and which will continue to be so determined thereafter shall be deemed to have accrued at a fixed rate per annum equal to the rate of interest on such Indebtedness in effect on the Transaction Date;

(2) if interest on any Indebtedness actually incurred on the Transaction Date may optionally be determined at an interest rate based upon a factor of a prime or similar rate, a eurocurrency interbank offered rate, or other rates, then the interest rate in effect on the Transaction Date will be deemed to have been in effect during the Four Quarter Period; and

(3) notwithstanding clause (1) above, interest on Indebtedness determined on a fluctuating basis, to the extent such interest is covered by agreements relating to Interest Swap Obligations, shall be deemed to accrue at the rate per annum resulting after giving effect to the operation of such agreements.

“*Consolidated Fixed Charges*” means, with respect to any Person for any period, the sum, without duplication, of (1) Consolidated Interest Expense, plus (2) the product of (A) the amount of all dividend payments on any series of Preferred Stock of such Person (other than (x) dividends paid in Qualified Capital Stock and (y) dividends on the Preferred Stock, the net proceeds of which will be used for the Distribution, to the extent they are paid in kind or accrete, except to the extent they constitute Disqualified Capital Stock) paid, accrued or scheduled to be paid or accrued during such period times (B) a fraction, the numerator of which is one and the denominator of which is one minus the then current effective consolidated federal, state and local tax rate of such Person, expressed as a decimal.

“*Consolidated Interest Expense*” means, for any period, the aggregate amount of interest in respect of Indebtedness (including, without limitation, amortization of original issue discount on any Indebtedness and the interest portion of any deferred payment obligation of the type described under clause (4) of the definition of “Indebtedness”, calculated in accordance with the effective interest method of accounting; all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers’ acceptance financing; Indebtedness that is Guaranteed or secured by the Company, any of its Restricted Subsidiaries, or any of its Regulated Subsidiaries), and all but the principal component of rentals in respect of Capitalized Lease Obligations paid, accrued or scheduled to be paid or to be accrued by the Company, its Restricted Subsidiaries and its Regulated Subsidiaries during such period; excluding, however, (1) any amount of such interest of any Restricted Subsidiary or Regulated Subsidiary if the net income of such Restricted Subsidiary or Regulated Subsidiary is excluded in the calculation of Adjusted Consolidated Net Income pursuant to clause (3) or (4) of the definition thereof (but only in the same proportion as the net income of such Restricted Subsidiary or Regulated Subsidiary is excluded from the calculation of Adjusted Consolidated Net Income pursuant to clause (3) or (4) of the definition thereof) and (2) any premiums, fees and expenses (and any amortization thereof) payable in connection with the offering of the Notes, the 2013 Notes and the 2011 Notes, all as determined on a consolidated basis (without taking into account Unrestricted Subsidiaries) in conformity with GAAP, and (3) interest payments on trust preferred or similar securities issued by a Regulated Subsidiary to the extent the proceeds of the sale of such securities are invested in a Regulated Subsidiary.

“*Consolidated Net Worth*” means, at any date of determination, stockholders’ equity as set forth on the most recently available quarterly or annual consolidated balance sheet of the Company and its Restricted Subsidiaries and Regulated Subsidiaries (which shall be as of a date not more than 90 days prior to the date of such computation, and which shall not take into account Unrestricted Subsidiaries), plus, to the extent not included, any Preferred Stock of the Company, less any amounts attributable to Disqualified Stock or any equity security convertible into or exchangeable for Indebtedness, the cost of treasury stock and the principal amount of any promissory notes receivable from the sale of the Capital Stock of the Company or any of its Restricted Subsidiaries or

Regulated Subsidiaries, each item to be determined in conformity with GAAP (excluding the effects of foreign currency exchange adjustments under Financial Accounting Standards Board Statement of Financial Accounting Standards No. 52).

“*Corporate Trust Office*” means the office of the Trustee at which the corporate trust business of the Trustee is principally administered, which at the date of the Indenture is located at 101 Barclay Street, Floor 8W, New York, NY 10286, Attn: Corporate Trust Administration.

“*Credit Facility*” means a credit facility of, or Guaranteed by, the Company and used by the Company, its Restricted Subsidiaries or its Regulated Subsidiaries for working capital and other general corporate purposes together with the related documents (including, without limitation, any guarantee agreements and security documents), as such agreements may be amended (including any amendment and restatement), supplemented, replaced or otherwise modified from time to time.

“*Default*” means any event that is, or after notice or passage of time or both would be, an Event of Default.

“*Depository*” means the depository of each Global Note, which will initially be DTC.

“*Disqualified Stock*” means any class or series of Capital Stock of any Person that by its terms or otherwise is (1) required to be redeemed prior to a date that is 123 days following the Stated Maturity of the Notes, (2) redeemable at the option of the holder of such class or series of Capital Stock at any time prior to the Stated Maturity of the Notes or (3) convertible into or exchangeable for Capital Stock referred to in clause (1) or (2) above or Indebtedness having a scheduled maturity prior to the Stated Maturity of the Notes; provided that any Capital Stock that would not constitute Disqualified Stock but for provisions thereof giving holders thereof the right to require such Person to repurchase or redeem such Capital Stock upon the occurrence of an “asset sale” or “change of control” occurring prior to the Stated Maturity of the Notes shall not constitute Disqualified Stock if the “asset sale” or “change of control” provisions applicable to such Capital Stock are no more favorable to the holders of such Capital Stock than the provisions contained in Section 4.11 and Section 4.12 and such Capital Stock specifically provides that such Person will not repurchase or redeem any such stock pursuant to such provision prior to the Company’s repurchase of such Notes as are required to be repurchased pursuant to Section 4.11 and Section 4.12.

“*Domestic Subsidiary*” means any Restricted Subsidiary of the Company with total assets as determined under GAAP of at least \$100,000, as set forth on the most recently available quarterly or annual consolidated balance sheet of such Restricted Subsidiary other than a Restricted Subsidiary that is (1) a Foreign Subsidiary or (2) a Subsidiary of any such Foreign Subsidiary.

“*DTC*” means The Depository Trust Company, a New York corporation, and its successors.

“*DTC Legend*” means the legend set forth in Exhibit C.

“*Event of Default*” has the meaning assigned to such term in Section 6.01.

“*Exchange Act*” means the Securities Exchange Act of 1934, as amended.

“*fair market value*” means the price that would be paid in an arm’s-length transaction between an informed and willing seller under no compulsion to sell and an informed and willing buyer under no compulsion to buy which, if determined by the Board of Directors as evidenced by a Board Resolution, shall be conclusively determined.

“*FDIC*” means the Federal Deposit Insurance Corporation.

“*Foreign Subsidiary*” means any Subsidiary of the Company that is an entity which is a controlled foreign corporation under Section 957 of the Internal Revenue Code or any subsidiary that is otherwise organized under the laws of a jurisdiction other than the United States, any state thereof, or the District of Columbia.

“*GAAP*” means generally accepted accounting principles in the United States of America as in effect as of the Closing Date, including, without limitation, those set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as approved by a significant segment of the accounting profession. All ratios and computations contained or referred to in the Indenture shall be computed in conformity with GAAP applied on a consistent basis, except that calculations made for purposes of determining compliance with the terms of the covenants and with other provisions of the Indenture shall be made without giving effect to (1) the amortization of any expenses incurred in connection with the offering of the Notes, the 2013 Notes and the 2011 Notes and (2) except as otherwise provided, the amortization or writedown of any amounts required or permitted by Accounting Principles Board Opinion Nos. 16 and 17 and Statement of Financial Accounting Standards No. 142.

“*Global Note*” means a Note in registered global form without interest coupons.

“*Guarantee*” means any obligation, contingent or otherwise, of any Person directly or indirectly guaranteeing any Indebtedness of any other Person and, without limiting the generality of the foregoing, any obligation, direct or indirect, contingent or otherwise, of such Person (1) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness of such other Person (whether arising by virtue of partnership arrangements, or by agreements

to keep-well, to purchase assets, goods, securities or services (unless such purchase arrangements are on arm's-length terms and are entered into in the ordinary course of business), to take-or-pay, or to maintain financial statement conditions or otherwise) or (2) entered into for purposes of assuring in any other manner the obligee of such Indebtedness of the payment thereof or to protect such obligee against loss in respect thereof (in whole or in part); provided that the term "Guarantee" shall not include endorsements for collection or deposit in the ordinary course of business, letters of credit issued by a Bank Regulated Subsidiary in the ordinary course of its business or STAMP or other signature guarantees made by a Regulated Subsidiary in the ordinary course of its business. The term "Guarantee" used as a verb has a corresponding meaning.

"*Hedging Obligations*" means, with respect to any Person, the obligations of such person under (i) currency exchange, interest rate, commodity, credit or equity swap, forward or futures agreements, currency exchange, interest rate, commodity, credit or equity cap agreements, currency exchange, interest rate, commodity, credit or equity collar agreements, or currency exchange, interest rate, commodity, credit or equity puts or calls, and (ii) other agreements or arrangements designed to protect such Person, directly or indirectly, against fluctuations in currency exchange, interest rate, commodity or equity prices.

"*Incur*" means, with respect to any Indebtedness, to incur, create, issue, assume, Guarantee or otherwise become liable for or with respect to, or become responsible for, the payment of, contingently or otherwise, such Indebtedness; provided that (1) any Indebtedness of a Person existing at the time such Person becomes a Restricted Subsidiary will be deemed to be incurred by such Restricted Subsidiary at the time it becomes a Restricted Subsidiary and (2) neither the accrual of interest nor the accretion of original issue discount shall be considered an Incurrence of Indebtedness.

"*Indebtedness*" means, with respect to any Person at any date of determination (without duplication):

- (1) all indebtedness of such Person for borrowed money;
- (2) all obligations of such Person evidenced by bonds, debentures, notes or other similar instruments;
- (3) all obligations of such Person in respect of letters of credit or other similar instruments (including reimbursement obligations with respect thereto, but excluding letters of credit issued by such Person and excluding obligations with respect to letters of credit (including trade letters of credit) securing obligations (other than obligations described in (1) or (2) above or (5), (6) or (7) below) entered into in the ordinary course of business of such Person to the extent such letters of credit are not drawn upon or, if drawn upon, to the extent such drawing is reimbursed no later than the third Business Day following receipt by such Person of a demand for reimbursement);

(4) all obligations of such Person to pay the deferred and unpaid purchase price of property or services, which purchase price is recorded as a liability under GAAP and due more than six months after the date of placing such property in service or taking delivery and title thereto or the completion of such services, except Trade Payables;

(5) all Capitalized Lease Obligations;

(6) all Indebtedness of other Persons secured by a Lien on any asset of such Person, whether or not such Indebtedness is assumed by such Person; provided that the amount of such Indebtedness shall be the lesser of (A) the fair market value of such asset at such date of determination and (B) the amount of such Indebtedness;

(7) all Indebtedness of other Persons Guaranteed by such Person to the extent such Indebtedness is Guaranteed by such Person;

(8) Acquired Indebtedness;

(9) to the extent not otherwise included in this definition, net obligations under Hedging Obligations (other than Hedging Obligations not entered into for speculative investment purposes and designed to protect the Company or its Restricted Subsidiaries or Regulated Subsidiaries against fluctuations in commodity prices, equity prices, foreign currency exchange rates or interest rates and that do not increase the Indebtedness of the obligor outstanding at any time other than as a result of fluctuations in commodity prices, foreign currency exchange rates or interest rates or by reason of fees, indemnities and compensation payable thereunder); and

(10) all obligations to redeem or repurchase Preferred Stock issued by such Person, other than PIK Preferred Stock,

provided that Indebtedness shall not include:

(a) obligations arising from products and services offered by Bank Regulated Subsidiaries or Broker Dealer Regulated Subsidiaries in the ordinary course including, but not limited to, deposits, CDs, prepaid forward contracts, swaps, exchangeable debt securities, foreign currency purchases or sales and letters of credit;

(b) indebtedness or other obligations incurred in the ordinary course arising from margin lending, Stock Loan activities or foreign currency settlement obligations of a Broker Dealer Regulated Subsidiary;

(c) indebtedness of the Company or any Restricted Subsidiary represented by letters of credit for the account of the Company or such Restricted Subsidiary, as the case may be, in order to provide security for workers' compensation claims, payment obligations in connection with self-insurance or similar requirements in the ordinary course of business;

(d) Purchase Money Indebtedness of the Company or any Restricted Subsidiary not to exceed at any one time outstanding 5% of Consolidated Net Worth;

(e) indebtedness arising from agreements of the Company or a Restricted Subsidiary providing for indemnification, adjustment of purchase price or similar obligations, in each case, incurred or assumed in connection with the disposition of any business, assets or a Subsidiary, other than Guarantees of Indebtedness Incurred by any Person acquiring all or any portion of such business, assets or a Subsidiary for the purpose of financing such acquisition;

(f) indebtedness Incurred by Professional Path, Inc. in the ordinary course of its proprietary trading activities in an amount not to exceed at any one time outstanding of \$5 million;

(g) advances from the Federal Home Loan Bank, Federal Reserve Bank (or similar institution), repurchase and reverse repurchase agreements relating to Investment Securities, medium term notes, treasury tax and loan balances, special direct investment balances, bank notes, commercial paper, term investment option balances, brokered certificates of deposit, dollar rolls, and fed funds purchased, in each case incurred in the ordinary course of a Regulated Subsidiary's business;

(h) Indebtedness Incurred by a Regulated Subsidiary and Guaranteed by the Company (i)(A) the proceeds of which are used to satisfy applicable minimum capital requirements imposed by applicable regulatory authorities of such Regulated Subsidiary and (B) where the provision of such Guarantee by the Company is required by the applicable regulatory authority or (ii) where the provision of such Guarantee by the Company is required by a bank, clearing house or other market participant in connection with the ordinary course of a Broker Dealer Regulated Subsidiary's business.

The amount of Indebtedness of any Person at any date shall be the outstanding balance at such date of all unconditional obligations as described above and, with respect to contingent obligations, the maximum liability upon the occurrence of the contingency giving rise to the obligation, provided

(A) that the amount outstanding at any time of any Indebtedness issued with original issue discount is the face amount of such Indebtedness less the remaining unamortized portion of the original issue discount of such Indebtedness at such time as determined in conformity with GAAP,

(B) that money borrowed and set aside at the time of the Incurrence of any Indebtedness in order to prefund the payment of the interest on such Indebtedness shall not be deemed to be "Indebtedness" so long as such money is held to secure the payment of such interest and

(C) that Indebtedness shall not include:

(x) any liability for federal, state, local or other taxes,

(y) performance, surety or appeal bonds provided in the ordinary course of business or

(z) agreements providing for indemnification, adjustment of purchase price or similar obligations, or Guarantees or letters of credit, surety bonds or performance bonds securing any obligations of the Company or any of its Restricted Subsidiaries pursuant to such agreements, in any case Incurred in connection with the disposition of any business, assets or Restricted Subsidiary (other than Guarantees of Indebtedness Incurred by any Person acquiring all or any portion of such business, assets or Restricted Subsidiary for the purpose of financing such acquisition), so long as the principal amount does not to exceed the gross proceeds actually received by the Company or any Restricted Subsidiary in connection with such disposition.

"*Indenture*" means this indenture, as amended or supplemented from time to time.

"*Indentures*" means this Indenture, the 2013 Notes Indenture and the 2011 Notes Indenture.

"*Insurance Regulated Subsidiary*" means any Subsidiary which conducts an insurance business such that it is regulated by any supervisory agency, state insurance department other state, federal or foreign insurance regulatory body or the National Association of Insurance Commissioners.

“*interest*”, in respect of the Notes, unless the context otherwise requires, refers to interest and Additional Interest, if any.

“*Interest Payment Date*” means each June 1 and December 1 of each year, commencing June 1, 2006.

“*Interest Swap Obligations*” means the obligations of any Person pursuant to any arrangement with any other Person, whereby, directly or indirectly, such Person is entitled to receive from time to time periodic payments calculated by applying either a floating or a fixed rate of interest on a stated notional amount in exchange for periodic payments made by such other Person calculated by applying a fixed or a floating rate of interest on the same notional amount and shall include, without limitation, interest rate swaps, caps, floors, collars and similar agreements.

“*Investment*” in any Person means any direct or indirect advance, loan or other extension of credit (including, without limitation, by way of Guarantee or similar arrangement; but excluding Investment Securities, advances to customers or suppliers in the ordinary course of business that are, in conformity with GAAP, recorded as accounts receivable, prepaid expenses or deposits on the balance sheet of the Company or its Restricted Subsidiaries and endorsements for collection or deposit arising in the ordinary course of business) or capital contribution to (by means of any transfer of cash or other property to others or any payment for property or services for the account or use of others), or any purchase or acquisition of Capital Stock, bonds, notes, debentures or other similar instruments issued by, such Person and shall include (1) the designation of a Restricted Subsidiary as an Unrestricted Subsidiary or as a Regulated Subsidiary and (2) the retention of the Capital Stock (or any other Investment) by the Company or any of its Restricted Subsidiaries, of (or in) any Person that has ceased to be a Restricted Subsidiary, including without limitation, by reason of any transaction permitted by clause (3) or (4) of Section 4.06. For purposes of the definition of “Unrestricted Subsidiary” and Section 4.04, (a) the amount of or a reduction in an Investment shall be equal to the fair market value thereof at the time such Investment is made or reduced and (b) in the event the Company or a Restricted Subsidiary makes an Investment by transferring assets to any Person and as part of such transaction receives Net Cash Proceeds, the amount of such Investment shall be the fair market value of the assets less the amount of Net Cash Proceeds so received, provided the Net Cash Proceeds are applied in accordance with clause (A) or (B) of Section 4.11.

“*Investment Grade Status*” shall occur when the Notes receive a rating of “BBB-” or higher from S&P or a rating of “Baa3” or higher from Moody’s.

“Investment Securities” means marketable securities of a Person (other than an Affiliate or joint venture of the Company or any Restricted Subsidiary or any Regulated Subsidiary), mortgages, credit card and other loan receivables, futures contracts on marketable securities, interest rates and foreign currencies used for the hedging of marketable securities, mortgages or credit card and other loan receivables purchased, borrowed, sold, loaned or pledged by such Person in the ordinary course of its business.

“Issue Date” means the date on which the Original Notes are originally issued under the Indenture.

“Lien” means any mortgage, pledge, security interest, encumbrance, lien or charge of any kind (including, without limitation, any conditional sale or other title retention agreement or lease in the nature thereof or any agreement to give any security interest).

“Moody’s” means Moody’s Investors Service, Inc. and its successors.

“Net Cash Proceeds” means:

(a) with respect to any Asset Sale or Regulated Sale, the proceeds of such Asset Sale or Regulated Sale in the form of cash or cash equivalents, including payments in respect of deferred payment obligations (to the extent corresponding to the principal, but not interest, component thereof) when received in the form of cash or cash equivalents and proceeds from the conversion of other property received when converted to cash or cash equivalents, net of

(1) brokerage commissions and other fees and expenses (including attorney’s fees, accountants’ fees, underwriters’, placement agents’ and other investment bankers’ fees, commissions and consultant fees) related to such Asset Sale or Regulated Sale;

(2) provisions for all taxes (whether or not such taxes will actually be paid or are payable) as a result of such Asset Sale or Regulated Sale without regard to the consolidated results of operations of the Company and its Restricted Subsidiaries, taken as a whole, together with any actual distributions to shareholders of the type contemplated under clause (b)(9) under Section 4.04 with respect to the taxable income relating to such Asset Sale or Regulated Sale;

(3) payments made to repay Indebtedness or any other obligation outstanding at the time of such Asset Sale or Regulated Sale that either (x) is secured by a Lien on the property or assets sold or (y) is required to be paid as a result of such sale and

(4) appropriate amounts to be provided by the Company, any Restricted Subsidiary or any Regulated Subsidiary as a reserve against any liabilities associated with such Asset Sale or Regulated Sale, including, without limitation, pension and other post-employment benefit liabilities, liabilities related to environmental matters and liabilities under any indemnification obligations associated with such Asset Sale or Regulated Sale, all as determined in conformity with GAAP; and

(b) with respect to any issuance or sale of Capital Stock, the proceeds of such issuance or sale in the form of cash or cash equivalents, including payments in respect of deferred payment obligations (to the extent corresponding to the principal, but not interest, component thereof) when received in the form of cash or cash equivalents and proceeds from the conversion of other property received when converted to cash or cash equivalents, net of attorney's fees, accountants' fees, underwriters' or placement agents' fees, discounts or commissions and brokerage, consultant and other fees incurred in connection with such issuance or sale and net of taxes paid or payable as a result thereof.

"*Note Guarantee*" means any Guarantee of the obligations of the Company under the Indenture and the Notes by any Subsidiary Guarantor.

"*Notes*" has the meaning assigned to such term in the Recitals.

"*Obligations*" means any principal, interest, penalties, fees, indemnifications, reimbursements, damages and other liabilities payable under the documentation governing any Indebtedness.

"*Offer to Purchase*" means an offer to purchase Notes by the Company from the Holders commenced by mailing a notice to the Trustee and each Holder stating:

- (1) the covenant pursuant to which the offer is being made and that all Notes validly tendered will be accepted for payment on a pro rata basis;
- (2) the purchase price and the date of purchase (which shall be a Business Day no earlier than 30 days nor later than 60 days from the date such notice is mailed) (the "Payment Date");
- (3) that any Note not tendered will continue to accrue interest pursuant to its terms;

(4) that, unless the Company defaults in the payment of the purchase price, any Note accepted for payment pursuant to the Offer to Purchase shall cease to accrue interest on and after the Payment Date;

(5) that Holders electing to have a Note purchased pursuant to the Offer to Purchase will be required to surrender the Note, together with the form entitled "Option of the Holder to Elect Purchase" on the reverse side of the Note completed, to the Paying Agent at the address specified in the notice prior to the close of business on the Business Day immediately preceding the Payment Date;

(6) that Holders will be entitled to withdraw their election if the Paying Agent receives, not later than the close of business on the third Business Day immediately preceding the Payment Date, a telegram, facsimile transmission or letter setting forth the name of such Holder, the principal amount of Notes delivered for purchase and a statement that such Holder is withdrawing his election to have such Notes purchased; and

(7) that Holders whose Notes are being purchased only in part will be issued new Notes equal in principal amount to the unpurchased portion of the Notes surrendered; provided that each Note purchased and each new Note issued shall be in a principal amount of \$1,000 or multiples of \$1,000.

On the Payment Date, the Company shall (a) accept for payment on a pro rata basis Notes or portions thereof tendered pursuant to an Offer to Purchase; (b) deposit with the Paying Agent money sufficient to pay the purchase price of all Notes or portions thereof so accepted; and (c) deliver, or cause to be delivered, to the Trustee all Notes or portions thereof so accepted together with an Officers' Certificate specifying the Notes or portions thereof accepted for payment by the Company. The Paying Agent shall promptly mail to the Holders of Notes so accepted payment in an amount equal to the purchase price, and the Trustee shall promptly authenticate and mail to such Holders a new Note equal in principal amount to any unpurchased portion of the Note surrendered; provided that each Note purchased and each new Note issued shall be in a principal amount of \$1,000 or multiples of \$1,000. The Company will publicly announce the results of an Offer to Purchase as soon as practicable after the Payment Date. The Trustee shall act as the Paying Agent for an Offer to Purchase. The Company will comply with Rule 14e-1 under the Exchange Act and any other securities laws and regulations thereunder to the extent such laws and regulations are applicable, if the Company is required to repurchase Notes pursuant to an Offer to Purchase.

"*Officer*" means the chairman of the Board of Directors, the president or chief executive officer, any vice president, the chief financial officer, the treasurer or any assistant treasurer, or the secretary or any assistant secretary, of the Company.

“*Officers’ Certificate*” means a certificate signed in the name of the Company (i) by the chairman of the Board of Directors, the president or chief executive officer or a vice president and (ii) by the chief financial officer, the treasurer or any assistant treasurer or the secretary or any assistant secretary.

“*Opinion of Counsel*” means an opinion from legal counsel that meets the requirements of the Indenture.

“*Original Notes*” means the Notes issued on the Issue Date and any Notes issued in replacement thereof.

“*OTS*” means the Office of Thrift Supervision.

“*Outstanding Convertible Notes*” means 6.00% convertible subordinated notes due February 2007, issued by the Company pursuant to the indenture dated February 1, 2000, outstanding on the Closing Date.

“*Paying Agent*” refers to a Person engaged to perform the obligations of the Trustee in respect of payments made or funds held hereunder in respect of the Notes.

“*Permitted Investment*” means:

(1) an Investment in the Company or a Restricted Subsidiary or a Regulated Subsidiary or a Person which will, upon the making of such Investment, become a Restricted Subsidiary or Regulated Subsidiary or be merged or consolidated with or into or transfer or convey all or substantially all its assets to, the Company or a Restricted Subsidiary or Regulated Subsidiary; provided that such person’s primary business is a Related Business on the date of such Investment;

(2) Temporary Cash Investments and Investment Securities;

(3) payroll, travel and similar advances to cover matters that are expected at the time of such advances ultimately to be treated as expenses in accordance with GAAP;

(4) stock, obligations or securities received in satisfaction of judgments;

(5) an Investment in an Unrestricted Subsidiary consisting solely of an Investment in another Unrestricted Subsidiary;

(6) Hedging Obligations not entered into for speculative investment purposes and designed to protect the Company or its Restricted Subsidiaries or Regulated Subsidiaries against fluctuations in commodity prices, securities prices, foreign currency exchange rates or interest rates; and

(7) any Investment made as a result of the receipt of non-cash consideration from an Asset Sale that was made pursuant to and in compliance with Section 4.11.

"Permitted Liens" means:

(1) Liens for taxes, assessments, governmental charges or claims that are being contested in good faith by appropriate legal proceedings promptly instituted and diligently conducted and for which a reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made;

(2) statutory and common law Liens of landlords and carriers, warehousemen, mechanics, suppliers, materialmen, repairmen or other similar Liens (including a lender's unexercised rights of set-off) arising in the ordinary course of business and with respect to amounts not yet delinquent or being contested in good faith by appropriate legal proceedings promptly instituted and diligently conducted and for which a reserve or other appropriate provision, if any, as shall be required in conformity with GAAP shall have been made;

(3) Liens incurred or deposits made in the ordinary course of business in connection with workers' compensation, unemployment insurance and other types of social security;

(4) Liens incurred or deposits made to secure the performance of tenders, bids, leases, statutory or regulatory obligations, bankers' acceptances, surety and appeal bonds, government contracts, performance and return-of-money bonds and other obligations of a similar nature incurred in the ordinary course of business (exclusive of obligations for the payment of borrowed money);

(5) easements, rights-of-way, municipal and zoning ordinances and similar charges, encumbrances, title defects or other irregularities that do not materially interfere with the ordinary course of business of the Company or any of its Restricted Subsidiaries;

(6) leases or subleases granted to others that do not materially interfere with the ordinary course of business of the Company and its Restricted Subsidiaries, taken as a whole;

(7) Liens encumbering property or assets under construction arising from progress or partial payments by a customer of the Company or its Restricted Subsidiaries relating to such property or assets;

(8) any interest or title of a lessor in the property subject to any Capitalized Lease or operating lease;

(9) Liens arising from filing Uniform Commercial Code financing statements regarding leases;

(10) Liens on property of, or on shares of Capital Stock or Indebtedness of, any Person existing at the time such Person becomes, or becomes a part of, any Restricted Subsidiary; provided that such Liens do not extend to or cover any property or assets of the Company or any Restricted Subsidiary other than the property or assets acquired;

(11) Liens in favor of the Company or any Restricted Subsidiary;

(12) Liens arising from the rendering of a final judgment or order against the Company or any Restricted Subsidiary that does not give rise to an Event of Default;

(13) Liens securing reimbursement obligations with respect to letters of credit that encumber documents and other property relating to such letters of credit and the products and proceeds thereof;

(14) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods;

(15) Liens encumbering customary initial deposits and margin deposits, and other Liens that are within the general parameters customary in the industry and incurred in the ordinary course of business, in each case, securing Indebtedness under Hedging Obligations not entered into for speculative investment purposes and designed to protect the Company or any of its Restricted Subsidiaries from fluctuations in interest rates, currencies or the price of commodities or securities;

(16) Liens arising out of conditional sale, title retention, consignment or similar arrangements for the sale of goods entered into by the Company or any of its Restricted Subsidiaries in the ordinary course of business in accordance with the past practices of the Company and its Restricted Subsidiaries prior to the Closing Date;

(17) Liens on shares of Capital Stock of any Unrestricted Subsidiary to secure Indebtedness of such Unrestricted Subsidiary; and

(18) Liens on or sales of receivables or mortgages.

“*Person*” means an individual, a corporation, a partnership, a limited liability company, an association, a trust or any other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

“*PIK Preferred Stock*” means Preferred Stock the terms of which do not permit the declaration or payment of any dividend or other distribution thereon or with respect thereto, or the redemption or conversion thereof, in each such case prior to the payment in full of the Company’s obligations under the Notes.

“*Preferred Stock*” of any Person means any Capital Stock of such Person that has preferential rights to any other Capital Stock of such Person with respect to dividends or redemptions or upon liquidation.

“*Prospectus*” means the prospectus dated October 28, 2005, together with the prospectus supplement thereto dated November 16, 2005, prepared by the Company in connection with the offering of the Notes.

“*Rating Agency*” means any “nationally recognized statistical rating organization,” as such term is defined for purposes of Rule 436(g)(2) under the Securities Act.

“*Rating Decline*” means (i) a decrease of one or more gradations (including gradations within Rating Categories as well as between Rating Categories) in the rating of the notes by both Moody’s and S&P or (ii) a withdrawal of the rating of the Notes by Moody’s and S&P, in each case, directly as a result of a Change of Control; provided, however, that such decrease or withdrawal occurs on, or within 30 days following, the date of public notice of the occurrence of a Change of Control or of the intention by the Company, or a stockholder of the Company, as applicable, to effect a Change of Control, which period shall be extended so long as the rating of the Notes relating to the Change of Control as noted by the Rating Agency is under publicly announced consideration for downgrade by the applicable Rating Agency.

“*Register*” has the meaning assigned to such term in Section 2.09.

“*Registrar*” means a Person engaged to maintain the Register.

“*Regular Record Date*” for the interest payable on any Interest Payment Date means the [] or [] (whether or not a Business Day) next preceding such Interest Payment Date.

“*Regulated Sale*” means any sale, transfer or other disposition (including by way of merger, consolidation or Sale-Leaseback Transaction) in one transaction or a series of related transactions by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries to any Person other than the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries of:

- (1) all or any of the Common Stock of any Regulated Subsidiary that constitutes a Significant Subsidiary, or

(2) all or substantially all of the property and assets of an operating unit or business of any Regulated Subsidiary that constitutes a Significant Subsidiary,

in each case, that is not governed by the provisions of the Indenture applicable to mergers, consolidations and sales of assets of the Company; provided that "Regulated Sale" shall not include an issuance, sale, transfer or other disposition of Capital Stock by a Regulated Subsidiary to the Company, a Wholly Owned Restricted Subsidiary or a Wholly Owned Regulated Subsidiary.

"*Regulated Subsidiary*" means a Broker Dealer Regulated Subsidiary, a Bank Regulated Subsidiary or an Insurance Regulated Subsidiary or any other Subsidiary subject to minimum capital requirements or other similar material regulatory requirements imposed by applicable regulatory authorities.

"*Related Business*" means any financial services business which is the same as or ancillary or complementary to any business of the Company and its Restricted Subsidiaries and Regulated Subsidiaries that is being conducted on the Closing Date, including, but not limited to, activities under Section 4(k) of the Bank Holding Company Act, as amended, or Section 10 of the Home Owners' Loan Act, as amended, broker-dealer services, insurance, investment advisory services, specialist and other market making activities, trust services, underwriting and the creation of and offers and sales of interests in mutual funds.

"*Replacement Assets*" means, on any date, property or assets (other than current assets) of a nature or type or that are used in a business (or an Investment in a company having property or assets of a nature or type, or engaged in a business) similar or related to the nature or type of the property and assets of, or the business of, the Company and its Restricted Subsidiaries existing on such date.

"*Responsible Officer*" shall mean, when used with respect to the Trustee, any officer within the corporate trust department of the Trustee, including any vice president, assistant vice president, assistant secretary, assistant treasurer, trust officer or any other officer of the Trustee who customarily performs functions similar to those performed by the Persons who at the time shall be such officers, respectively, or to whom any corporate trust matter is referred because of such person's knowledge of and familiarity with the particular subject and who shall have direct responsibility for the administration of this Indenture.

"*Restricted Subsidiary*" means any Subsidiary of the Company other than an Unrestricted Subsidiary, or a Regulated Subsidiary.

"*Sale-Leaseback Transaction*" means, with respect to any Person, an arrangement whereby such Person sells or transfers property and then or thereafter leases such property or any substantial part thereof which such Person intends to use for substantially the same purpose or purposes as the property sold or transferred, provided that for purposes of this definition, "property" shall not include Investment Securities.

“S&P” means Standard & Poor’s Ratings Group, a division of The McGraw-Hill Companies, and its successors.

“Secured Indebtedness Cap” means, on any date, an amount equal to 1.0 times the Consolidated EBITDA of the Company for the most recently ended Four Quarter Period for which financial statements are available immediately preceding such date. For purposes of making the computation referred to above, Consolidated EBITDA shall be calculated after giving effect on a pro forma basis for the period of such calculation to any Asset Sales or Asset Acquisitions (including, without limitation, any Asset Acquisition giving rise to the need to make such calculation as a result of such Person or one of its Restricted Subsidiaries or Regulated Subsidiaries (including any Person who becomes a Restricted Subsidiary or Regulated Subsidiary as a result of the Asset Acquisition) incurring, assuming or otherwise being liable for Acquired Indebtedness and also including any Consolidated EBITDA attributable to the assets which are the subject of the Asset Acquisition or Asset Sale during the Four Quarter Period) occurring during the Four Quarter Period or at any time subsequent to the last day of the Four Quarter Period and on or prior to the date of such calculation, as if such Asset Sale or Asset Acquisition (including the incurrence, assumption or liability for any such Acquired Indebtedness) occurred on the first day of the Four Quarter Period.

“Securities Act” means the Securities Act of 1933, as amended.

“Significant Subsidiary” means, at any date of determination, any Restricted Subsidiary that, together with its Subsidiaries, (1) for the most recent fiscal year of the Company, accounted for more than 10% of the consolidated revenues of the Company and its Restricted Subsidiaries or (2) as of the end of such fiscal year, was the owner of more than 10% of the consolidated assets of the Company and its Restricted Subsidiaries, all as set forth on the most recently available consolidated financial statements of the Company for such fiscal year.

“Stated Maturity” means, (1) with respect to any debt security, the date specified in such debt security as the fixed date on which the final installment of principal of such debt security is due and payable and (2) with respect to any scheduled installment of principal of or interest on any debt security, the date specified in such debt security as the fixed date on which such installment is due and payable.

“Stock Loan” means a “Loan” as used in the Master Securities Loan Agreement published from time to time by the Bond Market Association.

“Subsidiary” means, with respect to any Person, any corporation, association or other business entity of which more than 50% of the voting power of the outstanding Voting Stock is owned, directly or indirectly, by such Person and one or more other Subsidiaries of such Person.

“*Subsidiary Guarantor*” means any Domestic Subsidiary which provides a Note Guarantee of the Company’s obligations under the Indenture and the Notes pursuant to Section 4.07.

“*Temporary Cash Investment*” means any of the following:

(1) direct obligations of the United States of America or any agency thereof or obligations fully and unconditionally guaranteed by the United States of America or any agency thereof, in each case maturing within one year unless such obligations are deposited by the Company (x) to defease any Indebtedness or (y) in a collateral or escrow account or similar arrangement to prefund the payment of interest on any indebtedness;

(2) demand deposits, time deposit accounts, bankers acceptances, certificates of deposit and money market deposits maturing within 180 days of the date of acquisition thereof issued by a bank or trust company which is organized under the laws of the United States of America, any state thereof or any foreign country recognized by the United States of America, and which bank or trust company (i) has capital, surplus and undivided profits aggregating in excess of \$100 million (or the foreign currency equivalent thereof) and has outstanding debt which is rated “A” (or such similar equivalent rating) or higher by at least one nationally recognized statistical rating organization (as defined in Rule 436 under the Securities Act) or (ii) is a money market fund sponsored by a registered broker dealer or mutual fund distributor;

(3) repurchase obligations with a term of not more than 30 days for underlying securities of the types described in clause (1) above entered into with a bank or trust company meeting the qualifications described in clause (2) above;

(4) commercial paper, maturing not more than one year after the date of acquisition, issued by a corporation (other than an Affiliate of the Company) organized and in existence under the laws of the United States of America, any state thereof or any foreign country recognized by the United States of America with a rating at the time as of which any investment therein is made of “P- 1” (or higher) according to Moody’s or “A 1” (or higher) according to S&P;

(5) securities with maturities of six months or less from the date of acquisition issued or fully and unconditionally guaranteed by any state, commonwealth or territory of the United States of America, or by any political subdivision or taxing authority thereof, and rated at least “A” by S&P or Moody’s; and

(6) any mutual fund that has at least 95% of its assets continuously invested in investments of the types described in clauses (1) through (5) above.

“*Trade Payables*” means, with respect to any Person, any accounts payable or any other indebtedness or monetary obligation to trade creditors created, assumed or Guaranteed by such Person or any of its Subsidiaries arising in the ordinary course of business in connection with the acquisition of goods or services.

“*Transaction Date*” means, with respect to the Incurrence of any Indebtedness, the date such Indebtedness is to be Incurred and, with respect to any Restricted Payment, the date such Restricted Payment is to be made.

“*Trustee*” means the party named as such in the first paragraph of the Indenture or any successor trustee under the Indenture pursuant to Article 7.

“*Trust Indenture Act*” means the Trust Indenture Act of 1939, as amended.

“*2011 Notes Indenture*” means the indenture dated as of June 8, 2004, between the Company and The Bank of New York, as trustee, as amended or supplemented from time to time.

“*2013 Notes Indenture*” means the indenture dated as of September 19, 2005 between the Company and The Bank of New York, as trustee, as amended or supplemented from time to time.

“*Unrestricted Subsidiary*” means (1) any Subsidiary of the Company that at the time of determination shall be designated an Unrestricted Subsidiary by the Board of Directors in the manner provided below; and (2) any Subsidiary of an Unrestricted Subsidiary. The Board of Directors may designate any Restricted Subsidiary or Regulated Subsidiary (including any newly acquired or newly formed Subsidiary of the Company) to be an Unrestricted Subsidiary unless such Subsidiary owns any Capital Stock of, or owns or holds any Lien on any property of, the Company or any Restricted Subsidiary; provided that (A) any Guarantee by the Company or any Restricted Subsidiary of any Indebtedness of the Subsidiary being so designated shall be deemed an “Incurrence” of such Indebtedness and an “Investment” by the Company or such Restricted Subsidiary (or both, if applicable) at the time of such designation; (B) either (I) the Subsidiary to be so designated has total assets of \$1,000 or less or (II) if such Subsidiary has assets greater than \$1,000, such designation would be permitted under Section 4.04 and (C) if applicable, the Incurrence of Indebtedness and the Investment referred to in clause (A) of this proviso would be permitted under the Section 4.03 and Section 4.04. The Board of Directors may designate any Unrestricted Subsidiary to be a Restricted Subsidiary; provided that (a) no Default

or Event of Default shall have occurred and be continuing at the time of or after giving effect to such designation and (b) all Liens and Indebtedness of such Unrestricted Subsidiary outstanding immediately after such designation would, if Incurred at such time, have been permitted to be Incurred (and shall be deemed to have been Incurred) for all purposes of the Indenture. Any such designation by the Board of Directors shall be evidenced to the Trustee by promptly filing with the Trustee a copy of the Board Resolution giving effect to such designation and an Officers' Certificate certifying that such designation complied with the foregoing provisions.

“*U.S. Government Obligations*” means securities that are (1) direct obligations of the United States of America for the payment of which its full faith and credit is pledged or (2) obligations of a Person controlled or supervised by and acting as an agency or instrumentality of the United States of America the payment of which is unconditionally guaranteed as a full faith and credit obligation by the United States of America, which, in either case, are not callable or redeemable at the option of the issuer thereof at any time prior to the Stated Maturity of the Notes, and shall also include a depository receipt issued by a bank or trust company as custodian with respect to any such U.S. Government Obligation or a specific payment of interest on or principal of any such U.S. Government Obligation held by such custodian for the account of the holder of a depository receipt; provided that (except as required by law) such custodian is not authorized to make any deduction from the amount payable to the holder of such depository receipt from any amount received by the custodian in respect of the U.S. Government Obligation or the specific payment of interest on or principal of the U.S. Government Obligation evidenced by such depository receipt.

“*Voting Stock*” means with respect to any Person, Capital Stock of any class or kind ordinarily having the power to vote for the election of directors, managers or other voting members of the governing body of such Person.

“*Wholly Owned*” means, with respect to any Subsidiary of any Person, the ownership all of the outstanding Capital Stock of such Subsidiary by such Person or one or more Wholly Owned Subsidiaries of such Person.

Section 1.02. *Incorporation by Reference of Trust Indenture Act.* Whenever this Indenture refers to a provision of the Trust Indenture Act of 1939, as amended (the “TIA”), the provision is incorporated by reference in and made a part of this Indenture. The following TIA terms used in this Indenture have the following meanings:

“indenture securities” means the Notes;

“indenture security holder” means a Holder or a Noteholder;

“indenture to be qualified” means this Indenture;

“indenture trustee” or “institutional trustee” means the Trustee; and

“obligor” on the indenture securities means the Company or any other obligor on the Notes.

All other TIA terms used in this Indenture that are defined by the TIA, defined by TIA reference to another statute or defined by a rule of the Commission and not otherwise defined herein have the meanings assigned to them therein.

Section 1.03. *Rules of Construction.* Unless the context otherwise requires:

- (i) a term has the meaning assigned to it;
- (ii) an accounting term not otherwise defined has the meaning assigned to it in accordance with GAAP;
- (iii) “or” is not exclusive;
- (iv) words in the singular include the plural, and words in the plural include the singular;
- (v) provisions apply to successive events and transactions;
- (vi) “herein,” “hereof” and other words of similar import refer to this Indenture as a whole and not to any particular Article, Section or other subdivision;
- (vii) all ratios and computations based on GAAP contained in this Indenture shall be computed in accordance with the definition of GAAP set forth in Section 1.01; and
- (viii) all references to Sections or Articles refer to Sections or Articles of this Indenture unless otherwise indicated.

ARTICLE II
THE NOTES

Section 2.01. *Form, Dating and Denominations.* The Notes and the Trustee’s certificate of authentication will be substantially in the form attached as Exhibit A. The terms and provisions contained in the form of the Notes annexed as Exhibit A constitute, and are hereby expressly made, a part of the Indenture. The Notes may have notations, legends or endorsements required by law, rules of or agreements with national securities exchanges to which the Company is subject, or usage. Each Note will be dated the date of its authentication. The Notes will be issuable in denominations of \$1,000 in principal amount and any multiple of \$1,000 in excess thereof.

Section 2.02. *Execution and Authentication.*

(a) An Officer shall execute the Notes for the Company by facsimile or manual signature in the name and on behalf of the Company. If an Officer whose signature is on a Note no longer holds that office at the time the Note is authenticated, the Note will still be valid.

(b) A Note will not be valid until the Trustee manually signs the certificate of authentication on the Note, with the signature conclusive evidence that the Note has been authenticated under the Indenture.

(c) At any time and from time to time after the execution and delivery of the Indenture, the Company may deliver Notes executed by the Company to the Trustee for authentication. The Trustee will authenticate and deliver Notes for original issue in the aggregate principal amount not to exceed \$300,000,000 upon receipt by the Trustee of an Officers' Certificate specifying

- (1) the amount of Notes to be authenticated and the date on which the Notes are to be authenticated,
- (2) whether the Notes are to be issued as one or more Global Notes or Certificated Notes, and
- (3) other information the Company may determine to include or the Trustee may reasonably request.

The Notes shall be issuable only in registered form without coupons and only in denominations of \$1,000 in principal amount and any integral multiple thereof.

Section 2.03. *Registrar, Paying Agent and Authenticating Agent; Paying Agent to Hold Money in Trust.*

(a) The Company may appoint one or more Registrars and one or more Paying Agents, and the Trustee may appoint an Authenticating Agent, in which case each reference in the Indenture to the Trustee in respect of the obligations of the Trustee to be performed by that Agent will be deemed to be references to the Agent. The Company may act as Registrar or (except for purposes of Article 8) Paying Agent. In each case the Company and the Trustee will enter into an appropriate agreement with the Agent implementing the provisions of the Indenture relating to the obligations of the Trustee to be performed by the Agent and the related rights. The Company initially appoints the Trustee as Registrar and Paying Agent.

(b) The Company will require each Paying Agent other than the Trustee to agree in writing that the Paying Agent will hold in trust for the benefit of the Holders or the Trustee all money held by the Paying Agent for the payment of principal of and interest on the Notes and will promptly notify the Trustee of

any default by the Company in making any such payment. If the Company or any Subsidiary acts as Paying Agent, it shall segregate the money held by it as Paying Agent and hold it as a separate trust fund. The Company at any time may require a Paying Agent to pay all money held by it to the Trustee and account for any funds disbursed, and the Trustee may at any time during the continuance of any payment default, upon written request to a Paying Agent, require the Paying Agent to pay all money held by it to the Trustee and to account for any funds disbursed. Upon doing so, the Paying Agent will have no further liability for the money so paid over to the Trustee.

Section 2.04. *Replacement Notes.* If a mutilated Note is surrendered to the Trustee or if a Holder claims that its Note has been lost, destroyed or wrongfully taken, the Company will issue and the Trustee will authenticate a replacement Note of like tenor and principal amount and bearing a number not contemporaneously outstanding. Every replacement Note is an additional obligation of the Company and entitled to the benefits of the Indenture; provided that (i) the requirements of Section 8-405 of the Uniform Commercial Code are met, such that the Holder (a) satisfies the Company that such requirements have been met within a reasonable time after such Holder has notice of such loss, destruction or wrongful taking and the Registrar does not register a transfer prior to receiving such notification, (b) makes such request to the Company prior to the Note being acquired by a protected purchaser as defined in Section 8-303 of the Uniform Commercial Code (a "protected purchaser") and (c) satisfies any other reasonable requirements of the Trustee, and (ii) the requirements of this Section 2.04 are met. An affidavit of lost certificate and an indemnity bond must be furnished that is sufficient in the judgment of both the Trustee and the Company to protect the Company, the Trustee or any Agent from any loss that any of them may suffer if a Note is replaced. The Company may charge the Holder for the expenses of the Company and the Trustee in replacing a Note. In case the mutilated, lost, destroyed or wrongfully taken Note has become or is about to become due and payable, the Company in its discretion may pay the Note instead of issuing a replacement Note.

Section 2.05. *Outstanding Notes*

(a) Notes outstanding at any time are all Notes that have been authenticated by the Trustee except for

- (1) Notes cancelled by the Trustee or delivered to it for cancellation;
- (2) any Note which has been replaced pursuant to Section 2.04 unless and until the Trustee and the Company receive proof satisfactory to them that the replaced Note is held by a *bona fide* purchaser; and
- (3) on or after the maturity date or any redemption date or date for purchase of the Notes pursuant to an Offer to Purchase, those Notes

payable or to be redeemed or purchased on that date for which the Trustee (or Paying Agent, other than the Company or an Affiliate of the Company) holds money sufficient to pay all amounts then due.

(b) A Note does not cease to be outstanding because the Company or one of its Affiliates holds the Note, *provided* that in determining whether the Holders of the requisite principal amount of the outstanding Notes have given or taken any request, demand, authorization, direction, notice, consent, waiver or other action hereunder, Notes owned by the Company or any Affiliate of the Company will be disregarded and deemed not to be outstanding, (it being understood that in determining whether the Trustee is protected in relying upon any such request, demand, authorization, direction, notice, consent, waiver or other action, only Notes which the Trustee knows to be so owned will be so disregarded). Notes so owned which have been pledged in good faith may be regarded as outstanding if the pledgee establishes to the satisfaction of the Trustee the pledgee's right so to act with respect to such Notes and that the pledgee is not the Company or any Affiliate of the Company.

Section 2.06. *Temporary Notes.* Until definitive Notes are ready for delivery, the Company may prepare and the Trustee will authenticate temporary Notes. Temporary Notes will be substantially in the form of definitive Notes but may have insertions, substitutions, omissions and other variations determined to be appropriate by the Officer executing the temporary Notes, as evidenced by the execution of the temporary Notes. If temporary Notes are issued, the Company will cause definitive Notes to be prepared without unreasonable delay. After the preparation of definitive Notes, the temporary Notes will be exchangeable for definitive Notes upon surrender of the temporary Notes at the office or agency of the Company designated for the purpose pursuant to Section 4.02, without charge to the Holder. Upon surrender for cancellation of any temporary Notes the Company will execute and the Trustee will authenticate and deliver in exchange therefor a like principal amount of definitive Notes of authorized denominations. Until so exchanged, the temporary Notes will be entitled to the same benefits under the Indenture as definitive Notes.

Section 2.07. *Cancellation.* The Company at any time may deliver to the Trustee for cancellation any Notes previously authenticated and delivered hereunder which the Company may have acquired in any manner whatsoever, and may deliver to the Trustee for cancellation any Notes previously authenticated hereunder which the Company has not issued and sold. Any Registrar or the Paying Agent will forward to the Trustee any Notes surrendered to it for transfer, exchange or payment. The Trustee will cancel all Notes surrendered for transfer, exchange, payment or cancellation and dispose of them in accordance with its normal procedures or the written instructions of the Company. The Company may not issue new Notes to replace Notes it has paid in full or delivered to the Trustee for cancellation.

Section 2.08. *CUSIP and CINS Numbers.* The Company in issuing the Notes may use “CUSIP” and “CINS” numbers, and the Trustee will use CUSIP numbers or CINS numbers in notices of redemption or exchange or in Offers to Purchase as a convenience to Holders, the notice to state that no representation is made as to the correctness of such numbers either as printed on the Notes or as contained in any notice of redemption or exchange or Offer to Purchase. The Company will promptly notify the Trustee in writing of any change in the CUSIP or CINS numbers.

Section 2.09. *Registration, Transfer and Exchange.*

(a) The Notes will be issued in registered form only, without coupons, and the Company shall cause the Trustee to maintain a register (the “Register”) of the Notes, for registering the record ownership of the Notes by the Holders and transfers and exchanges of the Notes.

(b) (1) Each Global Note will be registered in the name of the Depository or its nominee and, so long as DTC is serving as the Depository thereof, will bear the DTC Legend.

(2) Each Global Note will be delivered to the Trustee as custodian for the Depository. Transfers of a Global Note (but not a beneficial interest therein) will be limited to transfers thereof in whole, but not in part, to the Depository, its successors or their respective nominees, except (1) as set forth in Section 2.09(b)(4) and (2) transfers of portions thereof in the form of Certificated Notes may be made upon request of an Agent Member (for itself or on behalf of a beneficial owner) by written notice given to the Trustee by or on behalf of the Depository in accordance with customary procedures of the Depository and in compliance with this Section 2.09 and Section 2.10.

(3) Agent Members will have no rights under the Indenture with respect to any Global Note held on their behalf by the Depository, and the Depository may be treated by the Company, the Trustee and any agent of the Company or the Trustee as the absolute owner and Holder of such Global Note for all purposes whatsoever. Notwithstanding the foregoing, the Depository or its nominee may grant proxies and otherwise authorize any Person (including any Agent Member and any Person that holds a beneficial interest in a Global Note through an Agent Member) to take any action which a Holder is entitled to take under the Indenture or the Notes, and nothing herein will impair, as between the Depository and its Agent Members, the operation of customary practices governing the exercise of the rights of a holder of any security.

(4) If (x) the Depository notifies the Company that it is unwilling or unable to continue as Depository for a Global Note and a successor depository is not appointed by the Company within 90 days of

the notice or (y) an Event of Default has occurred and is continuing and the Trustee has received a request from the Depository, the Trustee will promptly exchange each beneficial interest in the Global Note for one or more Certificated Notes in authorized denominations having an equal aggregate principal amount registered in the name of the owner of such beneficial interest, as identified to the Trustee by the Depository, and thereupon the Global Note will be deemed canceled.

(c) Each Certificated Note will be registered in the name of the holder thereof or its nominee.

(d) A Holder may transfer a Note (or a beneficial interest therein) to another Person or exchange a Note (or a beneficial interest therein) for another Note or Notes of any authorized denomination by presenting to the Trustee a written request therefor stating the name of the proposed transferee or requesting such an exchange, accompanied by any certification, opinion or other document required by Section 2.10. The Trustee will promptly register any transfer or exchange that meets the requirements of this Section 2.09 by noting the same in the register maintained by the Trustee for the purpose; provided that

(x) no transfer or exchange will be effective until it is registered in such register and

(y) the Trustee will not be required (i) to issue, register the transfer of or exchange any Note for a period of 15 days before a selection of Notes to be redeemed or purchased pursuant to an Offer to Purchase, (ii) to register the transfer of or exchange any Note so selected for redemption or purchase in whole or in part, except, in the case of a partial redemption or purchase, that portion of any Note not being redeemed or purchased, or (iii) if a redemption or a purchase pursuant to an Offer to Purchase is to occur after a Regular Record Date but on or before the corresponding Interest Payment Date, to register the transfer of or exchange any Note on or after the Regular Record Date and before the date of redemption or purchase. Prior to the registration of any transfer, the Company, the Trustee and their agents will treat the Person in whose name the Note is registered as the owner and Holder thereof for all purposes (whether or not the Note is overdue), and will not be affected by notice to the contrary.

From time to time the Company will execute and the Trustee will authenticate additional Notes as necessary in order to permit the registration of a transfer or exchange in accordance with this Section 2.09.

No service charge will be imposed in connection with any transfer or exchange of any Note, but the Company may require payment of a sum sufficient to cover any transfer tax or similar governmental charge payable in connection therewith (other than a transfer tax or other similar governmental charge payable upon exchange pursuant to subsection (b)(4)).

(e) (1) *Global Note to Global Note*. If a beneficial interest in a Global Note is transferred or exchanged for a beneficial interest in another Global Note, the Trustee will (x) record a decrease in the principal amount of the Global Note being transferred or exchanged equal to the principal amount of such transfer or exchange and (y) record a like increase in the principal amount of the other Global Note. Any beneficial interest in one Global Note that is transferred to a Person who takes delivery in the form of an interest in another Global Note, or exchanged for an interest in another Global Note, will, upon transfer or exchange, cease to be an interest in such Global Note and become an interest in the other Global Note and, accordingly, will thereafter be subject to all transfer and exchange restrictions, if any, and other procedures applicable to beneficial interests in such other Global Note for as long as it remains such an interest.

(2) *Global Note to Certificated Note*. If a beneficial interest in a Global Note is transferred or exchanged for a Certificated Note, the Trustee will (x) record a decrease in the principal amount of such Global Note equal to the principal amount of such transfer or exchange and (y) deliver one or more new Certificated Notes in authorized denominations having an equal aggregate principal amount to the transferee (in the case of a transfer) or the owner of such beneficial interest (in the case of an exchange), registered in the name of such transferee or owner, as applicable.

(3) *Certificated Note to Global Note*. If a Certificated Note is transferred or exchanged for a beneficial interest in a Global Note, the Trustee will (x) cancel such Certificated Note, (y) record an increase in the principal amount of such Global Note equal to the principal amount of such transfer or exchange and (z) in the event that such transfer or exchange involves less than the entire principal amount of the canceled Certificated Note, deliver to the Holder thereof one or more new Certificated Notes in authorized denominations having an aggregate principal amount equal to the untransferred or unexchanged portion of the canceled Certificated Note, registered in the name of the Holder thereof.

(4) *Certificated Note to Certificated Note*. If a Certificated Note is transferred or exchanged for another Certificated Note, the Trustee will (x) cancel the Certificated Note being transferred or exchanged, (y) deliver one or more new Certificated Notes in authorized denominations having an aggregate principal amount equal to the principal amount of such transfer or exchange to the transferee (in the case of a transfer) or the Holder of the canceled Certificated Note (in the case of an exchange), registered in the name of such transferee or Holder, as applicable, and (z) if such transfer or exchange involves less than the entire principal amount of the canceled Certificated Note, deliver to the Holder thereof one or

more Certificated Notes in authorized denominations having an aggregate principal amount equal to the untransferred or unexchanged portion of the canceled Certificated Note, registered in the name of the Holder thereof.

Section 2.10. *Restrictions on Transfer and Exchange.* The transfer or exchange of any Note (or a beneficial interest therein) may only be made in accordance with Section 2.09 and, in the case of a Global Note (or a beneficial interest therein), the applicable rules and procedures of the Depository. The Trustee shall refuse to register any requested transfer or exchange that does not comply with the preceding sentence.

ARTICLE III
REDEMPTION; OFFER TO PURCHASE

Section 3.01. *Optional Redemption.* At any time and from time to time on or after December 1, 2010, the Company may redeem the Notes, in whole or in part, at a redemption price equal to the percentage of principal amount set forth below plus accrued and unpaid interest to the redemption date.

12- month period commencing December 1,	Percentage
2010	103.938%
2011	102.625%
2012	101.313%
2013 and thereafter	100.000%

Section 3.02. *Redemption with Proceeds of Public Equity Offering.* At any time and from time to time prior to December 1, 2008, the Company may redeem Notes with the Net Cash Proceeds received by the Company from one or more sales of its Capital Stock (other than Disqualified Stock) at a redemption price equal to 107.875% of the principal amount plus accrued and unpaid interest, *provided* that at least 65% of the aggregate principal amount of Notes originally issued on the Closing Date remains outstanding after each such redemption and notice of any such redemption is mailed within 90 days of each such sale of Capital Stock.

Section 3.03. *Method and Effect of Redemption*

(a) If the Company elects to redeem Notes, it must notify the Trustee of the redemption date and the principal amount of Notes to be redeemed by delivering an Officers' Certificate not less than 15 days nor more than 90 days before the redemption date. If fewer than all of the Notes are being redeemed, the Officers' Certificate must also specify a record date not less than 15 days after the date of the notice of redemption is given to the Trustee, and the Trustee will select the Notes for redemption (1) in compliance with the requirements of the principal national securities exchange, if any, on which the Notes are listed, or, (2) if the

Notes are not listed on a national securities exchange, by lot or by such other method as the Trustee in its sole discretion shall deem to be fair and appropriate, in each case in denominations of \$1,000 principal amount and multiples thereof. The Trustee will notify the Company promptly of the Notes or portions of Notes to be called for redemption. Notice of redemption must be sent by the Company or at the Company's request, by the Trustee in the name and at the expense of the Company, to Holders whose Notes are to be redeemed at least 10 days but not more than 90 days before the redemption date, except where DTC requires a longer period.

(b) The notice of redemption will identify the Notes (including the CUSIP numbers) to be redeemed and will include or state the following:

- (1) the redemption date;
- (2) the redemption price, including the portion thereof representing any accrued interest;
- (3) the place or places where Notes are to be surrendered for redemption;
- (4) Notes called for redemption must be so surrendered in order to collect the redemption price;
- (5) on the redemption date the redemption price will become due and payable on Notes called for redemption, and interest on Notes called for redemption will cease to accrue on and after the redemption date;
- (6) if any Note is redeemed in part, on and after the redemption date, upon surrender of such Note, new Notes equal in principal amount to the unredeemed portion will be issued; and
- (7) if any Note contains a CUSIP or CINS number, no representation is being made as to the correctness of the CUSIP or CINS number either as printed on the Notes or as contained in the notice of redemption and that the Holder should rely only on the other identification numbers printed on the Notes.

(c) Once notice of redemption is sent to the Holders, Notes called for redemption become due and payable at the redemption price on the redemption date, and upon surrender of the Notes called for redemption, the Company shall redeem such Notes at the redemption price. Commencing on the redemption date, Notes redeemed will cease to accrue interest. Upon surrender of any Note redeemed in part, the Holder will receive a new Note equal in principal amount to the unredeemed portion of the surrendered Note.

ARTICLE IV
COVENANTS

Section 4.01. *Payment of Notes.* The Company shall pay, or cause to be paid, the principal of, premium, if any, and interest on the Notes of any series on the dates and in the manner provided in the Notes of that series and this Indenture. An installment of principal, premium, if any, or interest shall be considered paid on the date due if the Trustee or Paying Agent (other than the Company, a Subsidiary of the Company, or any Affiliate of any of them) holds as of 10:00 a.m. (New York City time) on that date money designated for and sufficient to pay the installment. If the Company or any Subsidiary of the Company or any Affiliate of any of them acts as Paying Agent, an installment of principal, premium, if any, or interest shall be considered paid on the due date if the entity acting as Paying Agent complies with the last sentence of Section 2.02. As provided in Section 6.07, upon any bankruptcy or reorganization procedure relative to the Company, the Trustee shall serve as the Paying Agent, if any, for the Notes.

The Company shall pay interest on overdue principal and premium, if any, and interest on overdue installments of interest, to the extent lawful, at the rate per annum specified in the Notes.

Section 4.02. *Maintenance of Office or Agency.* The Company will maintain in the Borough of Manhattan, The City of New York, an office or agency where Notes of one or more series may be surrendered for registration of transfer or exchange or for presentation for payment and where notices and demands to or upon the Company in respect of the Notes of those series and this Indenture may be served. The Company will give prompt written notice to the Trustee of the location, and any change in the location, of such office or agency. If at any time the Company shall fail to maintain any such required office or agency or shall fail to furnish the Trustee with the address thereof, such presentations, surrenders, notices and demands may be made or served at the address of the Trustee set forth in Section 11.03.

The Company may also from time to time designate one or more other offices or agencies where the Notes of one or more series may be presented or surrendered for any or all such purposes and may from time to time rescind such designations; provided that no such designation or rescission shall in any manner relieve the Company of its obligation to maintain an office or agency in the Borough of Manhattan, The City of New York, for such purposes. The Company shall give prompt written notice to the Trustee of any such designation or rescission and of any change in the location of any such other office or agency.

The Company hereby initially designates the Corporate Trust Office of the Trustee as such office of the Company in accordance with Section 2.03.

Section 4.03. *Limitation on Indebtedness and Issuances of Preferred Stock*

(a) The Company will not, and will not permit any of its Restricted Subsidiaries to, Incur any Indebtedness, including Disqualified Stock (other than the Notes, any Notes Guarantees, the 2013 Notes, the 2011 Notes and Indebtedness existing on the Closing Date), and the Company will not permit any Restricted Subsidiary to issue Preferred Stock; provided that the Company or any Subsidiary Guarantor may Incur Indebtedness and any Restricted Subsidiary may Incur Acquired Indebtedness if, after giving effect to the Incurrence of such Indebtedness and the receipt and application of the proceeds therefrom, the Consolidated Fixed Charge Coverage Ratio would be greater than 2.5:1.

Notwithstanding the foregoing, the Company and any Restricted Subsidiary (except as specified below) may Incur each and all of the following:

(1) Indebtedness of the Company under any Credit Facility in an aggregate principal amount at any one time outstanding (with letters of credit being deemed to have a principal amount equal to the maximum potential liability of the Company and its Restricted Subsidiaries thereunder) not to exceed \$300 million;

(2) Indebtedness owed (A) to the Company or any Subsidiary Guarantor evidenced by an unsubordinated promissory note or (B) to any Restricted Subsidiary or Regulated Subsidiary; provided that (x) any event which results in any such Restricted Subsidiary or Regulated Subsidiary ceasing to be a Restricted Subsidiary or Regulated Subsidiary or any subsequent transfer of such Indebtedness (other than to the Company or another Restricted Subsidiary or Regulated Subsidiary) shall be deemed, in each case, to constitute an Incurrence of such Indebtedness not permitted by this clause (2) and (y) if the Company (or any Subsidiary that is a Subsidiary Guarantor at the time such Indebtedness is Incurred) is the obligor on such Indebtedness, such Indebtedness must be expressly contractually subordinated in right of payment to the Notes, in the case of the Company, or the Note Guarantee, in the case of a Subsidiary Guarantor;

(3) Indebtedness issued in exchange for, or the net proceeds of which are used to refinance or refund, then outstanding Indebtedness (other than Indebtedness outstanding under clause (1), (2) or (4)) and any refinancings thereof in an amount not to exceed the amount so refinanced or refunded (plus premiums, accrued interest, fees and expenses); provided that (a) Indebtedness the proceeds of which are used to refinance or refund the Notes or Indebtedness that is pari passu with, or subordinated in right of payment to, the Notes or a Note Guarantee shall only be permitted under this clause (3) if (x) in case the Notes are refinanced in part or the Indebtedness to be refinanced is pari passu with

the Notes or a Note Guarantee, such new Indebtedness, by its terms or by the terms of any agreement or instrument pursuant to which such new Indebtedness is outstanding, is expressly made pari passu with, or subordinate in right of payment to, the remaining Notes or the Note Guarantee, or (y) in case the Indebtedness to be refinanced is subordinated in right of payment to the Notes or a Note Guarantee, such new Indebtedness, by its terms or by the terms of any agreement or instrument pursuant to which such new Indebtedness is issued or remains outstanding, is expressly made subordinate in right of payment to the Notes or the Note Guarantee at least to the extent that the Indebtedness to be refinanced is subordinated to the Notes or the Note Guarantee, (b) such new Indebtedness, determined as of the date of Incurrence of such new Indebtedness, does not mature prior to the Stated Maturity of the Indebtedness to be refinanced or refunded, and the Average Life of such new Indebtedness is at least equal to the remaining Average Life of the Indebtedness to be refinanced or refunded and (c) such new Indebtedness is Incurred by the Company or a Subsidiary Guarantor or by the Restricted Subsidiary that is the obligor on the Indebtedness to be refinanced or refunded;

(4) Indebtedness of the Company, to the extent the net proceeds thereof are promptly (A) used to purchase Notes, 2013 Notes or 2011 Notes tendered in an Offer to Purchase made as a result of a Change in Control or (B) deposited to defease the Notes, 2013 Notes or 2011 Notes as set forth in Article 8; and

(5) Guarantees of Indebtedness of the Company or of any Restricted Subsidiary by any Restricted Subsidiary provided the Guarantee of such Indebtedness is permitted by and made in accordance with Section 4.07.

(b) Notwithstanding any other provision of this Section 4.03, the maximum amount of Indebtedness that may be Incurred pursuant to this Section 4.03 will not be deemed to be exceeded, with respect to any outstanding Indebtedness due solely to the result of fluctuations in the exchange rates of currencies or due to fluctuations in the value of commodities or securities which underlie such Indebtedness. For the purposes of determining compliance with any restriction on the Incurrence of Indebtedness (x), the U.S dollar equivalent principal amount of any Indebtedness denominated in a foreign currency shall be calculated based on the relevant currency exchange rate in effect on the date such Indebtedness was Incurred, in the case of term debt, or first committed, in the case of revolving credit debt and (y) the principal amount of any Indebtedness which is calculated by reference to any underlying security or commodity shall be calculated based on the relevant closing price of such commodity or security on the date such Indebtedness was incurred.

(c) For purposes of determining any particular amount of Indebtedness under this Section 4.03, (x) Indebtedness outstanding under any Credit Facility on the Closing Date shall be treated as Incurred pursuant to clause (1) of the second paragraph of clause (a) of this Section 4.03, (y) Guarantees, Liens or obligations with respect to letters of credit supporting Indebtedness otherwise included in the determination of such particular amount shall not be included and (z) any Liens granted pursuant to the equal and ratable provisions referred to in Section 4.09 shall not be treated as Indebtedness. For purposes of determining compliance with this Section 4.03, if an item of Indebtedness meets the criteria of more than one of the types of Indebtedness described above (other than Indebtedness referred to in clause (x) of the preceding sentence), including under the first paragraph of part (a), the Company, in its sole discretion, shall classify, and from time to time may reclassify, such item of Indebtedness.

(d) Neither the Company nor any Subsidiary Guarantor will Incur any Indebtedness if such Indebtedness is subordinate in right of payment to any other Indebtedness unless such Indebtedness is also subordinate in right of payment to the Notes or the applicable Note Guarantee to the same extent.

(e) The Company will not permit any Regulated Subsidiary (x) to Incur any Indebtedness the proceeds of which are not invested in the business of such Bank Regulated Subsidiary (or any Subsidiary of such Bank Regulated Subsidiary) or such Broker Dealer Regulated Subsidiary (or any Subsidiary of such Broker Dealer Regulated Subsidiary which is also a Regulated Subsidiary) and (y) to Incur any Indebtedness for the purpose, directly or indirectly, of dividending or distributing the proceeds of such Indebtedness to the Company or any Restricted Subsidiary; except that the Incurrence of Indebtedness by a Regulated Subsidiary that does not comply with (x) and (y) above shall be permitted provided that such Incurrence complies with paragraph (a) of this Section 4.03 as if such paragraph applied to such Regulated Subsidiary.

Section 4.04. *Limitation on Restricted Payments.*

(a) The Company will not, and will not permit any Restricted Subsidiary or Regulated Subsidiary to, directly or indirectly,

(1) declare or pay any dividend or make any distribution on or with respect to its Capital Stock held by Persons other than the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries (other than (w) dividends or distributions payable solely in shares of its Capital Stock (other than Disqualified Stock) or in options, warrants or other rights to acquire shares of such Capital Stock, (x) pro rata dividends or distributions on Common Stock of Restricted Subsidiaries or Regulated Subsidiaries held by minority stockholders, (y) dividends or distributions on non-voting Preferred Stock the proceeds from the sale of which were invested in the business of such Regulated Subsidiary (or any Subsidiary of such Regulated Subsidiary which is also a Regulated Subsidiary), and (z) pro rata dividends on Preferred Stock of Subsidiaries that are real estate investment trusts, including Highland REIT, Inc., held by minority stockholders;

(2) purchase, call for redemption or redeem, retire or otherwise acquire for value any shares of Capital Stock of (A) the Company or any Subsidiary Guarantor (including options, warrants or other rights to acquire such shares of Capital Stock) held by any Person (other than the Company, any Restricted Subsidiary or any Regulated Subsidiary) or (B) a Restricted Subsidiary or Subsidiary Guarantor (including options, warrants or other rights to acquire such shares of Capital Stock) held by any Affiliate of the Company (other than the Company or a Wholly Owned Restricted Subsidiary or Wholly Owned Regulated Subsidiary);

(3) make any voluntary or optional principal payment, or voluntary or optional redemption, repurchase, defeasance, or other acquisition or retirement for value, of Indebtedness of the Company that is subordinated in right of payment to the Notes or any Indebtedness of a Subsidiary Guarantor that is subordinated in right of payment to a Note Guarantee; or

(4) (a) with respect to the Company and any Restricted Subsidiary, make any Investment, other than a Permitted Investment, in any Person, and (b) with respect to any Regulated Subsidiary, make any Investment in an Unrestricted Subsidiary (such payments or any other actions described in clauses (1) through (4) above being collectively "Restricted Payments");

if, at the time of, and after giving effect to, the proposed Restricted Payment:

(A) a Default or Event of Default shall have occurred and be continuing;

(B) the Company could not Incur at least \$1.00 of Indebtedness under the first paragraph of part (a) of Section 4.03;

(C) the subsidiary subject to the Restricted Payment is both a Regulated Subsidiary and a Significant Subsidiary that is not in compliance with applicable regulatory capital or other material requirements of its regulators, such as the OTS or FDIC, or any applicable state, federal or self-regulatory organization, or would fail to be in compliance with applicable regulatory requirements as a consequence of the payment; or

(D) the aggregate amount of all Restricted Payments made after the Closing Date shall exceed the sum of

(1) 50% of the aggregate amount of the Adjusted Consolidated Net Income (or, if the Adjusted Consolidated Net Income is a loss, minus

100% of the amount of such loss) accrued on a cumulative basis during the period (taken as one accounting period) beginning on April 1, 2004 and ending on the last day of such fiscal quarter preceding the Transaction Date for which reports have been filed with the SEC or provided to the Trustee, provided that such Adjusted Consolidated Net Income may only be recognized during those quarters for which the Company has filed reports with the SEC to the extent provided in Section 4.15 or has furnished comparable financial information to the Trustee *plus*

(2) the aggregate Net Cash Proceeds received by the Company after April 1, 2004 as a capital contribution or from the issuance and sale of its Capital Stock (other than Disqualified Stock or Preferred Stock) to a Person who is not a Subsidiary of the Company, including an issuance or sale permitted by the Indenture of Indebtedness of the Company for cash subsequent to April 1, 2004 upon the conversion of such Indebtedness into Capital Stock (other than Disqualified Stock) of the Company, or from the issuance to a Person who is not a Subsidiary of the Company of any options, warrants or other rights to acquire Capital Stock of the Company (in each case, exclusive of any Disqualified Stock or any options, warrants or other rights that are redeemable at the option of the holder, or are required to be redeemed, prior to the Stated Maturity of the Notes) *plus*

(3) an amount equal to the net reduction in Investments (other than reductions in Permitted Investments) in any Person resulting from payments of interest on Indebtedness, dividends, repayments of loans or advances, or other transfers of assets, in each case to the Company or any Restricted Subsidiary or Regulated Subsidiary or from the Net Cash Proceeds from the sale of any such Investment (except, in each case, to the extent any such payment or proceeds are included in the calculation of Adjusted Consolidated Net Income), from the release of any Guarantee or from redesignations of Unrestricted Subsidiaries as Restricted Subsidiaries (valued in each case as provided in the definition of "Investments"), not to exceed, in each case, the amount of Investments previously made by the Company or any Restricted Subsidiary or Regulated Subsidiary in such Person or Unrestricted Subsidiary *plus*

(4) \$100 million.

(b) The foregoing provision shall not be violated by reason of:

(1) the payment of any dividend or redemption of any Capital Stock within 60 days after the related date of declaration or call for redemption if, at said date of declaration or call for redemption, such payment or redemption would comply with the preceding paragraph;

(2) the redemption, repurchase, defeasance or other acquisition or retirement for value of Indebtedness that is subordinated in right of

payment to the Notes or any Note Guarantee including premium, if any, and accrued interest, with the proceeds of, or in exchange for, Indebtedness Incurred under clause (3) of the second paragraph of part (a) of Section 4.03;

(3) the repurchase, redemption or other acquisition of Capital Stock of the Company, a Subsidiary Guarantor, a Restricted Subsidiary or a Regulated Subsidiary (or options, warrants or other rights to acquire such Capital Stock) or a dividend on such Capital Stock in exchange for, or out of the proceeds of a capital contribution or a substantially concurrent offering of, shares of Capital Stock (other than Disqualified Stock) of the Company (or options, warrants or other rights to acquire such Capital Stock); *provided* that such options, warrants or other rights are not redeemable at the option of the holder, or required to be redeemed, in each case other than in connection with a Change of Control of the Company (provided that prior to any such repurchase, redemption or other acquisition in connection with a change of control, the Company has made an Offer to Purchase and purchased all Notes, 2013 Notes and 2011 Notes validly tendered for payment in accordance with Section 4.12), prior to the respective Stated Maturity of the Notes, 2013 Notes and 2011 Notes;

(4) the making of any principal payment or the repurchase, redemption, retirement, defeasance or other acquisition for value of Indebtedness which is subordinated in right of payment to the Notes or any Note Guarantee in exchange for, or out of the proceeds of a capital contribution or a substantially concurrent offering of, shares of the Capital Stock (other than Disqualified Stock) of the Company (or options, warrants or other rights to acquire such Capital Stock); *provided* that such options, warrants or other rights are not redeemable at the option of the holder, or required to be redeemed, in each case other than in connection with a Change of Control of the Company (provided that prior to any such repurchase, redemption or other acquisition in connection with a change of control, the Company has made an Offer to Purchase and purchased all Notes, 2013 Notes and 2011 Notes validly tendered for payment in accordance with Section 4.12), prior to the respective Stated Maturity of the Notes, 2013 Notes and 2011 Notes;

(5) payments or distributions to dissenting stockholders pursuant to applicable law, pursuant to or in connection with a consolidation, merger or transfer of assets of the Company, any Restricted Subsidiary or any Regulated Subsidiary and that, in the case of the Company, comply with the provisions of the Indenture applicable to mergers, consolidations and transfers of all or substantially all of the property and assets of the Company;

(6) Investments acquired as a capital contribution to, or in exchange for, or out of the proceeds of a substantially concurrent offering of, Capital Stock (other than Disqualified Stock) of the Company;

(7) the repurchase of Capital Stock deemed to occur upon the exercise of options or warrants if such Capital Stock represents all or a portion of the exercise price thereof;

(8) the repurchase, redemption or other acquisition of the Company's Capital Stock (or options, warrants or other rights to acquire such Capital Stock) from Persons who are, or were formerly, employees of the Company and their Affiliates, heirs and executors; *provided* that the aggregate amount of all such repurchases pursuant to this clause (8) shall not exceed \$50 million;

(9) the repurchase of Common Stock of the Company, or the declaration or payment of dividends on Common Stock (other than Disqualified Stock) of the Company; *provided* that the aggregate amount of all such declarations, payments or repurchases pursuant to this clause (9) shall not exceed \$100 million in any fiscal year; *provided further* that at the time of declaration of such dividend or at the time of such repurchase (x) no Default or Event of Default has occurred and is continuing, and (y) the Company is able to incur at least an additional \$1.00 of Indebtedness pursuant to the first paragraph of Section 4.03; or

(10) the repurchase, redemption or other acquisition of the Outstanding Convertible Notes,

provided that, except in the case of clause (1), no Default or Event of Default (excluding, in each case, clause (i) of Section 6.01) shall have occurred and be continuing or occur as a consequence of the actions or payments set forth therein.

(c) Each Restricted Payment permitted pursuant to the preceding paragraph (other than the Restricted Payment referred to in clause (10) thereof, clause (2) thereof, an exchange of Capital Stock for Capital Stock or Indebtedness referred to in clause (3) or (4) thereof, an Investment acquired as a capital contribution or in exchange for Capital Stock referred to in clause (6) thereof, the repurchase of Capital Stock referred to in clause (7) thereof, the repurchase of Common Stock referred to in clause (9) thereof), and the Net Cash Proceeds from any issuance of Capital Stock referred to in clause (3), (4) or (6), shall be included in calculating whether the conditions of clause (D) of the first paragraph of this Section 4.04 have been met with respect to any subsequent Restricted Payments. If the proceeds of an issuance of Capital Stock of the Company are used for the redemption, repurchase or other acquisition of the Notes, or Indebtedness that is *pari passu* with the Notes or any Note Guarantee, then the Net Cash Proceeds of such issuance shall be included in clause (D) of the first paragraph of this Section 4.04 only to the extent such proceeds are not used for such redemption, repurchase or other acquisition of Indebtedness.

(d) For purposes of determining compliance with this Section 4.04, (x) the amount, if other than in cash, of any Restricted Payment shall be determined in good faith by the Board of Directors, whose determination shall be conclusive and evidenced by a Board Resolution and (y) if a Restricted Payment meets the criteria of more than one of the types of Restricted Payments described in the above clauses, including the first paragraph of this Section 4.04, the Company, in its sole discretion, may order and classify, and from time to time may reclassify, such Restricted Payment if it would have been permitted at the time such Restricted Payment was made and at the time of such reclassification.

Section 4.05. *Limitation on Dividend and Other Payment Restrictions Affecting Restricted Subsidiaries or Regulated Subsidiaries.* The Company will not, and will not permit any Restricted Subsidiary or Regulated Subsidiary to, create or otherwise cause or suffer to exist or become effective any consensual encumbrance or restriction of any kind on the ability of any Restricted Subsidiary or Regulated Subsidiary (other than any Subsidiary Guarantor) to

- (1) pay dividends or make any other distributions permitted by applicable law on any Capital Stock of such Restricted Subsidiary or Regulated Subsidiary owned by the Company or any other Restricted Subsidiary or Regulated Subsidiary;
- (2) pay any Indebtedness owed to the Company or any other Restricted Subsidiary or Regulated Subsidiary;
- (3) make loans or advances to the Company or any other Restricted Subsidiary or Regulated Subsidiary; or
- (4) transfer any of its property or assets to the Company or any other Restricted Subsidiary or Regulated Subsidiary.

The foregoing provisions shall not restrict any encumbrances or restrictions:

- (1) existing on the Closing Date in any Credit Facility, the Indentures or any other agreements in effect on the Closing Date, and any extensions, refinancings, renewals or replacements of such agreements; provided that the encumbrances and restrictions in any such extensions, refinancings, renewals or replacements taken as a whole are no less favorable in any material respect to the Holders than those encumbrances or restrictions that are then in effect and that are being extended, refinanced, renewed or replaced;
- (2) existing under or by reason of applicable law including rules and regulations of and agreements with any regulatory authority

having jurisdiction over the Company, any Restricted Subsidiary, or any Regulated Subsidiary, including, but not limited to the OTS, the FDIC, the SEC or any self regulatory organization of which such Regulated Subsidiary is a member, or the imposition of conditions or requirements pursuant to the enforcement authority of any such regulatory authority;

(3) existing with respect to any Person or the property or assets of such Person acquired by the Company or any Restricted Subsidiary or Regulated Subsidiary, existing at the time of such acquisition and not incurred in contemplation thereof, which encumbrances or restrictions are not applicable to any Person or the property or assets of any Person other than such Person or the property or assets of such Person so acquired and any extensions, refinancings, renewals or replacements thereof; provided that the encumbrances and restrictions in any such extensions, refinancings, renewals or replacements taken as a whole are no less favorable in any material respect to the Holders than those encumbrances or restrictions that are then in effect and that are being extended, refinanced, renewed or replaced;

(4) in the case of clause (4) of the first paragraph of this Section 4.05:

(A) that restrict in a customary manner the subletting, assignment or transfer of any property or asset that is a lease, license, conveyance or contract or similar property or asset;

(B) existing by virtue of any transfer of, agreement to transfer, option or right with respect to, or Lien on, any property or assets of the Company, any Restricted Subsidiary or any Regulated Subsidiary not otherwise prohibited by the Indenture; or

(C) arising or agreed to in the ordinary course of business, not relating to any Indebtedness, and that do not, individually or in the aggregate, detract from the value of property or assets of the Company or any Restricted Subsidiary or Regulated Subsidiary in any manner material to the Company or any Restricted Subsidiary or Regulated Subsidiary taken as a whole; or

(5) with respect to a Restricted Subsidiary or Regulated Subsidiary and imposed pursuant to an agreement that has been entered into for the sale or disposition of all or substantially all of the Capital Stock of, or property and assets of, such Restricted Subsidiary or Regulated Subsidiary.

Nothing contained in this Section 4.05 shall prevent the Company, any Restricted Subsidiary or any Regulated Subsidiary from (1) creating, incurring,

assuming or suffering to exist any Liens otherwise permitted in Section 4.09 or (2) restricting the sale or other disposition of property or assets of the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries that secure Indebtedness of the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries.

Section 4.06. *Limitation on the Issuance and Sale of Capital Stock of Restricted Subsidiaries or Regulated Subsidiaries.* The Company will not sell, and will not permit any Restricted Subsidiary or Regulated Subsidiary, directly or indirectly, to issue or sell, any shares of Capital Stock of a Restricted Subsidiary or Regulated Subsidiary (including options, warrants or other rights to purchase shares of such Capital Stock) except:

(1) (i) with respect to the capital stock of a Restricted Subsidiary, to the Company or a Wholly Owned Restricted Subsidiary or, (ii) in the case of Regulated Subsidiary, to the Company, a Wholly Owned Restricted Subsidiary or a Wholly Owned Regulated Subsidiary;

(2) issuances of director's qualifying shares or sales to foreign nationals of shares of Capital Stock of foreign Restricted Subsidiaries, to the extent required by applicable law;

(3) if, immediately after giving effect to such issuance or sale, such Restricted Subsidiary would no longer constitute a Restricted Subsidiary and any Investment in such Person remaining after giving effect to such issuance or sale would have been permitted to be made under Section 4.04 if made on the date of such issuance or sale;

(4) (i) sales of Common Stock (including options, warrants or other rights to purchase shares of such Common Stock but excluding Disqualified Stock) of a Restricted Subsidiary or a Regulated Subsidiary by the Company, a Restricted Subsidiary or a Regulated Subsidiary, provided that the Company or such Restricted Subsidiary or Regulated Subsidiary applies the Net Cash Proceeds of any such sale in accordance with clause (A) or (B) of Section 4.11 and (ii) issuances of Preferred Stock of a Restricted Subsidiary if such Restricted Subsidiary would be entitled to Incur such Indebtedness under Section 4.03; or

(5) sales of Capital Stock, other than Common Stock, by a Regulated Subsidiary or a Subsidiary of such Regulated Subsidiary, the proceeds of which are invested in the business of such Regulated Subsidiary.

Section 4.07. *Future Subsidiary Guarantees.* The Company will not permit any Restricted Subsidiary or Regulated Subsidiary, directly or indirectly, to Guarantee any Indebtedness ("Guaranteed Indebtedness") of the Company or any Restricted Subsidiary (other than a Foreign Subsidiary), unless (a) such

Restricted Subsidiary or Regulated Subsidiary, to the extent permitted by law, simultaneously executes and delivers a supplemental indenture to the Indenture providing for a Guarantee (a "Subsidiary Guarantee") of payment of the Notes by such Restricted Subsidiary or Regulated Subsidiary and (b) such Restricted Subsidiary or Regulated Subsidiary waives and will not in any manner whatsoever claim or take the benefit or advantage of, any rights of reimbursement, indemnity or subrogation or any other rights against the Company or any other Restricted Subsidiary or Regulated Subsidiary as a result of any payment by such Restricted Subsidiary or Regulated Subsidiary under its Subsidiary Guarantee until the Notes have been paid in full. The obligations of any such future Subsidiary Guarantor will be limited so as not to constitute a fraudulent conveyance under applicable federal or state laws.

If the Guaranteed Indebtedness is (A) *pari passu* in right of payment with the Notes or any Note Guarantee, then the Guarantee of such Guaranteed Indebtedness shall be *pari passu* in right of payment with, or subordinated to, the Subsidiary Guarantee or (B) subordinated in right of payment to the Notes or any Note Guarantee, then the Guarantee of such Guaranteed Indebtedness shall be subordinated in right of payment to the Subsidiary Guarantee at least to the extent that the Guaranteed Indebtedness is subordinated to the Notes or the Notes Guarantee.

Notwithstanding the foregoing, any Subsidiary Guarantee by a Restricted Subsidiary or Regulated Subsidiary may provide by its terms that it shall be automatically and unconditionally released and discharged upon any:

(1) sale, exchange or transfer, to any Person not an Affiliate of the Company, of all of the Company's and each Restricted Subsidiary's and Regulated Subsidiary's Capital Stock in, or all or substantially all the assets of, such Restricted Subsidiary or Regulated Subsidiary (which sale, exchange or transfer is not prohibited by the Indenture) or upon the designation of such Restricted Subsidiary or Regulated Subsidiary as an Unrestricted Subsidiary in accordance with the terms of the Indenture; or

(2) the release or discharge of the Guarantee which resulted in the creation of such Subsidiary Guarantee, except a discharge or release by or as a result of payment under such Guarantee.

Section 4.08. *Limitation on Transactions with Shareholders and Affiliates.* The Company will not, and will not permit any Restricted Subsidiary or Regulated Subsidiary to, directly or indirectly, enter into, renew or extend any transaction (including, without limitation, the purchase, sale, lease or exchange of property or assets, or the rendering of any service) with any Affiliate of the Company or any Affiliates of any Restricted Subsidiary or Regulated Subsidiary, except upon fair and reasonable terms no less favorable to the Company or such Restricted Subsidiary or Regulated Subsidiary than could be obtained, at the time of such transaction or, if such transaction is pursuant to a written agreement, at the time of the execution of the agreement providing therefor, in a comparable arm's-length transaction with a Person that is not such a holder or an Affiliate.

The foregoing limitation does not limit, and shall not apply to:

(1) transactions (A) approved by a majority of the disinterested members of the Board of Directors or (B) for which the Company, a Restricted Subsidiary or a Regulated Subsidiary delivers to the Trustee a written opinion of a nationally recognized investment banking, accounting, valuation or appraisal firm stating that the transaction is fair to the Company or such Restricted Subsidiary or Regulated Subsidiary from a financial point of view;

(2) any transaction solely among the Company, its Wholly Owned Restricted Subsidiaries or its Wholly Owned Regulated Subsidiaries or any combination thereof;

(3) the payment of reasonable and customary regular fees to directors of the Company who are not employees of the Company and customary indemnification arrangements entered into by the Company;

(4) any payments or other transactions pursuant to any tax-sharing agreement between the Company and any other Person with which the Company files a consolidated tax return or with which the Company is part of a consolidated group for tax purposes;

(5) any sale of shares of Capital Stock (other than Disqualified Stock) of the Company;

(6) the granting or performance of registration rights under a written agreement and approved by the Board of Directors of the Company, containing customary terms, taken as a whole;

(7) loans to an Affiliate who is an officer, director or employee of the Company, a Restricted Subsidiary or a Regulated Subsidiary by a Regulated Subsidiary in the ordinary course of business in accordance with Sections 7 and 13(k) of the Exchange Act;

(8) deposit, checking, banking and brokerage products and services typically offered to our customers on substantially the same terms and conditions as those offered to our customers, or in the case of a Bank Regulated Subsidiary, as otherwise permitted under Regulation O promulgated by the Board of Governors of under the Federal Reserve System; or

(9) any Permitted Investments or any Restricted Payments not prohibited by Section 4.04.

Notwithstanding the foregoing, any transaction or series of related transactions covered by the first paragraph of this Section 4.08 and not covered by clauses (2) through (6) of this paragraph, (a) the aggregate amount of which exceeds \$15 million in value, must be approved or determined to be fair in the manner provided for in clause (1)(A) or (B) above and (b) the aggregate amount of which exceeds \$25 million in value, must be determined to be fair in the manner provided for in clause (1)(B) above.

Section 4.09. *Limitation on Liens.* The Company will not, and will not permit any Restricted Subsidiary to, create, incur, assume or suffer to exist any Lien on any of its assets or properties of any character, or any shares of Capital Stock or Indebtedness of any Restricted Subsidiary, without making effective provision for all of the Notes and all other amounts due under the Indenture to be directly secured equally and ratably with (or, if the obligation or liability to be secured by such Lien is subordinated in right of payment to the Notes, prior to) the obligation or liability secured by such Lien.

The foregoing limitation does not apply to:

- (1) Liens existing on the Closing Date;
- (2) Liens granted after the Closing Date on any assets or Capital Stock of the Company or its Restricted Subsidiaries created in favor of the Holders;
- (3) Liens with respect to the assets of a Restricted Subsidiary granted by such Restricted Subsidiary to the Company or a Wholly Owned Restricted Subsidiary or Wholly Owned Regulated Subsidiary to secure Indebtedness owing to the Company or such other Restricted Subsidiary or Regulated Subsidiary;
- (4) Liens securing Indebtedness which is Incurred to refinance secured Indebtedness which is permitted to be Incurred under clause (3) of the second paragraph of Section 4.03; provided that such Liens do not extend to or cover any property or assets of the Company or any Restricted Subsidiary or Regulated Subsidiary other than the property or assets securing the Indebtedness being refinanced;
- (5) Liens securing Indebtedness (including Hedging Obligations with respect thereto) in an aggregate amount not to exceed the greater of (x) \$300 million and (y) an amount equal to the Secured Indebtedness Cap on the date on which such Lien is to be incurred;
- (6) Liens (including extensions and renewals thereof) upon real or personal property acquired after the Closing Date; provided that (a) any such Lien is created solely for the purpose of securing Indebtedness Incurred, in accordance with Section 4.03, to finance the cost (including the cost of improvement or construction and fees and expenses related to

the acquisition) of the item of property or assets subject thereto and such Lien is created prior to, at the time of or within twelve months after the later of the acquisition, the completion of construction or the commencement of full operation of such property, (b) the principal amount of the Indebtedness secured by such Lien does not exceed 100% of such cost and (c) any such Lien shall not extend to or cover any property or assets other than such item of property or assets and any improvements on such item;

(7) Liens on cash set aside at the time of the Incurrence of any Indebtedness, or government securities purchased with such cash, in either case to the extent that such cash or government securities pre-fund the payment of interest on such Indebtedness and are held in a collateral or escrow account or similar arrangement to be applied for such purpose;

(8) Liens incurred by the Company or a Restricted Subsidiary for the benefit of a Regulated Subsidiary in the ordinary course of business including Liens incurred in the Broker Dealer Regulated Subsidiary's securities business with respect to obligations that do not exceed \$200 million at any one time outstanding and that are not incurred in connection with the borrowing of money or the obtaining of advances or credit (other than trade credit in the ordinary course of business); or

(9) Permitted Liens.

Section 4.10. *Limitation on Sale-Leaseback Transactions.* The Company will not, and will not permit any Restricted Subsidiary or Regulated Subsidiary to, enter into any Sale-Leaseback Transaction involving any of its assets or properties whether now owned or hereafter acquired.

The foregoing restriction does not apply to any Sale-Leaseback Transaction if:

(1) the lease is for a period, including renewal rights, of not in excess of three years;

(2) the lease secures or relates to industrial revenue or pollution control bonds;

(3) the transaction is solely among the Company, its Wholly Owned Restricted Subsidiaries or its Wholly Owned Regulated Subsidiaries or any combination thereof; or

(4) the Company or such Restricted Subsidiary or Regulated Subsidiary, within 12 months after the sale or transfer of any assets or properties is completed, applies an amount not less than the net proceeds received from such sale in accordance with clause (A) or (B) of the third paragraph of Section 4.11.

Section 4.11. *Limitation on Asset Sales.* The Company will not, and will not permit any Restricted Subsidiary to, consummate any Asset Sale, unless (1) the consideration received by the Company or such Restricted Subsidiary is at least equal to the fair market value of the assets sold or disposed of and (2) at least 75% of the consideration received consists of (a) cash or Temporary Cash Investments, (b) the assumption of unsubordinated Indebtedness of the Company or any Subsidiary Guarantor or Indebtedness of any other Restricted Subsidiary (in each case, other than Indebtedness owed to the Company), provided that the Company, such Subsidiary Guarantor, such Restricted Subsidiary, as the case may be is irrevocably and unconditionally released from all liability under such Indebtedness or (c) Replacement Assets.

The Company will not, and will not permit any Restricted Subsidiary or Regulated Subsidiary to consummate any Regulated Sale unless (1) the consideration received by the Company or such Restricted Subsidiary or Regulated Subsidiary is at least equal to the fair market value of the assets sold or disposed of and (2) at least 75% of the consideration received consists of (a) cash or Temporary Cash Investments, (b) the assumption of unsubordinated Indebtedness of the Company or any Subsidiary Guarantor or Indebtedness of any other Restricted Subsidiary or Regulated Subsidiary (in each case, other than Indebtedness owed to the Company), *provided* that the Company, such Subsidiary Guarantor, such Restricted Subsidiary or such Regulated Subsidiary, as the case may be is irrevocably and unconditionally released from all liability under such Indebtedness or (c) Replacement Assets.

If and to the extent that the Net Cash Proceeds received by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries (excluding the first \$300 million of Net Cash Proceeds received by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries from Asset Sales and Regulated Sales after the Closing Date) from one or more Asset Sales or Regulated Sales in any period of 12 consecutive months exceed 10% of Consolidated Net Worth (determined as of the date closest to the commencement of such 12 month period for which a consolidated balance sheet of the Company and its Subsidiaries has been filed with the SEC or *provided* to the Trustee), then the Company shall or shall cause the relevant Restricted Subsidiary or Regulated Subsidiary to:

(1) within twelve months after the date Net Cash Proceeds so received exceed 10% of Consolidated Net Worth,

(A) apply an amount equal to such excess Net Cash Proceeds to permanently repay unsubordinated Indebtedness of the Company or Indebtedness or to redeem or repurchase Capital Stock, otherwise permitted by the Indenture, of any Restricted Subsidiary or Regulated Subsidiary, in each case owing to or owned by a Person other than the Company or any Affiliate of the Company; or

(B) invest an equal amount, or the amount not so applied pursuant to clause (A) (or enter into a definitive agreement committing to so invest within 12 months after the date of such agreement), in Replacement Assets; and

(2) apply (no later than the end of the 12-month period referred to in clause (1)) such excess Net Cash Proceeds (to the extent not applied pursuant to clause (1)) as provided in the following paragraphs of this Section 4.11.

If and to the extent that the Net Cash Proceeds received by the Company or any of its Restricted Subsidiaries or Regulated Subsidiaries from one or more Regulated Sales in any period of 12 consecutive months exceed 10% of Consolidated Net Worth (determined as of the date closest to the commencement of such 12 month period for which a consolidated balance sheet of the Company and its Subsidiaries has been filed with the SEC or provided to the Trustee), then the Company shall or shall cause the relevant Restricted Subsidiary or Regulated Subsidiary to apply (no later than the end of the 12-month period referred to in clause (1)) such excess Net Cash Proceeds (to the extent not applied pursuant to clause (1)) as provided in the following paragraphs of this Section 4.11.

The amount of such excess Net Cash Proceeds required to be applied (or to be committed to be applied) during such 12-month period as set forth in clause (1) of the preceding sentence and not applied as so required by the end of such period shall constitute "Excess Proceeds."

If, as of the first day of any calendar month, the aggregate amount of Excess Proceeds not theretofore subject to an Offer to Purchase pursuant to this Section 4.11 totals at least \$50 million, the Company must commence, not later than the fifteenth Business Day of such month, and consummate an Offer to Purchase from the Holders (and if required by the terms of any Indebtedness that is pari passu with the Notes ("Pari passu Indebtedness"), from the holders of such Pari passu Indebtedness) on a pro rata basis an aggregate principal amount of Notes (and Pari Passu Indebtedness) equal to the Excess Proceeds on such date, at a purchase price equal to 100% of their principal amount, plus, in each case, accrued interest (if any) to the Payment Date.

To the extent that the aggregate amount of Notes and Pari passu Indebtedness so validly tendered and not properly withdrawn pursuant to an Offer to Purchase is less than the Excess Proceeds, the Company may use any remaining Excess Proceeds for any other purpose which is permitted by the Indenture.

If the aggregate principal amount of Notes surrendered by holders thereof and other Pari passu Indebtedness surrendered by holders or lenders, collectively, exceeds the amount of Excess Proceeds, the Trustee shall select the Notes and Pari Passu Indebtedness to be purchased on a pro rata basis on the basis of the aggregate principal amount of tendered Notes and Pari passu Indebtedness. Upon completion of such Offer to Purchase, the amount of Excess Proceeds shall be reset to zero.

Section 4.12. *Repurchase of Notes Upon a Change of Control.* The Company must commence, within 30 days of the later of (1) the occurrence of a Change of Control, and (2) a Rating Decline, and consummate an Offer to Purchase for all Notes then outstanding, at a purchase price equal to 101% of their principal amount, plus accrued interest (if any) to the Payment Date; provided that the Company shall not be required to make an Offer to Purchase unless a Rating Decline occurs.

The Company will not be required to make an Offer to Purchase upon the occurrence of a Change of Control, if a third party makes an offer to purchase the Notes in the manner, at the times and price and otherwise in compliance with the requirements of the Indenture applicable to an Offer to Purchase for a Change of Control and purchases all Notes validly tendered and not withdrawn in such offer to purchase.

Section 4.13. *Limitation on Lines of Business.* The Company will not, and will not permit any Restricted Subsidiary or Regulated Subsidiary to, engage in any business other than a Related Business.

Section 4.14. *Effectiveness of Covenants.* The covenants set forth in Sections 4.03, 4.04, 4.05, 4.06, 4.07, 4.08, 4.10, 4.11, 4.13 and 4.15 will no longer be in effect upon the Company attaining Investment Grade Status (the "Terminated Covenants"). The Terminated Covenants will not be reinstated regardless of whether the Company's credit rating is subsequently downgraded from Investment Grade Status.

Section 4.15. *SEC Reports and Reports to Holders.* The Company will deliver to the Trustee within 30 days after the filing of the same with the Securities and Exchange Commission, copies of the quarterly and annual reports and of the information, documents and other reports, if any, which the Company is required to file with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Exchange Act. Notwithstanding that the Company may not be subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the Company will file with the Securities and Exchange Commission, to the extent permitted, and *provide* the Trustee and Holders with such annual reports and such information, documents and other reports specified in Sections 13 and 15(d) of the Exchange Act, provided that the Company need not file such reports or other information if, and so long as, it would not be required to do so pursuant to Rule 12h-5 under the Exchange Act. The Company will also comply with the other provisions of the TIA, Section 314(a). Delivery of such reports, information and documents to the Trustee is for informational purposes only and the Trustee's receipt of such shall not constitute constructive notice of any information contained therein or determinable from information contained therein, including the Company's compliance with any of its covenants hereunder (as to which the Trustee is entitled to rely exclusively on Officers' Certificates).

Section 4.16. *Payments of Taxes and Other Claims.*

[Intentionally Omitted]

Section 4.17. *Compliance Certificates.*

(a) Officers of the Company must certify, on or before a date not more than 90 days after the end of each fiscal year, that a review has been conducted of the activities of the Company and its Restricted Subsidiaries and Regulated Subsidiaries and the Company's and its Restricted Subsidiaries' and its Regulated Subsidiaries' performance under this Indenture and that, to their knowledge, the Company has fulfilled all obligations hereunder, or, if there has been a default in the fulfillment of any such obligation, specifying each such default and the nature and status thereof. The Company will also be obligated to notify the Trustee of any default or defaults in the performance of any covenants or agreements under the Indenture. Such certificate shall contain a certification from the principal executive officer, principal financial officer or principal accounting officer of the Company as to his or her knowledge of the Company's compliance with all conditions and covenants under this Indenture. For purposes of this Section 4.17, such compliance shall be determined without regard to any period of grace or requirement of notice provided under this Indenture. If any of the officers of the Company signing such certificate has knowledge of such a Default or Event of Default, the certificate shall describe any such Default or Event of Default and its status. The first certificate to be delivered pursuant to this Section 4.17(a) shall be for the first fiscal year beginning after the execution of this Indenture.

(b) The Company shall deliver to the Trustee, within 90 days after the end of each fiscal year, beginning with the fiscal year in which this Indenture was executed, a certificate signed by the Company's independent certified public accountants stating (i) that their audit examination has included a review of the terms of this Indenture and the Notes as they relate to accounting matters, (ii) that they have read the most recent Officers' Certificate delivered to the Trustee pursuant to paragraph (a) of this Section 4.17 and (iii) whether, in connection with their audit examination, anything came to their attention that caused them to believe that the Company was not in compliance with any of the terms, covenants, provisions or conditions of Article 4 and Section 5.01 of this Indenture as they pertain to accounting matters and, if any Default or Event of Default has come to their attention, specifying the nature and period of existence thereof; provided that such independent certified public accountants shall not be liable in respect of such statement by reason of any failure to obtain knowledge of any such Default or Event of Default that would not be disclosed in the course of an audit examination conducted in accordance with generally accepted auditing standards in effect at the date of such examination. The Company shall not be required to comply with

the foregoing clause (b) with respect to any fiscal year if such compliance would be contrary to the recommendations of the American Institute of Certified Public Accountants so long as the Company delivers to the Trustee within 90 days after the end of such fiscal year an Officer's Certificate stating that such compliance would be so contrary and any facts particular to the Company that may have caused such compliance to be so contrary.

Section 4.18. *Waiver of Stay, Extension or Usury Laws.* The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay or extension law or any usury law or other law wherever enacted, now or at any time hereafter in force, or that may affect the covenants or the performance of this Indenture; and (to the extent that it may lawfully do so) the Company hereby expressly waives all benefit or advantage of any such law and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

ARTICLE V
CONSOLIDATION, MERGER OR SALE OF ASSETS

Section 5.01. *Consolidation, Merger and Sale of Assets.* The Company will not consolidate with, merge with or into, or sell, convey, transfer, lease or otherwise dispose of all or substantially all of its property and assets (as an entirety or substantially an entirety in one transaction or a series of related transactions) to, any Person or permit any Person to merge with or into it unless:

(1) it shall be the continuing Person, or the Person (if other than it) formed by such consolidation or into which it is merged or that acquired or leased such property and assets of (the "Surviving Person") shall be an entity organized and validly existing under the laws of the United States of America or any jurisdiction thereof and shall expressly assume, by a supplemental indenture, executed and delivered to the Trustee, all of the Company's obligations under the Indenture and the Notes; provided, that if such continuing Person or Person shall not be a corporation, such entity shall organize or have a wholly-owned Subsidiary in the form of a corporation organized and validly existing under the laws of the United States or any jurisdiction thereof, and shall cause such corporation to expressly assume, as a party to the supplemental indenture referenced above, as a co-obligor, each of such continuing Person or Person's obligations under the Indenture and the Notes;

(2) immediately after giving effect to such transaction, no Default or Event of Default shall have occurred and be continuing;

(3) immediately after giving effect to such transaction on a pro forma basis, the Company or the Surviving Person, as the case may be, shall have a Consolidated Net Worth equal to or greater than the Consolidated Net Worth of the Company immediately prior to such transaction;

(4) immediately after giving effect to such transaction on a pro forma basis the Company or the Surviving Person, as the case may be, could Incur at least \$1.00 of Indebtedness under the first paragraph of Section 4.03;

(5) it delivers to the Trustee an Officers' Certificate (attaching the arithmetic computations to demonstrate compliance with clauses (3) and (4)) and Opinion of Counsel, in each case stating that such consolidation, merger or transfer and such supplemental indenture complies with this provision and that all conditions precedent provided for herein relating to such transaction have been complied with; and

(6) each Subsidiary Guarantor, unless such Subsidiary Guarantor is the Person with which the Company has entered into a transaction under this Section 5.01, shall have by amendment to its Note Guarantee confirmed that its Note Guarantee shall apply to the obligations of the Company or the Surviving Person in accordance with the Notes and the Indenture;

provided, however, that clauses (3) and (4) above do not apply if, in the good faith determination of the Board of Directors of the Company, whose determination shall be evidenced by a Board Resolution, the principal purpose of such transaction is to change the state of organization or convert the form of organization of the Company to another form, and any such transaction shall not have as one of its purposes the evasion of the foregoing limitations.

Section 5.02. *Successor Substituted.* Upon any consolidation or merger, or any sale, conveyance, transfer, lease or other disposition of all or substantially all of the property and assets of the Company in accordance with Section 5.01 of this Indenture, the successor Person formed by such consolidation or into which the Company is merged or to which such sale, conveyance, transfer, lease or other disposition is made shall succeed to, and be substituted for, and may exercise every right and power of, the Company under this Indenture with the same effect as if such successor Person had been named as the Company herein; provided that the Company shall not be released from its obligation to pay the principal of, premium, if any, or interest on the Notes in the case of a lease of all or substantially all of its property and assets.

ARTICLE VI
EVENTS OF DEFAULT AND REMEDIES

Section 6.01. *Events of Default.* Any of the following events shall constitute an “Event of Default” hereunder with respect to Notes of any Series:

(a) default in the payment of principal of (or premium, if any, on) any Note when the same becomes due and payable at maturity, upon acceleration, redemption or otherwise;

(b) default in the payment of interest on any Note when the same becomes due and payable, and such default continues for a period of 30 days;

(c) default in the performance or breach of the provisions of the Indenture applicable to mergers, consolidations and transfers of all or substantially all of the assets of the Company or the failure by the Company to make or consummate an Offer to Purchase in accordance with Section 4.11 or Section 4.12;

(d) the Company or any Subsidiary Guarantor defaults in the performance of or breaches any other covenant or agreement in the Indenture or under the Notes (other than a default specified in clause (a), (b) or (c) of this Section 6.01) and such default or breach continues for a period of 30 consecutive days after written notice by the Trustee or the Holders of 25% or more in aggregate principal amount of the Notes;

(e) there occurs with respect to any issue or issues of Indebtedness of the Company or any Significant Subsidiary having an outstanding principal amount of \$20 million or more in the aggregate for all such issues of all such Persons, whether such Indebtedness now exists or shall hereafter be created, (I) an event of default that has caused the holder thereof to declare such Indebtedness to be due and payable prior to its Stated Maturity and such Indebtedness has not been discharged in full or such acceleration has not been rescinded or annulled within 45 days of such acceleration or (II) the failure to make a principal payment at the final (but not any interim) fixed maturity and such defaulted payment shall not have been made, waived or extended;

(f) any final judgment or order (not covered by insurance), that is non-appealable, for the payment of money in excess of \$20 million in the aggregate for all such final judgments or orders against all such Persons (treating any deductibles, self-insurance or retention as not so covered) shall be rendered against the Company or any Significant Subsidiary and shall not be paid or discharged, and there shall be any period of 45 consecutive days following entry of the final judgment or order that causes the aggregate amount for all such final judgments or orders outstanding and not paid or discharged against all such Persons to exceed \$20 million during which a stay of enforcement of such final judgment or order, by reason of a pending appeal or otherwise, shall not be in effect;

(g) a court having jurisdiction in the premises enters a decree or order for (A) relief in respect of the Company or any Significant Subsidiary in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, (B) appointment of a receiver, liquidator, assignee,

custodian, trustee, sequestrator or similar official of the Company or any Significant Subsidiary or for all or substantially all of the property and assets of the Company or any Significant Subsidiary or (C) the winding up or liquidation of the affairs of the Company or any Significant Subsidiary and, in each case, such decree or order shall remain unstayed and in effect for a period of 60 consecutive days;

(h) the Company or any Significant Subsidiary (A) commences a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or consents to the entry of an order for relief in an involuntary case under any such law, (B) consents to the appointment of or taking possession by a receiver, liquidator, assignee, custodian, trustee, sequestrator or similar official of the Company or any Significant Subsidiary or for all or substantially all of the property and assets of the Company or any Significant Subsidiary or (C) effects any general assignment for the benefit of creditors;

(i) failure by any Broker Dealer Regulated Subsidiary that is a Significant Subsidiary to meet the minimum capital requirements imposed by applicable regulatory authorities, and such condition continues for a period of 30 days after the Company or such Broker Dealer Regulated Subsidiary first becomes aware of such failure;

(j) failure by any Bank Regulated Subsidiary that is a Significant Subsidiary to be at least "adequately capitalized," as defined in regulations of applicable regulatory authorities; provided that an Event of Default under this clause (j) shall not have occurred until (x) 45 days from the time that such Bank Regulated Subsidiary has notice or is deemed to have notice of such failure unless a capital restoration plan has been filed with the OTS within that time (y) the expiration of a 90-day period commencing on the earlier the date of initial submission of a capital restoration plan to the OTS (unless such capital plan is approved by the OTS before the expiration of such 90-day period or, if the OTS has notified us that it needs additional time to determine whether to approve such capital plan, in which case such 90-day period shall be extended until the OTS determines whether to approve such capital plan, such capital plan is approved by the OTS upon the expiration of such extended period);

(k) if the Company or any Subsidiary that holds Capital Stock of a Broker Dealer Regulated Subsidiary that is a Significant Subsidiary shall become ineligible to hold such Capital Stock by reason of a statutory disqualification or otherwise;

(l) the Commission shall revoke the registration of any Broker Dealer Regulated Subsidiary that is a Significant Subsidiary as a broker-dealer under the Exchange Act or any such Broker Dealer Regulated Subsidiary shall fail to maintain such registration;

(m) the Examining Authority (as defined in Rule 15c3-1) for any Broker Dealer Regulated Subsidiary that is a Significant Subsidiary shall suspend (and shall not reinstate within 10 days) or shall revoke such Broker Dealer Regulated Subsidiary's status as a member organization thereof;

(n) the occurrence of any event of acceleration in a subordination agreement, as defined in Appendix D to Rule 15c3-1 of the Exchange Act, to which the Company or any Broker Dealer Regulated Subsidiary that is a Significant Subsidiary is a party; or

(o) any Subsidiary Guarantor that is a Significant Subsidiary repudiates its obligations under its Note Guarantee or, except as permitted by the Indenture, any Note Guarantee is determined to be unenforceable or invalid or shall for any reason cease to be in full force and effect.

Section 6.02. *Acceleration* . If an Event of Default (other than an Event of Default specified in clause (g) or (h) of Section 6.01 that occurs with respect to the Company or any Subsidiary Guarantor) occurs and is continuing under the Indenture, the Trustee or the Holders of at least 25% in aggregate principal amount of the Notes, then outstanding, by written notice to the Company (and to the Trustee if such notice is given by the Holders), may, and the Trustee at the request of such Holders shall, declare the principal of, premium, if any, and accrued interest on the Notes to be immediately due and payable. Upon a declaration of acceleration, such principal of, premium, if any, and accrued interest shall be immediately due and payable. In the event of a declaration of acceleration because an Event of Default set forth in clause (e) of Section 6.01 has occurred and is continuing, such declaration of acceleration shall be automatically rescinded and annulled if the event of default triggering such Event of Default pursuant to clause (e) of Section 6.01 shall be remedied or cured by the Company or the relevant Significant Subsidiary or waived by the holders of the relevant Indebtedness within 60 days after the declaration of acceleration with respect thereto. If an Event of Default specified in clause (g) or (h) of Section 6.01 occurs with respect to the Company, the principal of, premium, if any, and accrued interest on the Notes then outstanding shall automatically become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder. The Holders of at least a majority in principal amount of the outstanding Notes by written notice to the Company and to the Trustee, may waive all past defaults and rescind and annul a declaration of acceleration and its consequences if (x) all existing Events of Default, other than the nonpayment of the principal of, premium, if any, and interest on the Notes that have become due solely by such declaration of acceleration, have been cured or waived and (y) the rescission would not conflict with any judgment or decree of a court of competent jurisdiction.

Section 6.03. *Control by Majority* . With respect to the Notes of any series, the Holders of at least a majority in aggregate principal amount of the outstanding Notes may direct the time, method and place of conducting any

proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee; provided that the Trustee may refuse to follow any direction that conflicts with law or this Indenture, that may involve the Trustee in personal liability, or that the Trustee determines in good faith may be unduly prejudicial to the rights of Holders of Notes not joining in the giving of such direction and may take any other action it deems proper that is not inconsistent with any such direction received from Holders of Notes of that series.

Section 6.04. *Limitation on Suits.* A Holder of any Note of any series may not institute any proceeding, judicial or otherwise, with respect to this Indenture or that series of Notes, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless:

- (1) the Holder gives the Trustee written notice of a continuing Event of Default;
- (2) the Holders of at least 25% in aggregate principal amount of outstanding Notes make a written request to the Trustee to pursue the remedy;
- (3) such Holder or Holders offer the Trustee indemnity satisfactory to the Trustee against any costs, liability or expense;
- (4) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of indemnity; and
- (5) during such 60-day period, the Holders of a majority in aggregate principal amount of the outstanding Notes do not give the Trustee a direction that is inconsistent with the request;

For purposes of Section 6.03 of this Indenture and this Section 6.04, the Trustee shall comply with TIA Section 316(a) in making any determination of whether the Holders of the required aggregate principal amount of outstanding Notes of a particular series have concurred in any request or direction of the Trustee to pursue any remedy available to the Trustee or the Holders with respect to this Indenture or the Notes of that series or otherwise under the law.

A Holder may not use this Indenture to prejudice the rights of another Holder of Notes of the same series or to obtain a preference or priority over such other Holder (it being understood that the Trustee does not have any affirmative duty to ascertain whether or not such actions or forbearances are unduly prejudicial to such Holders).

Section 6.05. *Rights of Holders to Receive Payment.* Notwithstanding any other provision of this Indenture, the right of any Holder of a Note to receive payment of the principal of, premium, if any, or interest on, such Note or to bring suit for the enforcement of any such payment, on or after the due date expressed in the Notes, shall not be impaired or affected without the consent of the Holder.

Section 6.06. *Collection Suit by Trustee.* If an Event of Default in payment of principal, premium or interest of any Note specified in clause (a) or (b) of Section 6.01 occurs and is continuing, the Trustee may recover judgment in its own name and as trustee of an express trust against the Company or any other obligor of that Note for the whole amount of principal, premium, if any, and accrued interest remaining unpaid, together with interest on overdue principal, premium, if any, and, to the extent that payment of such interest is lawful, interest on overdue installments of interest, in each case at the rate specified in such Notes, and such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

Section 6.07. *Trustee May File Proofs of Claim.* The Trustee may file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due the Trustee under Section 7.07) and the Holders allowed in any judicial proceedings relative to the Company (or any other obligor of the Notes), its creditors or its property and shall be entitled and empowered to collect and receive any monies, securities or other property payable or deliverable upon conversion or exchange of the Notes or upon any such claims and to distribute the same, and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Holder to make such payments to the Trustee and, in the event that the Trustee shall consent to the making of such payments directly to the Holders, to pay to the Trustee any amount due to it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due the Trustee under Section 7.07. Nothing herein contained shall be deemed to empower the Trustee to authorize or consent to, or accept or adopt on behalf of any Holder, any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceeding.

Section 6.08. *Priorities.* If the Trustee collects any money pursuant to this Article 6, it shall pay out the money in the following order:

First: to the Trustee for all amounts due under Section 7.07;

Second: to Holders for amounts then due and unpaid for principal of, premium, if any, and interest on the Notes in respect of which or for the benefit of which such money has been collected, ratably, without preference or priority of any kind, according to the amounts due and payable on such Notes for principal, premium, if any, and interest, respectively; and

Third: to the Company or any other obligors of the Notes, as their interests may appear, or as a court of competent jurisdiction may direct.

The Trustee, upon prior written notice to the Company, may fix a record date and payment date for any payment to Holders pursuant to this Section 6.08.

Section 6.09. *Undertaking for Costs.* In any suit for the enforcement of any right or remedy under this Indenture or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court may require any party litigant in such suit to file an undertaking to pay the costs of the suit, and the court may assess reasonable costs, including reasonable attorneys' fees and expenses, against any party litigant in the suit having due regard to the merits and good faith of the claims or defenses made by the party litigant. This Section 6.09 does not apply to a suit by the Trustee, a suit by a Holder pursuant to Section 6.05, or a suit by Holders of more than 10% in principal amount of the outstanding Notes of any series.

Section 6.10. *Restoration of Rights and Remedies.* If the Trustee or any Holder has instituted any proceeding to enforce any right or remedy under this Indenture and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Holder, then, and in every such case, subject to any determination in such proceeding, the Company, the Trustee and the Holders shall be restored severally and respectively to their former positions hereunder and thereafter all rights and remedies of the Company, Trustee and the Holders shall continue as though no such proceeding had been instituted.

Section 6.11. *Rights and Remedies Cumulative.* Except as otherwise provided with respect to the replacement or payment of mutilated, destroyed, lost or wrongfully taken Notes in Section 2.04, no right or remedy herein conferred upon or reserved to the Trustee or to the Holders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Section 6.12. *Delay or Omission Not Waiver.* No delay or omission of the Trustee or of any Holder to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein. Every right and remedy given by this Article 6 or by law to the Trustee or to the Holders may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the Holders, as the case may be.

ARTICLE VII
THE TRUSTEE

Section 7.01. *General.*

(a) The duties and responsibilities of the Trustee are as provided by the TIA and as set forth herein. Whether or not expressly so provided, every provision of the Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee is subject to this Article.

(b) Except during the continuance of an Event of Default, the Trustee need perform only those duties that are specifically set forth in the Indenture and no others, and no implied covenants or obligations will be read into the Indenture against the Trustee. In case an Event of Default has occurred and is continuing, the Trustee shall exercise those rights and powers vested in it by the Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs.

(c) No provision of the Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct.

Section 7.02. *Certain Rights of Trustee.* Subject to TIA Sections 315(a) through (d):

(1) In the absence of bad faith on its part, the Trustee may conclusively rely, and will be protected in acting or refraining from acting, upon any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture, note, other evidence of indebtedness or other paper or document believed by it to be genuine and to have been signed or presented by the proper Person. The Trustee need not investigate any fact or matter stated in the document, but, in the case of any document which is specifically required to be furnished to the Trustee pursuant to any provision hereof, the Trustee shall examine the document to determine whether it conforms to the requirements of the Indenture (but need not confirm or investigate the accuracy of mathematical calculations or other facts stated therein). The Trustee, in its discretion, may make further inquiry or investigation into such facts or matters as it sees fit.

(2) Before the Trustee acts or refrains from acting, it may require an Officers' Certificate or an Opinion of Counsel conforming to Section 11.05 and the Trustee will not be liable for any action it takes or omits to take in good faith in reliance on the certificate or opinion.

(3) The Trustee may act through its attorneys and agents and will not be responsible for the misconduct or negligence of any agent appointed with due care.

(4) The Trustee will be under no obligation to exercise any of the rights or powers vested in it by the Indenture at the request or direction of any of the Holders, unless such Holders have offered to the Trustee reasonable security or indemnity satisfactory to it against the costs, expenses and liabilities that might be incurred by it in compliance with such request or direction.

(5) The Trustee will not be liable for any action it takes or omits to take in good faith that it believes to be authorized or within its rights or powers or for any action it takes or omits to take in accordance with the direction of the Holders in accordance with Section 6.05 relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee, under the Indenture.

(6) The Trustee may consult with counsel of its selection, and the advice of such counsel or any Opinion of Counsel will be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in reliance thereon.

(7) No provision of the Indenture will require the Trustee to expend or risk its own funds or otherwise incur any financial liability in the performance of its duties hereunder, or in the exercise of its rights or powers, unless it receives indemnity satisfactory to it against any loss, liability or expense.

(8) The Trustee shall not be deemed to have notice of any Default or Event of Default unless a Responsible Officer of the Trustee has actual knowledge thereof or unless written notice of any event which is in fact such a default is received by the Trustee at the Corporate Trust Office of the Trustee, and such notice references the Securities and this Indenture;

(9) the rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each agent, custodian and other Person employed to act hereunder; and

(10) the Trustee may request that the Company deliver an Officers' Certificate setting forth the names of individuals and/or titles of officers authorized at such time to take specified actions pursuant to this Indenture, which Officers' Certificate may be signed by any person authorized to sign an Officers' Certificate, including any person specified as so authorized in any such certificate previously delivered and not superseded.

Section 7.03. *Individual Rights of Trustee.* The Trustee, in its individual or any other capacity, may become the owner or pledgee of Notes and may otherwise deal with the Company or its Affiliates with the same rights it would have if it were not the Trustee. Any Agent may do the same with like rights. However, the Trustee is subject to TIA Sections 310(b) and 311. For purposes of TIA Section 311(b)(4) and (6):

(a) “**cash transaction**” means any transaction in which full payment for goods or securities sold is made within seven days after delivery of the goods or securities in currency or in checks or other orders drawn upon banks or bankers and payable upon demand; and

(b) “**self-liquidating paper**” means any draft, bill of exchange, acceptance or obligation which is made, drawn, negotiated or incurred for the purpose of financing the purchase, processing, manufacturing, shipment, storage or sale of goods, wares or merchandise and which is secured by documents evidencing title to, possession of, or a lien upon, the goods, wares or merchandise or the receivables or proceeds arising from the sale of the goods, wares or merchandise previously constituting the security, provided the security is received by the Trustee simultaneously with the creation of the creditor relationship arising from the making, drawing, negotiating or incurring of the draft, bill of exchange, acceptance or obligation.

Section 7.04. *Trustee’s Disclaimer.* The Trustee (i) makes no representation as to the validity or adequacy of the Indenture or the Notes, (ii) is not accountable for the Company’s use or application of the proceeds from the Notes and (iii) is not responsible for any statement in the Notes other than its certificate of authentication.

Section 7.05. *Notice of Default.* If any Default occurs and is continuing and is known to a Responsible Officer of the Trustee, the Trustee will send notice of the Default to each Holder within 90 days after it occurs, unless the Default has been cured; provided that, except in the case of a default in the payment of the principal of or interest on any Note, the Trustee may withhold the notice if and so long as the board of directors, the executive committee or a trust committee of directors of the Trustee in good faith determines that withholding the notice is in the interest of the Holders. Notice to Holders under this Section will be given in the manner and to the extent provided in TIA Section 313(c).

Section 7.06. *Reports by Trustee to Holders.* Within 60 days after each May 15, beginning with May 15, 2006, the Trustee will mail to each Holder, as provided in TIA Section 313(c), a brief report dated as of such May 15, if required by TIA Section 313(a), and file such reports with each stock exchange upon which its Notes are listed and with the Commission as required by TIA Section 313(d).

Section 7.07. *Compensation and Indemnity.*

(a) The Company will pay the Trustee compensation as agreed upon in writing for its services. The compensation of the Trustee is not limited by any law on compensation of a Trustee of an express trust. The Company will reimburse the Trustee upon request for all reasonable out-of-pocket expenses, disbursements and advances incurred or made by the Trustee, including the reasonable compensation and expenses of the Trustee's agents and counsel.

(b) The Company will indemnify the Trustee for, and hold it harmless against, any and all loss, liability, damage, claim or expense, including taxes (other than taxes based upon, measured by or determined by the income of the Trustee) incurred by it without negligence or bad faith on its part arising out of or in connection with the acceptance or administration of the Indenture and its duties under the Indenture and the Notes, including the costs and expenses of defending itself against any claim (whether asserted by the Company, any Holder or any other Person) or liability and of complying with any process served upon it or any of its officers in connection with the exercise or performance of any of its powers or duties under the Indenture and the Notes.

(c) To secure the Company's payment obligations in this Section, the Trustee will have a lien prior to the Notes on all money or property held or collected by the Trustee, in its capacity as Trustee, except money or property held in trust to pay principal of, and interest on particular Notes.

This section shall survive the resignation or removal of the Trustee or the termination of the Indenture.

Section 7.08. *Replacement of Trustee.*

(a) (1) The Trustee may resign at any time by written notice to the Company.

(2) The Holders of a majority in principal amount of the outstanding Notes may remove the Trustee by written notice to the Trustee.

(3) If the Trustee is no longer eligible under Section 7.10 or in the circumstances described in TIA Section 310(b), any Holder that satisfies the requirements of TIA Section 310(b) may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

(4) The Company may remove the Trustee if: (i) the Trustee is no longer eligible under Section 7.10; (ii) the Trustee is adjudged a bankrupt or an insolvent; (iii) a receiver or other public officer takes charge of the Trustee or its property; or (iv) the Trustee becomes incapable of acting.

A resignation or removal of the Trustee and appointment of a successor Trustee will become effective only upon the successor Trustee's acceptance of appointment as provided in this Section.

(b) If the Trustee has been removed by the Holders, Holders of a majority in principal amount of the Notes may appoint a successor Trustee with the consent of the Company. Otherwise, if the Trustee resigns or is removed, or if a vacancy exists in the office of Trustee for any reason, the Company will promptly appoint a successor Trustee. If the successor Trustee does not deliver its written acceptance within 30 days after the retiring Trustee resigns or is removed, the retiring Trustee, the Company or the Holders of a majority in principal amount of the outstanding Notes may petition any court of competent jurisdiction at the expense of the Company in the case of the Trustee, for the appointment of a successor Trustee.

(c) Upon delivery by the successor Trustee of a written acceptance of its appointment to the retiring Trustee and to the Company, (i) the retiring Trustee will transfer all property held by it as Trustee to the successor Trustee, subject to the lien provided for in Section 7.07, (ii) the resignation or removal of the retiring Trustee will become effective, and (iii) the successor Trustee will have all the rights, powers and duties of the Trustee under the Indenture. Upon request of any successor Trustee, the Company will execute any and all instruments for fully and vesting in and confirming to the successor Trustee all such rights, powers and trusts. The Company will give notice of any resignation and any removal of the Trustee and each appointment of a successor Trustee to all Holders, and include in the notice the name of the successor Trustee and the address of its Corporate Trust Office.

(d) Notwithstanding replacement of the Trustee pursuant to this Section, the Company's obligations under Section 7.07 will continue for the benefit of the retiring Trustee.

(e) The Trustee agrees to give the notices provided for in, and otherwise comply with, TIA Section 310(b).

Section 7.09. *Successor Trustee by Merger.* If the Trustee consolidates with, merges or converts into, or transfers all or substantially all of its corporate trust business to, another corporation or national banking association, the resulting, surviving or transferee corporation or national banking association without any further act will be the successor Trustee with the same effect as if the successor Trustee had been named as the Trustee in the Indenture.

Section 7.10. *Eligibility.* The Indenture must always have a Trustee that satisfies the requirements of TIA Section 310(a) and has a combined capital and surplus of at least \$25,000,000 as set forth in its most recent published annual report of condition.

Section 7.11. *Money Held in Trust.* The Trustee will not be liable for interest on any money received by it except as it may agree with the Company. Money held in trust by the Trustee need not be segregated from other funds except to the extent required by law and except for money held in trust under Article 8.

ARTICLE VIII
DEFEASANCE AND DISCHARGE

Section 8.01. *Discharge of Company's Obligations.*

(a) Subject to paragraph (b), the Company's obligations under the Notes and the Indenture, and each Subsidiary Guarantor's obligations under its Note Guarantee, will terminate if:

(1) either:

(a) all Notes that have been authenticated and delivered (other than destroyed, lost or stolen Notes that have been replaced, Notes that are paid pursuant to Section 4.01 and Notes for whose payment money or securities have theretofore been deposited in trust and thereafter repaid to the Company pursuant to Section 8.05) have been delivered to the Trustee for cancellation and the Company has paid all sums payable under such Indenture; or

(b) all Notes mature within one year or are to be called for redemption within one year and the Company has irrevocably deposited with the Trustee, as trust funds in trust solely for the benefit of the holders, money or U.S. Government Obligations sufficient, without consideration of any reinvestment of interest, to pay principal, premium, if any, and accrued interest on the Notes to the date of maturity or redemption and all other sums payable under such Indenture;

(2) no Default or Event of Default shall have occurred and be continuing on the date of such deposit and such deposit will not result in a breach or violation of, or constitute a default under such Indenture or any other instrument to which the Company or any Subsidiary Guarantor is a party or by which the Company or any Subsidiary Guarantor is bound;

(3) the Company has delivered irrevocable instructions to the Trustee to apply the deposited money toward the payment of the Notes at maturity or the redemption date, as applicable; and

(4) the Company delivers to the Trustee an Officers' Certificate and an Opinion of Counsel, in each case stating that all conditions precedent provided for herein relating to the satisfaction and discharge of the Indenture have been complied with.

(b) After satisfying the conditions in clause (1)(a), only the Company's obligations under Section 7.07 will survive. After satisfying the conditions in clause (1)(b), (2) and (3), only the Company's obligations in Article 2 and Sections 4.01, 4.02, 7.07, 7.08, 8.05 and 8.06 will survive. In either case, the Trustee upon request will acknowledge in writing the discharge of the Company's obligations under the Notes and the Indenture other than the surviving obligations.

Section 8.02. *Legal Defeasance.* On the 123rd day following the deposit referred to in clause (1), the Company will be deemed to have paid and will be discharged from its obligations in respect of the Notes and this Indenture, other than its obligations in Article 2 and Sections 4.01, 4.02, 7.07, 7.08, 8.05 and 8.06, and each Subsidiary Guarantor's obligations under its Note Guarantee will terminate, *provided* the following conditions have been satisfied:

(1) The Company has irrevocably deposited in trust with the Trustee, as trust funds solely for the benefit of the Holders, money and/or U.S. Government Obligations or a combination thereof sufficient, in the opinion of a nationally recognized firm of independent public accountants expressed in a written certificate thereof delivered to the Trustee, without consideration of any reinvestment, to pay principal of, premium, if any, and accrued interest on the Notes to maturity or redemption, as the case may be, *provided* that any redemption before maturity has been irrevocably provided for under arrangements satisfactory to the Trustee.

(2) Immediately after giving effect to such deposit on a *pro forma* basis, no Event of Default, or event that after the giving of notice or lapse of time or both would become an Event of Default, shall have occurred and be continuing on the date of such deposit or during the period ending on the 123rd day after the date of such deposit, and such deposit shall not result in a breach or violation of, or constitute a default under, any other agreement or instrument to which the Company or any of its Subsidiaries is a party or by which the Company or any of its Subsidiaries is bound.

(3) The Company has delivered to the Trustee

(A) either (x) an Opinion of Counsel to the effect that Holders will not recognize income, gain or loss for federal income tax purposes as a result of the defeasance and will be subject to federal income tax on the same amount and in the same manner and at the same times as would have been the case if such deposit,

defeasance and discharge had not occurred, which Opinion of Counsel must be based upon (and accompanied by a copy of) a ruling of the Internal Revenue Service to the same effect unless there has been a change in applicable federal income tax law after the Closing Date such that a ruling is no longer required or (y) a ruling directed to the Trustee received from the Internal Revenue Service to the same effect as the aforementioned Opinion of Counsel; and

(B) the defeasance trust is not required to register as an investment company under the Investment Company Act of 1940 and, after the passage of 123 days following the deposit, the trust fund will not be subject to the effect of Section 547 of the United States Bankruptcy Code or Section 15 of the New York Debtor and Creditor Law.

(4) The Company has delivered to the Trustee an Officers' Certificate and an Opinion of Counsel, in each case stating that all conditions precedent provided for herein relating to the defeasance have been complied with.

Prior to the end of the 123-day period, none of the Company's obligations under the Indenture will be discharged. Thereafter, the Trustee upon request will acknowledge in writing the discharge of the Company's obligations under the Notes and the Indenture except for the surviving obligations specified above.

Section 8.03. *Covenant Defeasance*. The Company may, subject as provided herein, be released from their respective obligations to comply with, and shall have no liability in respect of any term, condition or limitation, set forth in Sections 4.03, 4.04, 4.05, 4.06, 4.07, 4.08, 4.09, 4.10, 4.11 and 4.13, clauses (3) and (4) of Section 5.01, clause (c) of Section 6.01 with respect to such clauses (3) and (4) of Section 5.01, clause (d) of Section 6.01 with respect to the covenants contained in Sections 4.03, 4.04, 4.05, 4.06, 4.07, 4.08, 4.09, 4.10, 4.11 and 4.13, and clauses (e) and (f) of Section 6.01 shall not constitute an Event of Default under Section 6.01 ("Covenant Defeasance") if:

(i) The Company has complied with clauses (1), (2), 3(B), and (4) of Section 8.02; and

(ii) the Company has delivered to the Trustee an Opinion of Counsel to the effect that the Holders will not recognize income, gain or loss for federal income tax purposes as a result of such deposit and defeasance and will be subject to federal income tax on the same amount and in the same manner and at the same times as would otherwise have been the case if such deposit and defeasance had not occurred.

Except as specifically stated above, none of the Company's obligations under the Indenture will be discharged.

Section 8.04. *Application of Trust Money.* Subject to Section 8.05, the Trustee will hold in trust the money or U.S. Government Obligations deposited with it pursuant to Section 8.01, 8.02 or 8.03, and apply the deposited money and the proceeds from deposited U.S. Government Obligations to the payment of principal of and interest on the Notes in accordance with the Notes and the Indenture. Such money and U.S. Government Obligations need not be segregated from other funds except to the extent required by law.

Section 8.05. *Repayment to Company.* Subject to Sections 7.07, 8.01, 8.02 and 8.03, the Trustee will promptly pay to the Company upon request any excess money held by the Trustee at any time and thereupon be relieved from all liability with respect to such money. The Trustee will pay to the Company upon request any money held for payment with respect to the Notes that remains unclaimed for two years, provided that before making such payment the Trustee may at the expense of the Company publish once in a newspaper of general circulation in New York City, or send to each Holder entitled to such money, notice that the money remains unclaimed and that after a date specified in the notice (at least 30 days after the date of the publication or notice) any remaining unclaimed balance of money will be repaid to the Company. After payment to the Company, Holders entitled to such money must look solely to the Company for payment, unless applicable law designates another Person, and all liability of the Trustee with respect to such money will cease.

Section 8.06. *Reinstatement.* If and for so long as the Trustee is unable to apply any money or U.S. Government Obligations held in trust pursuant to Section 8.01, 8.02 or 8.03 by reason of any legal proceeding or by reason of any order or judgment of any court or governmental authority enjoining, restraining or otherwise prohibiting such application, the Company's obligations under the Indenture and the Notes will be reinstated as though no such deposit in trust had been made. If the Company makes any payment of principal of or interest on any Notes because of the reinstatement of its obligations, it will be subrogated to the rights of the Holders of such Notes to receive such payment from the money or U.S. Government Obligations held in trust.

ARTICLE IX
AMENDMENTS, SUPPLEMENTS AND WAIVERS

Section 9.01. *Amendments Without Consent of Holders.*

- (a) The Company and the Trustee may amend or supplement the Indenture or the Notes without notice to or the consent of any Noteholder
- (1) to cure any ambiguity, defect or inconsistency in the Indenture or the Notes, *provided* that such amendments or supplements

shall not, in the good faith opinion of the Board of Directors of the Company as evidenced by a board resolution, adversely affect the interest of the holders in any material respect;

- (2) to comply with Section 4.07 or Article 5;
- (3) to comply with any requirements of the Commission in connection with the qualification of the Indenture under the TIA;
- (4) to evidence and provide for the acceptance of an appointment hereunder by a successor Trustee;
- (5) make any change that, in the good faith opinion of the Board of Directors as evidenced by a Board Resolution, does not materially and adversely affect the rights of any Holder;
- (6) to provide for uncertificated Notes in addition to or in place of certificated Notes;
- (7) to provide for the issuance of Additional Notes in accordance with the Indenture;
- (8) add Guarantees with respect to the Notes in accordance with the applicable provisions of the Indenture;
- (9) secure the Notes; or
- (10) to conform any provision contained in this Indenture to the Section titled "Description of the Notes" contained in the Prospectus.

Section 9.02. *Amendments with Consent of Holders.*

(a) Except as otherwise provided in Section 6.05, Section 9.01 or paragraph (b), the Company and the Trustee may amend the Indenture and the Notes with the consent of the Holders of a majority in aggregate principal amount of the outstanding Notes, and the Holders of a majority in principal amount of the outstanding Notes by written notice to the Trustee may waive future compliance by the Company with any provision of the Indenture or the Notes.

(b) Notwithstanding the provisions of paragraph (a), without the consent of each Holder affected, an amendment or waiver may not

- (1) change the Stated Maturity of the principal of, or any installment of interest on, any Note,
- (2) reduce the principal amount of, or premium, if any, or interest on, any Note,

(3) change the optional redemption dates or optional redemption prices of the Notes from that stated under the caption "Optional Redemption,"

(4) change the place or currency of payment of principal of, or premium, if any, or interest on, any Note,

(5) impair the right to institute suit for the enforcement of any payment on or after the Stated Maturity (or, in the case of a redemption, on or after the Redemption Date) of any Note,

(6) waive a default in the payment of principal of, premium, if any, or interest on the Notes or modify any provision of the Indenture relating to modification or amendment thereof,

(7) reduce the above-stated percentage of outstanding notes of such series, the consent of whose holders is necessary to modify or amend the applicable indenture,

(8) release any Subsidiary Guarantor from its Notes Guarantee, except as provided in the Indenture, or

(9) reduce the percentage or aggregate principal amount of outstanding Notes the consent of whose Holders is necessary for waiver of compliance with certain provisions of the Indenture or for waiver of certain defaults.

(c) It is not necessary for Noteholders to approve the particular form of any proposed amendment, supplement or waiver, but is sufficient if their consent approves the substance thereof.

(d) An amendment, supplement or waiver under this Section will become effective on receipt by the Trustee of written consents from the Holders of the requisite percentage in principal amount of the outstanding Notes. After an amendment, supplement or waiver under this Section becomes effective, the Company will send to the Holders affected thereby a notice briefly describing the amendment, supplement or waiver. The Company will send supplemental indentures to Holders upon request. Any failure of the Company to send such notice, or any defect therein, will not, however, in any way impair or affect the validity of any such supplemental indenture or waiver.

Section 9.03. Effect of Consent.

(a) After an amendment, supplement or waiver becomes effective, it will bind every Holder unless it is of the type requiring the consent of each Holder affected. If the amendment, supplement or waiver is of the type requiring the consent of each Holder affected, the amendment, supplement or waiver will bind each Holder that has consented to it and every subsequent Holder of a Note that evidences the same debt as the Note of the consenting Holder.

(b) If an amendment, supplement or waiver changes the terms of a Note, the Trustee may require the Holder to deliver it to the Trustee so that the Trustee may place an appropriate notation of the changed terms on the Note and return it to the Holder, or exchange it for a new Note that reflects the changed terms. The Trustee may also place an appropriate notation on any Note thereafter authenticated. However, the effectiveness of the amendment, supplement or waiver is not affected by any failure to annotate or exchange Notes in this fashion.

Section 9.04. *Trustee's Rights and Obligations.* The Trustee is entitled to receive, and will be fully protected in conclusively relying upon, an Officer's Certificate and an Opinion of Counsel stating that the execution of any amendment, supplement or waiver authorized pursuant to this Article is authorized or permitted by the Indenture. If the Trustee has received such an Opinion of Counsel, it shall sign the amendment, supplement or waiver so long as the same does not adversely affect the rights of the Trustee. The Trustee may, but is not obligated to, execute any amendment, supplement or waiver that affects the Trustee's own rights, duties or immunities under the Indenture.

Section 9.05. *Conformity with Trust Indenture Act.* Every supplemental indenture executed pursuant to this Article shall conform to the requirements of the TIA.

Section 9.06. *Payments for Consents.* Neither the Company nor any of its Subsidiaries or Affiliates may, directly or indirectly, pay or cause to be paid any consideration, whether by way of interest, fee or otherwise, to any Holder for or as an inducement to any consent, waiver or amendment of any of the terms or provisions of the Indenture or the Notes unless such consideration is offered to be paid or agreed to be paid to all Holders of the Notes that consent, waive or agree to amend such term or provision within the time period set forth in the solicitation documents relating to the consent, waiver or amendment.

ARTICLE X GUARANTEES

Section 10.01. *Guarantees.* Subject to this Article 10, each of the Guarantors hereby, jointly and severally, unconditionally guarantees to each Holder of a Note and to the Trustee and its successors and assigns, irrespective of the validity and enforceability of this Indenture, the Notes or the obligations of the Company hereunder or thereunder, that: (a) the principal of, premium, if any, and interest on the Notes will be promptly paid in full when due, whether at maturity, by acceleration, redemption or otherwise, and interest on the overdue principal of, premium, if any, and interest on the Notes, if any, if lawful, and all other obligations of the Company to the Holders or the Trustee hereunder or thereunder will be promptly paid in full or performed, all in accordance with the terms hereof

and thereof; and (b) in the case of any extension of time of payment or renewal of any Notes or any of such other obligations, that the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at stated maturity, by acceleration or otherwise. Failing payment when due of any amount so guaranteed or any performance so guaranteed for whatever reason, the Guarantors shall be jointly and severally obligated to pay the same immediately. Each Subsidiary Guarantor agrees that this is a guarantee of payment and not a guarantee of collection.

The Guarantors hereby agree that their obligations hereunder shall be unconditional, irrespective of the validity, regularity or enforceability of the Notes or this Indenture, the absence of any action to enforce the same, any waiver or consent by any Holder of the Notes with respect to any provisions hereof or thereof, the recovery of any judgment against the Company, any action to enforce the same or any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor. Each Subsidiary Guarantor hereby waives diligence, presentment, demand of payment, filing of claims with a court in the event of insolvency or bankruptcy of the Company, any right to require a proceeding first against the Company, protest, notice and all demands whatsoever and covenant that this Guarantee shall not be discharged except by complete performance of the obligations contained in the Notes and this Indenture or pursuant to Section 10.04.

If any Holder or the Trustee is required by any court or otherwise to return to the Company, the Guarantors or any custodian, trustee, liquidator or other similar official acting in relation to either the Company or the Guarantors, any amount paid by either to the Trustee or such Holder, this Guarantee, to the extent theretofore discharged, shall be reinstated in full force and effect.

Each Subsidiary Guarantor agrees that it shall not be entitled to any right of subrogation in relation to the Holders in respect of any obligations guaranteed hereby until payment in full of all obligations guaranteed hereby. Each Subsidiary Guarantor further agrees that, as between the Guarantors, on the one hand, and the Holders and the Trustee, on the other hand, (x) the maturity of the obligations guaranteed hereby may be accelerated as provided in Article 6 for the purposes of this Guarantee, notwithstanding any stay, injunction or other prohibition preventing such acceleration in respect of the obligations guaranteed hereby, and (y) in the event of any declaration of acceleration of such obligations as provided in Article 6, such obligations (whether or not due and payable) shall forthwith become due and payable by the Guarantors for the purpose of this Guarantee. The Guarantors shall have the right to seek contribution from any non paying Subsidiary Guarantor so long as the exercise of such right does not impair the rights of the Holders under the Guarantee.

Section 10.02. *Limitation on Subsidiary Guarantor Liability.* Each Subsidiary Guarantor, and by its acceptance of Notes, each Holder, hereby confirms that it is the intention of all such parties that the Guarantee of such

Guarantor not constitute a fraudulent transfer or conveyance for purposes of Bankruptcy Law, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act or any similar federal or state law to the extent applicable to any Guarantor. To effectuate the foregoing intention, the Trustee, the Holders and the Guarantors hereby irrevocably agree that the obligations of such Subsidiary Guarantor under its Guarantee and this Article 10 shall be limited to the maximum amount as will, after giving effect to such maximum amount and all other contingent and fixed liabilities of such Subsidiary Guarantor that are relevant under such laws, and after giving effect to any collections from, rights to receive contribution from or payments made by or on behalf of any other Subsidiary Guarantor in respect of the obligations of such other Subsidiary Guarantor under this Article 10, result in the obligations of such Subsidiary Guarantor under its Guarantee to not constitute a fraudulent transfer or conveyance.

Section 10.03. *Execution and Delivery of the Guarantee.* In the event that the Company is required to cause a Regulated Subsidiary or Restricted Subsidiary to guarantee the Notes pursuant to Section 4.07, the Company shall cause such Subsidiaries to execute supplemental indentures to this Indenture and Guarantees in accordance with Section 4.07 and this Article 10, to the extent applicable.

Section 10.04. *Guarantors May Consolidate, etc., on Certain Terms.* No Subsidiary Guarantor may consolidate with or merge with or into (whether or not such Subsidiary Guarantor is the surviving Person) another Person whether or not affiliated with such Subsidiary Guarantor unless:

(a) subject to the other provisions of this Section, the Person formed by or surviving any such consolidation or merger (if other than a Subsidiary Guarantor or the Company) shall be a corporation organized and validly existing under the laws of the United States or any state thereof or the District of Columbia, and unconditionally assumes all the obligations of such Subsidiary Guarantor, pursuant to a supplemental indenture in form and substance reasonably satisfactory to the Trustee, under the Notes, this Indenture, the Registration Rights Agreement and the Guarantee on the terms set forth herein or therein;

(b) immediately after giving effect to such transaction, no Default or Event of Default exists; and

(c) the Company would be permitted, immediately after giving effect to such transaction, to incur at least \$1.00 of additional Indebtedness (other than Permitted Indebtedness) pursuant to Section 4.03.

In case of any such consolidation, merger, sale or conveyance and upon the assumption by the successor Person, by supplemental indenture, executed and delivered to the Trustee and satisfactory in form to the Trustee, of the Guarantee endorsed upon the Notes and the due and punctual performance of all of the

covenants and conditions of this Indenture to be performed by the Subsidiary Guarantor, such successor Person shall succeed to and be substituted for the Subsidiary Guarantor with the same effect as if it had been named herein as a Subsidiary Guarantor. Such successor Person thereupon may cause to be signed any or all of the Guarantees to be endorsed upon all of the Notes issuable hereunder which theretofore shall not have been signed by the Company and delivered to the Trustee. All the Guarantees so issued shall in all respects have the same legal rank and benefit under this Indenture as the Guarantees theretofore and thereafter issued in accordance with the terms of this Indenture as though all of such Guarantees had been issued at the date of the execution hereof.

Except as set forth in Articles Four and Five, and notwithstanding clause (c) above, nothing contained in this Indenture or in any of the Notes shall prevent any consolidation or merger of a Subsidiary Guarantor with or into the Company or another Subsidiary Guarantor, or shall prevent any sale or conveyance of the property of a Subsidiary Guarantor as an entirety or substantially as an entirety to the Company or another Subsidiary Guarantor.

Section 10.05. *Releases Following Certain Events.* In the event of a (i) sale or other disposition of all of the assets of any Subsidiary Guarantor, by way of merger, consolidation or otherwise, or a sale, exchange or transfer to any Person (other than an Affiliate of the Company) of all of the capital stock of any Subsidiary Guarantor, (ii) the designation of any Subsidiary Guarantor as an Unrestricted Subsidiary or (iii) the defeasance of the Notes in accordance with Section 8.01, in each case in compliance with the terms of this Indenture, then such Subsidiary Guarantor (in the event of a sale, exchange, transfer or other disposition, by way of merger, consolidation or otherwise, of all of the capital stock of such Subsidiary Guarantor) or the corporation acquiring the property (in the event of a sale or other disposition of all or substantially all of the assets of such Subsidiary Guarantor) will be released and relieved of any obligations under its Guarantee and Registration Rights Agreement; provided that, in the case of (i) above, the Net Cash Proceeds of such sale or other disposition are applied in accordance with the applicable provisions of this Indenture, including without limitation Section 4.11. Upon delivery by the Company to the Trustee of an Officers' Certificate and an Opinion of Counsel to the effect that such sale or other disposition was made by the Company in accordance with the applicable provisions of this Indenture, including, in the case of a release pursuant to (i) above and Section 4.11, the Trustee shall execute any documents reasonably required in order to evidence the release of any Subsidiary Guarantor from its obligations under its Guarantee.

Any Subsidiary Guarantor not released from its obligations under its Guarantee shall remain liable for the full amount of principal of and interest on the Notes and for the other obligations of any Subsidiary Guarantor under this Indenture as provided in this Article 10.

ARTICLE XI
MISCELLANEOUS

Section 11.01. *Trust Indenture Act of 1939*. The Indenture shall incorporate and be governed by the provisions of the TIA that are required to be part of and to govern indentures qualified under the TIA.

Section 11.02. *Noteholder Communications; Noteholder Actions*.

(a) The rights of Holders to communicate with other Holders with respect to the Indenture or the Notes are as provided by the TIA, and the Company and the Trustee shall comply with the requirements of TIA Sections 312(a) and 312(b). Neither the Company nor the Trustee will be held accountable by reason of any disclosure of information as to names and addresses of Holders made pursuant to the TIA.

(b) (1) Any request, demand, authorization, direction, notice, consent to amendment, supplement or waiver or other action provided by this Indenture to be given or taken by a Holder (an "act") may be evidenced by an instrument signed by the Holder delivered to the Trustee. The fact and date of the execution of the instrument, or the authority of the person executing it, may be proved in any manner that the Trustee deems sufficient.

(2) The Trustee may make reasonable rules for action by or at a meeting of Holders, which will be binding on all the Holders.

(c) Any act by the Holder of any Note binds that Holder and every subsequent Holder of a Note that evidences the same debt as the Note of the acting Holder, even if no notation thereof appears on the Note. Subject to paragraph (d), a Holder may revoke an act as to its Notes, but only if the Trustee receives the notice of revocation before the date the amendment or waiver or other consequence of the act becomes effective.

(d) The Company may, but is not obligated to, fix a record date (which need not be within the time limits otherwise prescribed by TIA Section 316(c)) for the purpose of determining the Holders entitled to act with respect to any amendment or waiver or in any other regard, except that during the continuance of an Event of Default, only the Trustee may set a record date as to notices of default, any declaration or acceleration or any other remedies or other consequences of the Event of Default. If a record date is fixed, those Persons that were Holders at such record date and only those Persons will be entitled to act, or to revoke any previous act, whether or not those Persons continue to be Holders after the record date. No act will be valid or effective for more than 90 days after the record date.

Section 11.03. *Notices.*

(a) Any notice or communication to the Company will be deemed given if in writing (i) when delivered in person or (ii) five days after mailing when mailed by first class mail, or (iii) when sent by facsimile transmission, with transmission confirmed. Notices or communications to a Subsidiary Guarantor will be deemed given if given to the Company. Any notice to the Trustee will be effective only upon receipt. In each case the notice or communication should be addressed as follows:

if to the Company:

E*TRADE Financial Corporation
135 East 57th Street
New York, New York 10022

if to the Trustee:

The Bank of New York
101 Barclay Street, Floor 8W
New York, New York 10286
Attn: Corporate Trust Administration
Fax: 212-815-5707

The Company or the Trustee by notice to the other may designate additional or different addresses for subsequent notices or communications.

(b) Except as otherwise expressly provided with respect to published notices, any notice or communication to a Holder will be deemed given when mailed to the Holder at its address as it appears on the Register by first class mail or, as to any Global Note registered in the name of DTC or its nominee, as agreed by the Company, the Trustee and DTC. Copies of any notice or communication to a Holder, if given by the Company, will be mailed to the Trustee at the same time. Defect in mailing a notice or communication to any particular Holder will not affect its sufficiency with respect to other Holders.

(c) Where the Indenture provides for notice, the notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and the waiver will be the equivalent of the notice. Waivers of notice by Holders must be filed with the Trustee, but such filing is not a condition precedent to the validity of any action taken in reliance upon such waivers.

Section 11.04. *Certificate and Opinion as to Conditions Precedent.* Upon any request or application by the Company to the Trustee to take any action under the Indenture, the Company will furnish to the Trustee:

(1) an Officers' Certificate stating that, in the opinion of the signers, all conditions precedent, if any, provided for in the Indenture relating to the proposed action have been complied with; and

(2) an Opinion of Counsel stating that all such conditions precedent have been complied with, except that such Opinion of Counsel need not be provided in connection with the issuance of the Original Notes.

Section 11.05. *Statements Required in Certificate or Opinion.* Each certificate or opinion with respect to compliance with a condition or covenant provided for in the Indenture must include:

- (1) a statement that each person signing the certificate or opinion has read the covenant or condition and the related definitions;
- (2) a brief statement as to the nature and scope of the examination or investigation upon which the statement or opinion contained in the certificate or opinion is based;
- (3) a statement that, in the opinion of each such person, that person has made such examination or investigation as is necessary to enable the person to express an informed opinion as to whether or not such covenant or condition has been complied with; and
- (4) a statement as to whether or not, in the opinion of each such person, such condition or covenant has been complied with, provided that an Opinion of Counsel may rely on an Officers' Certificate or certificates of public officials with respect to matters of fact.

Section 11.06. *Payment Date Other Than a Business Day.* If any payment with respect to a payment of any principal of, premium, if any, or interest on any Note (including any payment to be made on any date fixed for redemption or purchase of any Note) is due on a day which is not a Business Day, then the payment need not be made on such date, but may be made on the next Business Day with the same force and effect as if made on such date, and no interest will accrue for the intervening period.

Section 11.07. *Governing Law.* The Indenture, including any Note Guaranties, and the Notes shall be governed by, and construed in accordance with, the laws of the State of New York.

Section 11.08. *No Adverse Interpretation of Other Agreements.* The Indenture may not be used to interpret another indenture or loan or debt agreement of the Company or any Subsidiary of the Company, and no such indenture or loan or debt agreement may be used to interpret the Indenture.

Section 11.09. *Successors.* All agreements of the Company or any Subsidiary Guarantor in the Indenture and the Notes will bind its successors. All agreements of the Trustee in the Indenture will bind its successor.

Section 11.10. *Duplicate Originals.* The parties may sign any number of copies of the Indenture. Each signed copy shall be an original, but all of them together represent the same agreement.

Section 11.11. *Separability.* In case any provision in the Indenture or in the Notes is invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.

Section 11.12. *Table of Contents and Headings.* The Table of Contents, Cross-Reference Table and headings of the Articles and Sections of the Indenture have been inserted for convenience of reference only, are not to be considered a part of the Indenture and in no way modify or restrict any of the terms and provisions of the Indenture.

Section 11.13. *No Liability of Directors, Officers, Employees, Incorporators, Members and Stockholders.* No director, officer, employee, incorporator, member or stockholder of the Company or any Subsidiary Guarantor, as such, will have any liability for any obligations of the Company or such Subsidiary Guarantor under the Notes, any Note Guarantee or the Indenture or for any claim based on, in respect of, or by reason of, such obligations. Each Holder of Notes by accepting a Note waives and releases all such liability. The waiver and release are part of the consideration for issuance of the Notes.

SIGNATURES

IN WITNESS WHEREOF, the parties hereto have caused the Indenture to be duly executed as of the date first written above.

E*TRADE FINANCIAL CORPORATION
as Issuer

By: /s/ Robert J. Simmons

Name: Robert J. Simmons

Title: Chief Financial Officer

THE BANK OF NEW YORK
as Trustee

By: /s/ Stacey B. Poindexter

Name: Stacey B. Poindexter

Title: Assistant Vice President

[FACE OF NOTE]

E*TRADE FINANCIAL CORPORATION

7⁷/₈% Senior Note Due 2015

CUSIP No. 269246 AP9
\$300,000,000

E*TRADE Financial Corporation, a Delaware corporation (the "Company", which term includes any successor under the Indenture hereinafter referred to), for value received, promises to pay to CEDE & Co., or its registered assigns, the principal sum of THREE HUNDRED MILLION DOLLARS (\$300,000,000) or such other amount as indicated on the Schedule of Exchange of Notes attached hereto on December 1, 2015.

Interest Rate: 7⁷/₈% per annum.

Interest Payment Dates: June 1 and December 1, commencing June 1, 2006.

Regular Record Dates: May 15 and November 15.

Reference is hereby made to the further provisions of this Note set forth on the reverse hereof, which will for all purposes have the same effect as if set forth at this place.

IN WITNESS WHEREOF, the Company has caused this Note to be signed manually or by facsimile by its duly authorized officers.

Date:

E*TRADE FINANCIAL CORPORATION

By:
Name:
Title:

A-2

(Form of Trustee's Certificate of Authentication)

This is one of the 7⁷/₈% Senior Notes Due 2015 described in the Indenture referred to in this Note.

THE BANK OF NEW YORK, as Trustee

By: _____
Authorized Signatory

E*TRADE FINANCIAL CORPORATION

7⁷/₈% Senior Note Due 2015

1. *Principal and Interest.*

The Company promises to pay the principal of this Note on December 1, 2015.

The Company promises to pay interest on the principal amount of this Note on each interest payment date, as set forth on the face of this Note, at the rate of _____% per annum (subject to adjustment as provided below).

Interest will be payable semiannually (to the holders of record of the Notes at the close of business on the May 15 or November 15 immediately preceding the interest payment date) on each interest payment date, commencing June 1, 2006.

Interest on this Note will accrue from the most recent date to which interest has been paid on this Note or the Note surrendered in exchange for this Note (or, if there is no existing default in the payment of interest and if this Note is authenticated between a regular record date and the next interest payment date, from such interest payment date) or, if no interest has been paid, from the Issue Date. Interest will be computed in the basis of a 360-day year of twelve 30-day months.

The Company will pay interest on overdue principal, premium, if any, and, to the extent lawful, interest at the interest rate borne by the Notes. Interest not paid when due and any interest on principal, premium or interest not paid when due will be paid to the Persons that are Holders on a special record date, which will be the 15th day preceding the date fixed by the Company for the payment of such interest, whether or not such day is a Business Day. At least 15 days before a special record date, the Company will send to each Holder and to the Trustee a notice that sets forth the special record date, the payment date and the amount of interest to be paid.

2. *Indentures.*

This is one of the Notes issued under an Indenture dated as of November 22, 2005 (as amended from time to time, the "Indenture"), between the Company and The Bank of New York, as Trustee. Capitalized terms used herein are used as defined in the Indenture unless otherwise indicated. The terms of the Notes include those stated in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act. The Notes are subject to all such terms, and Holders are referred to the Indenture and the Trust Indenture Act for a statement of all such terms. To the extent permitted by applicable law, in the event of any inconsistency between the terms of this Note and the terms of the Indenture, the terms of the Indenture will control.

The Notes are general unsecured obligations of the Company. The Indenture limits the original aggregate principal amount of the Notes to \$300,000,000.

3. Redemption and Repurchase; Discharge Prior to Redemption or Maturity.

This Note is subject to optional redemption, and may be the subject of an Offer to Purchase, as further described in the Indenture. There is no sinking fund or mandatory redemption applicable to this Note.

If the Company deposits with the Trustee money or U.S. Government Obligations sufficient to pay the then outstanding principal of, premium, if any, and accrued interest on the Notes to redemption or maturity, the Company may in certain circumstances be discharged from the Indenture and the Notes or may be discharged from certain of its obligations under certain provisions of the Indenture.

4. Registered Form; Denominations; Transfer; Exchange.

The Notes are in registered form without coupons in denominations of \$1,000 principal amount and any multiple of \$1,000 in excess thereof. A Holder may register the transfer or exchange of Notes in accordance with the Indenture. The Trustee may require a Holder to furnish appropriate endorsements and transfer documents and to pay any taxes and fees required by law or permitted by the Indenture. Pursuant to the Indenture, there are certain periods during which the Trustee will not be required to issue, register the transfer of or exchange any Note or certain portions of a Note.

5. Defaults and Remedies.

If an Event of Default, as defined in the Indenture, occurs and is continuing, the Trustee or the Holders of at least 25% in principal amount of the Notes may declare all the Notes to be due and payable. If a bankruptcy or insolvency default with respect to the Company occurs and is continuing, the Notes automatically become due and payable. Holders may not enforce the Indenture or the Notes except as provided in the Indenture. The Trustee may require indemnity satisfactory to it before it enforces the Indenture or the Notes. Subject to certain limitations, Holders of a majority in principal amount of the Notes then outstanding may direct the Trustee in its exercise of remedies.

6. Amendment and Waiver.

Subject to certain exceptions, the Indenture and the Notes may be amended, or default may be waived, with the consent of the Holders of a majority in principal amount of the outstanding Notes. Without notice to or the consent of

any Holder, the Company and the Trustee may amend or supplement the Indenture or the Notes to, among other things, cure any ambiguity, defect or inconsistency or make any change that in the good faith opinion of the Board of Directors does not materially and adversely affect the rights of any Holder.

7. Authentication.

This Note is not valid until the Trustee (or Authenticating Agent) signs the certificate of authentication on the other side of this Note.

8. Governing Law.

This Note shall be governed by, and construed in accordance with, the laws of the State of New York.

9. Abbreviations.

Customary abbreviations may be used in the name of a Holder or an assignee, such as: TEN COM (= tenants in common), TEN ENT (= tenants by the entireties), JT TEN (= joint tenants with right of survivorship and not as tenants in common), CUST (= Custodian) and U/G/M/A/ (= Uniform Gifts to Minors Act).

The Company will furnish a copy of the Indenture to any Holder upon written request and without charge.

[FORM OF TRANSFER NOTICE]

FOR VALUE RECEIVED the undersigned registered holder hereby sell(s), assign(s) and transfer(s) unto
Insert Taxpayer Identification No.

Please print or typewrite name and address including zip code of assignee

the within Note and all rights thereunder, hereby irrevocably constituting and appointing
attorney to transfer said Note on the books of the Company with full power of substitution in the premises.

OPTION OF HOLDER TO ELECT PURCHASE

If you wish to have all of this Note purchased by the Company pursuant to Section 4.11 or Section 4.12 of the Indenture, check the box:

If you wish to have a portion of this Note purchased by the Company pursuant to Section 4.11 or Section 4.12 of the Indenture, state the amount (in original principal amount) below:

\$ _____.

Date: _____

Your Signature: _____

(Sign exactly as your name appears on the other side of this Note)

Signature Guarantee: _____

SCHEDULE OF EXCHANGES OF NOTES

The following exchanges of a part of this Global Note for Physical Notes or a part of another Global Note have been made:

<u>Date of Exchange</u>	<u>Amount of decrease in principal amount of this Global Note</u>	<u>Amount of increase in principal amount of this Global Note</u>	<u>Principal amount of this Global Note following such decrease (or increase)</u>	<u>Signature of authorized signatory of Trustee</u>
-------------------------	---	---	---	---

SUPPLEMENTAL INDENTURE

dated as of _____, _____

among

E*TRADE Financial Corporation,

[the Subsidiary Guarantor]

and

[Any existing Subsidiary Guarantors]

And

The Bank of New York,

as Trustee

7⁷/₈% Senior Notes due 2015

THIS SUPPLEMENTAL INDENTURE (this "**Supplemental Indenture**"), entered into as of _____, _____, among E*TRADE Financial Corporation, a Delaware corporation (the "**Company**"), (the "**Subsidiary Guarantor**"), any existing Subsidiary Guarantors and The Bank of New York, as trustee (the "**Trustee**").

RECITALS

WHEREAS, the Company, and the Trustee entered into the Indenture, dated as of November 22, 2005 (the "Indenture"), relating to the Company's 7 7/8% Senior Notes due 2015 (the "Notes");

WHEREAS, as a condition to the Trustee entering into the Indenture and the purchase of the Notes by the Holders, the Company agreed pursuant to the Indenture to cause Restricted Subsidiaries and Regulated Subsidiaries to provide Guarantees in certain circumstances.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and intending to be legally bound, the parties to this Supplemental Indenture hereby agree as follows:

Section 1. Capitalized terms used herein and not otherwise defined herein are used as defined in the Indenture.

Section 2. Each Subsidiary Guarantor, by its execution of this Supplemental Indenture, agrees to be a Subsidiary Guarantor under the Indenture and to be bound by the terms of the Indenture applicable to Subsidiary Guarantors, including, but not limited to, Article 10 thereof.

Section 3. This Supplemental Indenture shall be governed by and construed in accordance with the laws of the State of New York.

Section 4. This Supplemental Indenture may be signed in various counterparts which together will constitute one and the same instrument.

Section 5. This Supplemental Indenture is an amendment supplemental to the Indenture and the Indenture and this Supplemental Indenture will henceforth be read together.

Section 6. The Recitals herein are statements of the Company and/or the Guarantors, and the Trustee assumes no responsibility as to the correctness thereof. The Trustee makes no representations as to the validity of this Supplemental Indenture.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed as of the date first above written.

E*TRADE FINANCIAL CORPORATION,
as Issuer

By: _____
Name:
Title:

THE BANK OF NEW YORK, as Trustee

By: _____
Name:
Title:

[Subsidiary Guarantor], as Subsidiary
Guarantor

By: _____
Name:
Title:

[Any existing Subsidiary Guarantor]

By: _____
Name:
Title:

DTC LEGEND

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION ("DTC"), TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS A BENEFICIAL INTEREST HEREIN.

TRANSFERS OF THIS GLOBAL NOTE ARE LIMITED TO TRANSFERS IN WHOLE, BUT NOT IN PART, TO NOMINEES OF CEDE & CO. OR TO A SUCCESSOR THEREOF OR SUCH SUCCESSOR'S NOMINEE AND TRANSFERS OF PORTIONS OF THIS GLOBAL NOTE ARE LIMITED TO TRANSFERS MADE IN ACCORDANCE WITH THE TRANSFER PROVISIONS OF THE INDENTURE.

November 22, 2005

Morgan Stanley & Co. Incorporated
1585 Broadway
New York, NY 10036

The Bank of New York
101 Barclay Street, Floor 8W
New York, NY 10286
Attention: Corporate Trust Division-Corporate Finance Unit

Ladies and Gentlemen:

This Agreement is dated as of November 22, 2005 (the “**Agreement**”) by and among E*TRADE Financial Corporation, a Delaware corporation (the “**Company**”), Morgan Stanley & Co. Incorporated, as the remarketing agent (the “**Remarketing Agent**”), and The Bank of New York, a New York banking corporation, not individually but solely as Purchase Contract Agent (the “**Purchase Contract Agent**”) and as attorney-in-fact of the holders of Purchase Contracts (as defined in the Purchase Contract and Pledge Agreement referred to below).

Section 1.
Definitions.

(a) Capitalized terms used and not defined in this Agreement shall have the meanings set forth in the Purchase Contract and Pledge Agreement, dated as of November 22, 2005, among the Company, The Bank of New York as Purchase Contract Agent and attorney-in-fact for the Holders of the Purchase Contracts, and The Bank of New York as Collateral Agent, Custodial Agent and Securities Intermediary, as amended from time to time (the “**Purchase Contract and Pledge Agreement**”).

(b) As used in this Agreement, the following terms have the following meanings:

“**Agreement**” has the meaning specified in the first paragraph of this Remarketing Agreement.

“**Commencement Date**” has the meaning specified in Section 3.

“Commission” means the Securities and Exchange Commission.

“Company” has the meaning specified in the first paragraph of this Remarketing Agreement.

“Final Remarketing” has the meaning specified in Section 2(c).

“Final Remarketing Date” has the meaning specified in Section 2(c).

“indemnified party” has the meaning specified in Section 7(c).

“indemnifying party” has the meaning specified in Section 7(c).

“Initial Remarketing” has the meaning specified in Section 2(b).

“Initial Remarketing Date” has the meaning specified in Section 2(b).

“Preliminary Prospectus” means any preliminary prospectus relating to the Remarketed Notes included in the Registration Statement, including the documents incorporated by reference therein as of the date of such Preliminary Prospectus.

“Prospectus” means the prospectus relating to the Remarketed Notes, in the form in which first filed, or transmitted for filing, with the Commission after the effective date of the Registration Statement pursuant to Rule 424(b), including the documents incorporated by reference therein as of the date of such Prospectus; and any reference to any amendment or supplement to such Prospectus shall be deemed to refer to and include any documents filed after the date of such Prospectus, under the Exchange Act, and incorporated by reference in such Prospectus.

“Purchase Contract and Pledge Agreement” has the meaning specified in Section 1(a).

“Registration Statement” means a registration statement under the Securities Act prepared by the Company covering, inter alia, the Remarketing of the Remarketed Notes pursuant to Section 5(a) hereunder, including all exhibits thereto and the documents incorporated by reference in the Prospectus and any post-effective amendments thereto.

“Remarketed Notes” means the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Subordinated Notes and the Separate Subordinated Notes, if any, subject to Remarketing as identified to the Remarketing Agent by the Purchase Contract Agent and the Custodial Agent, respectively, as of 5:00 p.m., New York City time, on the seventh Business Day immediately preceding the Purchase Contract Settlement Date, as modified in connection with the Remarketing, and shall include: (a) the Subordinated Notes underlying the Pledged Applicable Ownership Interests in Notes of the Holders of Corporate Units who have not notified the Purchase Contract Agent prior to 5:00 p.m., New York City time, on the seventh Business Day immediately preceding the Purchase Contract Settlement Date of their intention to effect a

Cash Settlement of the related Purchase Contracts pursuant to the terms of the Purchase Contract and Pledge Agreement or who have so notified the Purchase Contract Agent but failed to make the required cash payment prior to 5:00 pm, New York City time, on the sixth Business Day immediately preceding the Purchase Contract Settlement Date pursuant to the terms of the Purchase Contract and Pledge Agreement, and (b) the Separate Notes of the holders of Separate Notes, if any, who have elected to have their Separate Notes remarketed in such Remarketing pursuant to the terms of the Purchase Contract and Pledge Agreement.

“**Remarketing**” means the remarketing of the Remarketed Notes pursuant to this Remarketing Agreement on any of the Initial Remarketing Date, the Second Remarketing Date or the Final Remarketing Date.

“**Remarketing Fee**” has the meaning specified in Section 4.

“**Remarketing Materials**” means the Preliminary Prospectus, the Prospectus or any other information furnished by the Company to the Remarketing Agent for distribution to investors in connection with the Remarketing.

“**Remarketing Settlement Date**” means the Purchase Contract Settlement Date.

“**Reset Rate**” has the meaning specified in Section 2(d).

“**Second Remarketing**” has the meaning specified in Section 2(c).

“**Second Remarketing Date**” has the meaning specified in Section 2(c).

“**Securities**” has the meaning specified in Section 10.

“**Notes**” means the series of subordinated notes, as modified in connection with the Remarketing, designated 6.125% Subordinated Notes due 2018 of the Company.

“**Transaction Documents**” means this Agreement, the Purchase Contract and Pledge Agreement and the Indenture, in each case as amended or supplemented from time to time.

“**Underwriting Agreement**” has the meaning specified in Section 3(a).

Section 2.

Appointment and Obligations of the Remarketing Agent.

(a) The Company hereby appoints Morgan Stanley & Co. Incorporated as the exclusive Remarketing Agent, and, subject to the terms and conditions set forth herein, Morgan Stanley & Co. Incorporated hereby accepts appointment as Remarketing Agent, for the purpose of (i) remarketing the Remarketed Notes on behalf of the holders thereof, (ii) determining, in consultation with the Company, in the manner provided for

herein and in the Purchase Contract and Pledge Agreement and the Indenture, the Reset Rate for the Notes, and (iii) performing such other duties as are assigned to the Remarketing Agent in the Transaction Documents.

(b) Unless a Special Event Redemption or a Termination Event has occurred, on the fifth Business Day immediately preceding the Purchase Contract Settlement Date (the "Initial Remarketing Date"), the Remarketing Agent shall use its reasonable efforts to remarket ("Initial Remarketing") the Remarketed Notes, at the Remarketing Price.

(c) In the case of a Failed Remarketing on the Initial Remarketing Date and unless a Special Event Redemption or a Termination Event has occurred, on the fourth Business Day immediately preceding the Purchase Contract Settlement Date (the "Second Remarketing Date"), the Remarketing Agent shall use its reasonable efforts to remarket (the "Second Remarketing") the Remarketed Notes at the Remarketing Price. In the case of a Failed Remarketing on the Second Remarketing Date and unless a Special Event Redemption or a Termination Event has occurred, on the third Business Day immediately preceding the Purchase Contract Settlement Date (the "Final Remarketing Date"), the Remarketing Agent shall use its reasonable efforts to remarket (the "Final Remarketing") the Remarketed Notes at the Remarketing Price. It is understood and agreed that the Remarketing on any Remarketing Date will be considered successful and no further attempts will be made if the resulting proceeds are at least equal to the Remarketing Price.

(d) In connection with each Remarketing, the Remarketing Agent shall determine, in consultation with the Company, the terms of the notes, including those which may be modified in connection with the remarketing pursuant to the Indenture, including the rate per annum, rounded to the nearest one-thousandth (0.001) of one percent per annum, that the Notes should bear (the "Reset Rate") in order for the Remarketed Notes to have an aggregate market value equal to the Remarketing Price and that in the sole reasonable discretion of the Remarketing Agent will enable it to remarket all of the Remarketed Notes at the Remarketing Price in such Remarketing; provided that such rate shall not exceed the maximum interest rate permitted by applicable law.

(e) If, by 4:00 p.m., New York City time, on the applicable Remarketing Date, (1) the Remarketing Agent is unable to remarket all of the Remarketed Notes, other than to the Company, at the Remarketing Price pursuant to the terms and conditions hereof or (2) the Remarketing did not occur on such Remarketing Date because one of the conditions set forth in Section 6 hereof was not satisfied, a Failed Remarketing shall be deemed to have occurred. The Remarketing Agent shall advise by telephone the Depository, the Purchase Contract Agent and the Company of any such Failed Remarketing. Whether or not there has been a Failed Remarketing will be determined in the sole reasonable discretion of the Remarketing Agent.

(f) In the event of a Successful Remarketing, by approximately 4:30 p.m., New York City time, on the applicable Remarketing Date, the Remarketing Agent shall advise, by telephone:

- (1) the Depository, the Purchase Contract Agent and the Company of the Reset Rate determined by the Remarketing Agent in such Remarketing and the number of Remarketed Notes sold in such Remarketing;

-
- (2) each purchaser (or the Depository Participant thereof) of Remarketed Notes of the Reset Rate and the number of Remarketed Notes such purchaser is to purchase;
 - (3) each such purchaser (if other than a Depository Participant) to give instructions to its Depository Participant to pay the purchase price on the Remarketing Settlement Date in same day funds against delivery of the Remarketed Notes purchased through the facilities of the Depository; and
 - (4) each such purchaser (or Depository Participant thereof) that the Remarketed Notes will not be delivered until the Remarketing Settlement Date, and, in the case of the Initial Remarketing Date or the Second Remarketing, the Remarketing Settlement Date will be five Business Days or four Business Days, respectively, following the date of such Remarketing and that if such purchaser wishes to trade the Remarketed Notes that it has purchased prior to the third Business Day preceding the Remarketing Settlement Date, such purchaser will have to specify an alternative settlement cycle at the time of any such trade to prevent failed settlement.

The Remarketing Agent shall also, if required by the Securities Act, deliver, in conformity with the requirements of the Securities Act, to each purchaser a Prospectus in connection with the Remarketing.

(g) The proceeds from a Successful Remarketing (i) with respect to the Notes underlying the Applicable Ownership Interests in Notes that are components of the Corporate Units, shall be paid to the Collateral Agent in accordance with Section 5.02 of the Purchase Contract and Pledge Agreement and (ii) with respect to the Separate Notes, shall be paid to the Custodial Agent for payment to the holders of such Separate Notes in accordance with Section 5.02 of the Purchase Contract and Pledge Agreement.

(h) The right of each holder of Remarketed Notes to have such Remarketed Notes remarketed and sold on any Remarketing Date shall be subject to the conditions that (i) the Remarketing Agent conducts (A) an Initial Remarketing, (B) a Second Remarketing in the event of a Failed Remarketing on the Initial Remarketing Date and (C) a Final Remarketing in the event of a Failed Remarketing on the Second Remarketing Date, each pursuant to the terms of this Agreement, (ii) neither a Special Event Redemption nor a Termination Event has occurred prior to such Remarketing Date, (iii) the Remarketing Agent is able to find a purchaser or purchasers for Remarketed Notes at the Remarketing Price based on the Reset Rate, and (iv) such purchaser or purchasers deliver the purchase price therefor to the Remarketing Agent as and when required.

(i) It is understood and agreed that the Remarketing Agent shall not have any obligation whatsoever to purchase any Remarketed Notes, whether in the Remarketing or otherwise, and shall in no way be obligated to provide funds to make payment upon tender of Remarketed Notes for Remarketing or to otherwise expend or risk its own funds or incur or to be exposed to financial liability in the performance of its duties under this Agreement. Neither the Company nor the Remarketing Agent shall be obligated in any case to provide funds to make payment upon tender of the Remarketed Notes for Remarketing.

Section 3.
Representations and Warranties of the Company.

The Company represents and warrants (i) on and as of the date any Remarketing Materials are first distributed in connection with the Remarketing (the "Commencement Date"), (ii) on and as of the applicable Remarketing Date and (iii) on and as of the Remarketing Settlement Date, that:

(a) Each of the representations and warranties of the Company as set forth in Section 1 (other than those made in subsection (e), (g), (h), (j), (l), (m) and (o)) of the Underwriting Agreement dated as of November 16, 2005 (the "**Underwriting Agreement**") among the Company and Morgan Stanley & Co. Incorporated and J.P. Morgan Securities Inc., as representatives of the Underwriters identified in Schedule I thereto, is true and correct as if made on each of the dates specified above; provided that for purposes of this Section 3(a), (A) any reference in such sections of the Underwriting Agreement to (i) the "Registration Statement" and the "Prospectus" shall be deemed to refer to such terms as defined herein, (ii) the "Closing Date" shall be deemed to refer to the Remarketing Settlement Date, (iii) the "Securities" shall be deemed to refer to the Remarketed Notes, (iv) the "preliminary prospectus" shall be deemed to refer to the "Preliminary Prospectus," (v) "Agreement" shall be deemed to refer to this Agreement, (vi) "Underwriter" shall be deemed to refer to the Remarketing Agent and (vii) "Transaction Documents" shall be deemed to refer to this Agreement, the Notes and the Indenture and (B) the term "Named Subsidiary" as used in Section 1(d) of the Underwriting Agreement shall be deemed to include any subsidiaries of the Company that are, on each of the dates specified above, "significant subsidiaries" of the Company within the meaning of Regulation S-X.

(b) The Notes and the Indenture conform in all material respects to the description thereof contained in the Prospectus, if any."

(c) No default or an event of default, and no event that with the passage of time or the giving of notice or both would become an event of default, shall occur and be continuing, under any of the Securities Agreements (as defined in the Underwriting Agreement).

Section 4.

Fees.

In the event of a Successful Remarketing of the Remarketed Notes, the Company shall pay the Remarketing Agent a remarketing fee equal to 0.25% of the principal amount of the Remarketed Notes (the "Remarketing Fee"). Such Remarketing Fee shall be paid by the Company on the Remarketing Settlement Date in cash by wire transfer of immediately available funds to an account designated by the Remarketing Agent.

Section 5.

Covenants of the Company.

The Company covenants and agrees as follows:

(a) If and to the extent the Remarketed Notes are required (in the view of counsel, which need not be in the form of a written opinion, for either the Remarketing Agent or the Company) to be registered under the Securities Act as in effect at the time of the Remarketing,

- (1) to prepare the Registration Statement and the Prospectus, in a form approved by the Remarketing Agent, to file any such Prospectus pursuant to the Securities Act within the period required by the Securities Act and the rules and regulations thereunder and to use commercially reasonable efforts to cause the Registration Statement to be declared effective by the Commission prior to the second Business Day immediately preceding the applicable Remarketing Date;
- (2) to file promptly with the Commission any amendment to the Registration Statement or the Prospectus or any supplement to the Prospectus that may, in the reasonable judgment of the Company or the Remarketing Agent, be required by the Securities Act or requested by the Commission;
- (3) to advise the Remarketing Agent, promptly after it receives notice thereof, of the time when any amendment to the Registration Statement has been filed or becomes effective or any supplement to the Prospectus or any amended Prospectus has been filed and to furnish the Remarketing Agent with copies thereof;
- (4) to file promptly all reports and any definitive proxy or information statements required to be filed by the Company with the Commission pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act subsequent to the date of the Prospectus and for so long as the delivery of a Prospectus is required in connection with the offering or sale of the Remarketed Notes;

-
- (5) to advise the Remarketing Agent, promptly after it receives notice thereof, of the issuance by the Commission of any stop order or of any order preventing or suspending the use of the Prospectus, of the suspension of the qualification of any of the Remarketed Notes for offering or sale in any jurisdiction, of the initiation or threatening of any proceeding for any such purpose, or of any request by the Commission for the amending or supplementing of the Registration Statement or the Prospectus or for additional information, and, in the event of the issuance of any stop order or of any order preventing or suspending the use of any Prospectus or suspending any such qualification, to use promptly its best efforts to obtain its withdrawal;
- (6) to furnish promptly to the Remarketing Agent such copies of the following documents as the Remarketing Agent shall reasonably request: (A) conformed copies of the Registration Statement as originally filed with the Commission and each amendment thereto (in each case excluding exhibits); (B) the Preliminary Prospectus and any amended or supplemented Preliminary Prospectus; (C) the Prospectus and any amended or supplemented Prospectus; and (D) any document incorporated by reference in the Prospectus (excluding exhibits thereto); and, if at any time when delivery of a prospectus is required in connection with the Remarketing, any event shall have occurred as a result of which the Prospectus as then amended or supplemented would include any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made when such Prospectus is delivered, not misleading, or if for any other reason it shall be necessary during such same period to amend or supplement the Prospectus or to file under the Exchange Act any document incorporated by reference in the Prospectus in order to comply with the Securities Act or the Exchange Act, to notify the Remarketing Agent and, upon its request, to file such document and to prepare and furnish without charge to the Remarketing Agent and to any dealer in securities as many copies as the Remarketing Agent may from time to time reasonably request of an amended or supplemented Prospectus that will correct such statement or omission or effect such compliance;

-
- (7) prior to filing with the Commission (A) any amendment to the Registration Statement or supplement to the Prospectus or (B) any Prospectus pursuant to Rule 424 under the Securities Act, to furnish a copy thereof to the Remarketing Agent; and not to file any such amendment or supplement that shall be reasonably disapproved by the Remarketing Agent;
 - (8) as soon as practicable, but in any event not later than eighteen months, after the date of a Successful Remarketing, to make “generally available to its security holders” an “earnings statement” of the Company and its subsidiaries complying with (which need not be audited) Section 11(a) of the Securities Act and the rules and regulations thereunder (including, at the option of the Company, Rule 158). The terms “generally available to its security holders” and “earnings statement” shall have the meanings set forth in Rule 158; and
 - (9) to take such action as the Remarketing Agent may reasonably request in order to qualify the Remarketed Notes for offer and sale under the securities or “blue sky” laws of such jurisdictions as the Remarketing Agent may reasonably request; provided that in no event shall the Company be required to qualify as a foreign corporation or to file a general consent to service of process in any jurisdiction.

(b) To pay: (1) the costs incident to the preparation and printing of the Registration Statement, if any, any Prospectus and any other Remarketing Materials and any amendments or supplements thereto; (2) the costs of distributing the Registration Statement, if any, any Prospectus and any other Remarketing Materials and any amendments or supplements thereto; (3) any fees and expenses of qualifying the Remarketed Notes under the securities laws of the several jurisdictions as provided in Section 5(a)(9) and of preparing, printing and distributing a Blue Sky Memorandum, if any (including any related reasonable fees and expenses of counsel to the Remarketing Agent); (4) all other costs and expenses incident to the performance of the obligations of the Company hereunder and the Remarketing Agent hereunder; and (5) the reasonable fees and expenses of counsel to the Remarketing Agent in connection with their duties hereunder.

(c) To furnish the Remarketing Agent with such information and documents as the Remarketing Agent may reasonably request in connection with the transactions contemplated hereby, and to make reasonably available to the Remarketing Agent and any accountant, attorney or other advisor retained by the Remarketing Agent such information that parties would customarily require in connection with a due diligence investigation conducted in accordance with applicable securities laws and to cause the Company’s officers, directors, employees and accountants to participate in all such discussions and to supply all such information reasonably requested by any such Person in connection with such investigation.

Section 6.
Conditions to the Remarketing Agent's Obligations.

The obligations of the Remarketing Agent hereunder shall be subject to the following conditions:

(a) The Prospectus, if any, shall have been timely filed with the Commission; no stop order suspending the effectiveness of the Registration Statement, if any, or any part thereof shall have been issued and no proceeding for that purpose shall have been initiated or threatened by the Commission; and any request of the Commission for inclusion of additional information in the Registration Statement or the Prospectus or otherwise shall have been complied with.

(b) (1) Trading in securities generally on the New York Stock Exchange shall not have been suspended or materially limited, (2) a general moratorium on commercial banking activities in the State of New York or the United States shall not have been declared by New York State or Federal authorities, or (3) there shall not have occurred any material outbreak, or material escalation, of hostilities or other national or international calamity or crisis, of such magnitude and severity in its effect on the financial markets of the United States, in the reasonable judgment of the Remarketing Agent, as to prevent or materially impair the Remarketing, or enforcement of contracts for sale, of the Remarketed Notes.

(c) The representations and warranties of the Company contained herein shall be true and correct in all material respects on and as of the applicable Remarketing Date, and the Company, the Purchase Contract Agent and the Collateral Agent shall have performed in all material respects all covenants and agreements contained herein or in the Purchase Contract and Pledge Agreement to be performed on their part at or prior to such Remarketing Date.

(d) The Company shall have furnished to the Remarketing Agent a certificate, dated the applicable Remarketing Date, of the Chief Financial Officer satisfactory to the Remarketing Agent stating that the representations and warranties of the Company in Section 3 are true and correct on and as of the applicable Remarketing Date and the Company has performed in all material respects all covenants and agreements contained herein to be performed on its part at or prior to such Remarketing Date.

(e) On the applicable Remarketing Date, the Remarketing Agent shall have received a letter addressed to the Remarketing Agent and dated such date, in form and substance satisfactory to the Remarketing Agent, of the independent accountants of the Company, containing statements and information of the type ordinarily included in accountants' "comfort letters" with respect to certain financial information contained in the Remarketing Materials, if any.

(f) Each of (i) outside counsel for the Company reasonably acceptable to the Remarketing Agent, and (ii) the General Counsel of the Company, shall have furnished to the Remarketing Agent its opinion, addressed to the Remarketing Agent and dated the applicable Remarketing Date, in form and substance reasonably satisfactory to the Remarketing Agent addressing such matters as are set forth in such counsel's opinion furnished pursuant to Sections 6(f)(i) and 6(f)(ii) of the Underwriting Agreement, adapted as necessary to relate to the securities being remarketed hereunder and to the Remarketing Materials, if any, or to any changed circumstances or events occurring subsequent to the date of this Agreement, such adaptations being reasonably acceptable to counsel to the Remarketing Agent.

(g) Counsel for the Remarketing Agent, shall have furnished to the Remarketing Agent its opinion, addressed to the Remarketing Agent and dated the applicable Remarketing Date, in form and substance reasonably satisfactory to the Remarketing Agent.

(h) Subsequent to the Commencement Date and prior to the applicable Remarketing Date, there shall not have occurred any downgrading, nor shall any notice have been given of any intended or potential downgrading or of any review for a possible change that does not indicate the direction of the possible change, in the rating accorded the Company or any of the Company's securities or in the rating outlook for the Company by any "nationally recognized statistical rating organization," as such term is defined for purposes of Rule 436(g)(2) under the Securities Act.

Section 7.
Indemnification.

(a) The Company agrees to indemnify and hold harmless the Remarketing Agent, each person, if any, who controls the Remarketing Agent within the meaning of either Section 15 of the Securities Act or Section 20 of the Exchange Act, and each affiliate of the Remarketing Agent within the meaning of Rule 405 under the Securities Act from and against any and all losses, claims, damages and liabilities (including, without limitation, any legal or other expenses reasonably incurred in connection with defending or investigating any such action or claim) caused by any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or any amendment thereof, any Preliminary Prospectus or the Prospectus or any amendment or supplement thereto, or caused by any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, except insofar as such losses, claims, damages or liabilities are caused by any such untrue statement or omission or alleged untrue statement or omission based upon information relating to the Remarketing Agent furnished to the Company in writing by the Remarketing Agent through you expressly for use therein; provided, however, that the foregoing indemnity shall not inure to the benefit of the Remarketing Agent from whom the person asserting any such losses, claims, damages or liabilities purchased Remarketed Notes, or any person controlling the Remarketing Agent, if a copy of the applicable Prospectus (as then amended or supplemented if the Company shall have

furnished any amendments or supplements thereto) was not sent or given by or on behalf of the Remarketing Agent to such person at or prior to the written confirmation of the sale of the Remarketed Notes to such person, and if the applicable Prospectus (as so amended or supplemented) would have cured the defect giving rise to such losses, claims, damages or liabilities, unless such failure is the result of noncompliance by the Company with Section 5(a)(6) hereof.

(b) The Remarketing Agent agrees to indemnify and hold harmless the Company, its directors and its officers who sign the Registration Statement and each person, if any, who controls the Company within the meaning of either Section 15 of the Securities Act or Section 20 of the Exchange Act from and against any and all losses, claims, damages and liabilities (including, without limitation, any legal or other expenses reasonably incurred in connection with defending or investigating any such action or claim) caused by any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or any amendment thereof, any Preliminary Prospectus or the Prospectus (as amended or supplemented if the Company shall have furnished any amendments or supplements thereto), or caused by any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, but only with reference to information relating to the Remarketing Agent furnished to the Company in writing by the Remarketing Agent expressly for use in the Registration Statement, any Preliminary Prospectus, the Prospectus or any amendments or supplements thereto.

(c) In case any proceeding (including any governmental investigation) shall be instituted involving any person in respect of which indemnity may be sought pursuant to Section 7(a) or 7(b), such person (the “**indemnified party**”) shall promptly notify the person against whom such indemnity may be sought (the “**indemnifying party**”) in writing and the indemnifying party, upon request of the indemnified party, shall retain counsel reasonably satisfactory to the indemnified party to represent the indemnified party and any others the indemnifying party may designate in such proceeding and shall pay the fees and disbursements of such counsel related to such proceeding. In any such proceeding, any indemnified party shall have the right to retain its own counsel, but the fees and expenses of such counsel shall be at the expense of such indemnified party unless (i) the indemnifying party and the indemnified party shall have mutually agreed to the retention of such counsel or (ii) the named parties to any such proceeding (including any impleaded parties) include both the indemnifying party and the indemnified party and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them. It is understood that the indemnifying party shall not, in respect of the legal expenses of any indemnified party in connection with any proceeding or related proceedings in the same jurisdiction, be liable for the fees and expenses of more than one separate firm (in addition to any local counsel) for all such indemnified parties and that all such fees and expenses shall be reimbursed as they are incurred. Such firm shall be designated in writing by the Remarketing Agent, in the case of parties indemnified pursuant to Section 7(a), and by the Company, in the case of parties indemnified pursuant to Section 7(b). The indemnifying party shall not be liable for any settlement of any proceeding effected without its written consent, but if settled with such consent or if there be a final judgment for the plaintiff, the indemnifying party agrees to indemnify the

indemnified party from and against any loss or liability by reason of such settlement or judgment. Notwithstanding the foregoing sentence, if at any time an indemnified party shall have requested an indemnifying party to reimburse the indemnified party for fees and expenses of counsel as contemplated by the second and third sentences of this paragraph, the indemnifying party agrees that it shall be liable for any settlement of any proceeding effected without its written consent if (i) such settlement is entered into more than 30 days after receipt by such indemnifying party of the aforesaid request and (ii) such indemnifying party shall not have reimbursed the indemnified party in accordance with such request prior to the date of such settlement. No indemnifying party shall, without the prior written consent of the indemnified party, effect any settlement of any pending or threatened proceeding in respect of which any indemnified party is or could have been a party and indemnity could have been sought hereunder by such indemnified party, unless such settlement includes an unconditional release of such indemnified party from all liability on claims that are the subject matter of such proceeding.

Section 8.
Contribution.

(a) To the extent the indemnification provided for in Section 7(a) or Section 7(b) is unavailable to an indemnified party or insufficient in respect of any losses, claims, damages or liabilities referred to under such paragraph, then each indemnifying party under such paragraph, in lieu of indemnifying such indemnified party thereunder, shall contribute to the amount paid or payable by such indemnified party as a result of such losses, claims, damages or liabilities (i) if the indemnifying party is the Company, in such proportion as is appropriate to reflect the relative benefits received by the Company, on the one hand, and the indemnified party or parties on the other hand from the Remarketing of the Remarketed Notes, (ii) if the Remarketing Agent is the indemnifying party, in such proportion as is appropriate to reflect the relative fault of the Remarketing Agent on the one hand and the indemnified party or parties on the other hand in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities or (iii) if the allocation provided by Section 8(a)(i) or Section 8(a)(ii) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits received by the Company on the one hand and the Remarketing Agent on the other hand from the Remarketing of the Remarketed Notes but also the relative fault of the Company on the one hand and of the Remarketing Agent on the other hand in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations. The relative benefits received by the Company, on one hand, and the Remarketing Agent, on the other hand, in connection with the Remarketing shall be deemed to be in the same respective proportions as the aggregate principal amount of the Remarketed Notes less the Remarketing Fee on the one hand and the Remarketing Fee on the other hand bear to the aggregate principal amount of the Remarketed Notes. The relative fault of the Company on the one hand and the Remarketing Agent on the other hand shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by the Company or by the Remarketing Agent and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

(b) The Company and the Remarketing Agent agree that it would not be just or equitable if contribution pursuant to this Section 8 were determined by pro rata allocation or by any other method of allocation that does not take account of the equitable considerations referred to in Section 8(a). The amount paid or payable by an indemnified party as a result of the losses, claims, damages and liabilities referred to in the immediately preceding paragraph shall be deemed to include, subject to the limitations set forth above, any legal or other expenses reasonably incurred by such indemnified party in connection with investigating or defending any such action or claim. Notwithstanding the provisions of this Section 8, the Remarketing Agent shall not be required to contribute any amount in excess of the amount by which the Remarketing Fee exceeds the amount of any damages that the Remarketing Agent has otherwise been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The remedies provided for in Section 7 and Section 8 are not exclusive and shall not limit any rights or remedies which may otherwise be available to any indemnified party at law or in equity.

(c) The indemnity and contribution provisions contained in Section 7 and Section 8 and the representations, warranties and other statements of the Company contained in this Agreement shall remain operative and in full force and effect regardless of (i) any termination of this Agreement, (ii) any investigation made by or on behalf of the Remarketing Agent, any person controlling the Remarketing Agent or any affiliate of the Remarketing Agent or by or on behalf of the Company, its officers or directors or any person controlling the Company and (iii) acceptance of and payment for any of the Remarketed Notes.

Section 9.
Resignation and Removal of the Remarketing Agent.

The Remarketing Agent may resign and be discharged from its duties and obligations hereunder, and the Company may remove the Remarketing Agent, by giving 30 days' prior written notice, in the case of a resignation, to the Company and the Purchase Contract Agent and, in the case of a removal, to the removed Remarketing Agent and the Purchase Contract Agent; provided, however, that no such resignation nor any such removal shall become effective until the Company shall have appointed at least one nationally recognized broker-dealer as successor Remarketing Agent and such successor Remarketing Agent shall have entered into a remarketing agreement with the Company, in which it shall have agreed to conduct the Remarketing in accordance with the Transaction Documents in all material respects.

In any such case, the Company will use commercially reasonable efforts to appoint a successor Remarketing Agent and enter into such a remarketing agreement with

such person as soon as reasonably practicable. The provisions of Section 7 and Section 8 shall survive the resignation or removal of any Remarketing Agent pursuant to this Agreement.

Section 10.
Dealing in Securities.

The Remarketing Agent, when acting as a Remarketing Agent or in its individual or any other capacity, may, to the extent permitted by law, buy, sell, hold and deal in any of the Remarketed Notes, Corporate Units, Treasury Units or any of the securities of the Company (collectively, the "Securities"). The Remarketing Agent may exercise any vote or join in any action which any beneficial owner of such Securities may be entitled to exercise or take pursuant to the Indenture with like effect as if it did not act in any capacity hereunder. The Remarketing Agent, in its individual capacity, either as principal or agent, may also engage in or have an interest in any financial or other transaction with the Company as freely as if it did not act in any capacity hereunder.

Section 11.
Remarketing Agent's Performance; Duty of Care.

The duties and obligations of the Remarketing Agent shall be determined solely by the express provisions of this Agreement and the Transaction Documents. No implied covenants or obligations of or against the Remarketing Agent shall be read into this Agreement or any of the Transaction Documents. In the absence of bad faith on the part of the Remarketing Agent, the Remarketing Agent may conclusively rely upon any document furnished to it, as to the truth of the statements expressed in any of such documents. The Remarketing Agent shall be protected in acting upon any document or communication reasonably believed by it to have been signed, presented or made by the proper party or parties except as otherwise set forth herein. The Remarketing Agent shall have no obligation to determine whether there is any limitation under applicable law on the Reset Rate on the Notes or, if there is any such limitation, the maximum permissible Reset Rate on the Notes, and it shall rely solely upon written notice from the Company (which the Company agrees to provide prior to the eighth Business Day before the Initial Remarketing Date) as to whether or not there is any such limitation and, if so, the maximum permissible Reset Rate. The Remarketing Agent, acting under this Agreement, shall incur no liability to the Company or to any holder of Remarketed Notes in its individual capacity or as Remarketing Agent for any action or failure to act, on its part in connection with a Remarketing or otherwise, except if such liability is (i) judicially determined to have resulted from its failure to comply with the material terms of this Agreement or bad faith, gross negligence or willful misconduct on its part or (ii) determined pursuant to Section 7 or 8 of this Agreement. The provisions of this Section 11 shall survive the termination of this Agreement and shall survive the resignation or removal of any Remarketing Agent pursuant to this Agreement.

Section 12.
Termination.

This Agreement shall automatically terminate (i) as to the Remarketing Agent on the effective date of the resignation or removal of the Remarketing Agent pursuant to Section 9 and (ii) on the earlier of (x) any Special Event Redemption Date, (y) the occurrence of a Termination Event and (z) the Business Day immediately following the Purchase Contract Settlement Date. If this Agreement is terminated pursuant to any of the other provisions hereof, except as otherwise provided herein, the Company shall not be under any liability to the Remarketing Agent and the Remarketing Agent shall not be under any liability to the Company, except that if this Agreement is terminated by the Remarketing Agent because of any failure or refusal on the part of the Company to comply with the terms or to fulfill any of the conditions of this Agreement, the Company will reimburse the Remarketing Agent for all of its out-of-pocket expenses (including the fees and disbursements of its counsel) reasonably incurred by it. Notwithstanding any termination of this Agreement, in the event there has been a Successful Remarketing, the obligations set forth in Section 4 hereof shall survive and remain in full force and effect until all amounts payable under said Section 4 shall have been paid in full. In addition, Sections 7, 8 and 11 hereof shall survive the termination of this Agreement or the resignation or removal of the Remarketing Agent.

Section 13.
Notices.

All statements, requests, notices and agreements hereunder shall be in writing, and:

- (a) if to the Remarketing Agent, shall be delivered or sent by mail, telex or facsimile transmission to Morgan Stanley & Co. Incorporated, 1585 Broadway, New York, NY, 10036, Attention: Attention: Equity Syndicate Desk;
- (b) if to the Company, shall be delivered or sent by mail, telex or facsimile transmission to E*TRADE Financial Corporation, 671 North Glebe Road, Arlington, Virginia 22203, Attention: General Counsel; and
- (c) if to the Purchase Contract Agent, shall be delivered or sent by mail, telex or facsimile transmission to The Bank of New York, 101 Barclay Street, Floor 8W, New York, NY 10286, Attention: Corporate Trust Division-Corporate Finance Unit (Fax: 212-815-5707).

Any such statements, requests, notices or agreements shall take effect at the time of receipt thereof.

Section 14.
Persons Entitled to Benefit of Agreement.

This Agreement shall inure to the benefit of and be binding upon each party hereto and its respective successors. This Agreement and the terms and provisions hereof are for the sole benefit of only those persons, except that (x) the representations, warranties, indemnities and agreements of the Company contained in this Agreement shall also be deemed to be for the benefit of the Remarketing Agent and the person or persons, if any, who control the Remarketing Agent within the meaning of Section 15 of the Securities Act and (y) the indemnity agreement of the Remarketing Agent contained in Section 7 of this Agreement shall be deemed to be for the benefit of the Company's directors and officers who sign the Registration Statement, if any, and any person controlling the Company within the meaning of Section 15 of the Securities Act. Nothing contained in this Agreement is intended or shall be construed to give any person, other than the persons referred to herein, any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision contained herein.

Section 15.
Survival.

The respective indemnities, representations, warranties and agreements of the Company and the Remarketing Agent contained in this Agreement or made by or on behalf of them, respectively, pursuant to this Agreement, shall survive any Remarketing and shall remain in full force and effect, regardless of any investigation made by or on behalf of any of them or any person controlling any of them.

Section 16.
Governing Law.

THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICTS OF LAW PROVISIONS THEREOF TO THE EXTENT A DIFFERENT LAW WOULD GOVERN AS A RESULT.

Section 17.
Judicial Proceedings.

(a) Each party hereto expressly accepts and irrevocably submits to the non-exclusive jurisdiction of the United States Federal or New York State court sitting in the Borough of Manhattan, The City of New York, New York, over any suit, action or proceeding arising out of or relating to this Agreement or the Remarketed Notes. To the fullest extent it may effectively do so under applicable law, each party hereto irrevocably waives and agrees not to assert, by way of motion, as a defense or otherwise, any claim that it is not subject to the jurisdiction of any such court, any objection that it may now or

hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

(b) Each party hereto agrees, to the fullest extent that it may effectively do so under applicable law, that a judgment in any suit, action or proceeding of the nature referred to in Section 17(a) brought in any such court shall be conclusive and binding upon such party, subject to rights of appeal, and may be enforced in the courts of the United States of America or the State of New York (or any other court the jurisdiction to which the Company is or may be subject) by a suit upon such judgment.

Section 18.
Counterparts.

This Agreement may be executed in one or more counterparts and, if executed in more than one counterpart, the executed counterparts shall each be deemed to be an original but all such counterparts shall together constitute one and the same instrument.

Section 19.
Headings.

The headings herein are inserted for convenience of reference only and are not intended to be part of, or to affect the meaning or interpretation of, this Agreement.

Section 20.
Severability.

If any provision of this Agreement shall be held or deemed to be or shall, in fact, be invalid, inoperative or unenforceable as applied in any particular case in any or all jurisdictions because it conflicts with any provisions of any constitution, statute, rule or public policy or for any other reason, then, to the extent permitted by law, such circumstances shall not have the effect of rendering the provision in question invalid, inoperative or unenforceable in any other case, circumstance or jurisdiction, or of rendering any other provision or provisions of this Agreement invalid, inoperative or unenforceable to any extent whatsoever.

Section 21.
Amendments.

This Agreement may be amended by an instrument in writing signed by the parties hereto. Each of the Company and the Purchase Contract Agent agrees that it will not enter into, cause or permit any amendment or modification of the Transaction Documents or any other instruments or agreements relating to the Applicable Ownership

Interests in Notes, the Notes or the Corporate Units that would in any way adversely affect the rights, duties and obligations of the Remarketing Agent, without the prior written consent of the Remarketing Agent.

Section 22.
Successors and Assigns.

Except in the case of a succession pursuant to the terms of the Purchase Contract and Pledge Agreement, the rights and obligations of the Company hereunder may not be assigned or delegated to any other Person without the prior written consent of the Remarketing Agent. The rights and obligations of the Remarketing Agent hereunder may not be assigned or delegated to any other Person (other than an affiliate of the Remarketing Agent) without the prior written consent of the Company.

If the foregoing correctly sets forth the agreement by and between the Company, the Remarketing Agent and the Purchase Contract Agent, please indicate your acceptance in the space provided for that purpose below.

Section 23.
Rights of the Purchase Contract Agent.

Notwithstanding any other provisions of this Agreement, the Purchase Contract Agent shall be entitled to all the rights, protections and privileges granted to the Purchase Contract Agent in the Purchase Contract and Pledge Agreement.

[SIGNATURES ON THE FOLLOWING PAGE]

Very truly yours,

E*TRADE FINANCIAL CORPORATION

By: /s/ Robert J. Simmons

Name: Robert J. Simmons

Title: Chief Financial Officer

CONFIRMED AND ACCEPTED:

MORGAN STANLEY & CO. INCORPORATED,
as Remarketing Agent

By: /s/ John D. Tyree

Name: John D. Tyree

Title: Executive Director

THE BANK OF NEW YORK,
not individually, but solely as Purchase Contract Agent and as
attorney-in-fact for the Holders of the Purchase Contracts

By: /s/ Stacey B. Poindexter

Name: Stacey B. Poindexter

Title: Assistant Vice President

STATEMENT OF COMPUTATION OF RATIO EARNINGS TO FIXED CHARGES
(in thousands, except ratio of earnings to fixed charges)

	For the Year Ended December 31,				
	2005	2004	2003	2002	2001
Fixed charges:					
Interest expense	\$ 850,280	\$ 557,980	\$531,721	\$608,890	\$ 832,137
Amortization of debt issue expense	2,840	2,083	3,084	3,217	3,432
Estimated interest portion within rental expense	7,560	5,281	9,417	9,557	15,912
Preference securities dividend requirements of consol. subs	—	—	—	—	—
Total fixed charges	\$ 860,680	\$ 565,344	\$544,222	\$621,664	\$ 851,481
Earnings:					
Income (loss) before income taxes, discontinued operations and cumulative effect of accounting change less equity in income (loss) of investments	\$ 670,009	\$ 554,215	\$292,227	\$202,360	\$(254,763)
Fixed charges	860,680	565,344	544,222	621,664	851,481
Less:					
Preference securities dividend requirement of consol subs	—	—	—	—	—
Earnings	\$1,530,689	\$1,119,559	\$836,449	\$824,024	\$ 596,718
Ratio of earnings to fixed charges	\$ 1.78	\$ 1.98	\$ 1.54	\$ 1.33	\$ 0.70
Excess (deficiency) of earnings to fixed charges	\$ 670,009	\$ 554,215	\$292,227	\$202,360	\$(254,763)

The ratio of earnings to fixed charges is computed by dividing fixed charges into income (loss) before income taxes, discontinued operations and the cumulative effect of accounting changes less equity in the income (loss) of investments plus fixed charges less the preference securities dividend requirement of consolidated subsidiaries. Fixed charges include, as applicable, interest expense, amortization of debt issuance costs, the estimated interest component of rent expense and the preference securities dividend requirement of consolidated subsidiaries.

E*TRADE Financial Corporation**Subsidiaries of Registrant**

BRE Holdings, LLC	E*TRADE Israel Electronic Commerce Ltd. (Affiliate Company)
BrownCo, LLC	E*TRADE Korea Co., Ltd. (Affiliate Company)
BWL Aviation, LLC	E*TRADE Mauritius Limited
Canopy Acquisition Corp.	E*TRADE Mortgage Backed Securities Corporation
Capitol View, LLC	E*TRADE Mortgage Corporation
ClearStation, Inc.	E*TRADE Network Services International
Confluent, Inc.	E*TRADE Online Ventures, Inc.
Converging Arrows, Inc. (Delaware)	E*TRADE Professional Securities, LLC
Converging Arrows, Inc. (Nevada)	E*TRADE Professional Trading, LLC
E TRADE Nordic AB	E*TRADE Re, LLC
E TRADE Sverige AB	E*TRADE SARL
E TRADE Systems India Private Limited	E*TRADE Securities Corporation
E*TRADE Access, Inc.	E*TRADE Securities Limited
E*TRADE Advisory Services, Inc.	E*TRADE Securities LLC
E*TRADE Archipelago Holdings, LLC	E*TRADE Settlement Services, Inc.
E*TRADE Asia Ltd.	E*TRADE Technologies Corporation
E*TRADE Asset Management, Inc.	E*TRADE Technologies Group, LLC
E*TRADE Australia Limited (Affiliate Company)	E*TRADE Technologies Holding Limited
E*TRADE Bank	E*TRADE UK (Holdings) Limited
E*TRADE Bank A/S	E*TRADE UK Limited
E*TRADE BBH, Inc.	E*TRADE UK Nominees Limited
E*TRADE Benelux SA	E*TRADE Wealth Management, Inc.
E*TRADE Brokerage Holdings, Inc.	E*TRADE Web Services Limited
E*TRADE Brokerage Services, Inc.	EGI Canada Corporation
E*TRADE Canada Securities Corporation	Electronic Share Information Limited
E*TRADE Capital Markets, LLC	ETB Capital Trust XI
E*TRADE Capital Markets-Execution Services, LLC	ETB Capital Trust XII
E*TRADE Capital, Inc.	ETB Capital Trust XIII
E*TRADE Clearing LLC	ETB Capital Trust XV
E*TRADE Community Development Corporation	ETB Capital Trust XVI
E*TRADE Disaster Relief Fund	ETB Holdings, Inc.
E*TRADE Europe Securities Limited	ETB Holdings, Inc. Capital Trust XIV
E*TRADE Europe Services Limited	ETB Holdings, Inc. Capital Trust XVII
E*TRADE Financial Corporate Services, Inc.	ETB Holdings, Inc. Capital Trust XVIII
E*TRADE Financial Corporation Capital Trust IV	ETB Holdings, Inc. Capital Trust XIX
E*TRADE Financial Corporation Capital Trust V	ETB Holdings, Inc. Capital Trust XX
E*TRADE Financial Corporation Capital Trust VI	ETB Holdings, Inc. Capital Trust XXI
E*TRADE Financial Corporation Capital Trust VII	ETCF Recreational Asset Funding Corporation
E*TRADE Financial Corporation Capital Trust VIII	ETFC Capital Trust I
E*TRADE Financial Corporation Capital Trust IX	ETFC Capital Trust II
E*TRADE Financial Corporation Capital Trust X	ETFC Capital Trust III
E*TRADE Futures LLC	ETP Holdings, Inc.
E*TRADE Global Asset Management, Inc.	ETP Technologies, LLC
E*TRADE Global Services Limited	ETRADE Asia Services Limited
E*TRADE Iceland HF	ETRADE Corporate Services (Hong Kong) Limited
E*TRADE Insurance Services, Inc.	ETRADE Financial Information Services (Asia) Limited
E*TRADE International Equipment Management Corporation	ETRADE Securities (Hong Kong) Limited

ETRADE Securities Limited
Harrisdirect LLC
E*TRADE National Holdings, Inc.
Highland Holdings Corporation
Highland REIT, Inc.
Howard Capital Management, Inc.
Kobren Insight Management, Inc.
LendingLink, LLC
Professional Path, Inc.
SVI International S.A.
Telebanc Capital Trust I
Telebanc Capital Trust II
TFBC Holdings, Inc.
TIR (Australia) Services Pty Limited
TIR (Holdings) Limited

TIR Holdings (Brazil) Limitada
TIR Securities (Australia) Pty Limited
TIR Securities (UK) Limited
TK Global Communications GmbH
Tradescape Technology Holdings, Inc.
U.S. Raptor One, Inc.
U.S. Raptor Two, Inc.
U.S. Raptor Three, Inc.
VERSUS Brokerage Services (U.S.) Inc.
W&L Aviation, Inc.
Web Street Securities, Inc.
Web Street, Inc.
Webstreet.com, Inc.
3045175 Nova Scotia Company
3744221 Canada Inc.

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in the following Registration Statements of E*TRADE Financial Corporation of our reports dated March 1, 2006 relating to the consolidated financial statements and financial statement schedule of E*TRADE Financial Corporation and management's report on the effectiveness of internal control over financial reporting, appearing in this Annual Report on Form 10-K of E*TRADE Financial Corporation for the year ended December 31, 2005.

Filed on Form S-3:

Registration Statement Nos.: 333-104903, 333-41628, 333-124673, 333-129077, 333-130258

Filed on Form S-4:

Registration Statement Nos.: 333-91467, 333-62230, 333-117080, 333-129833

Filed on Form S-8:

Registration Statement Nos.: 333-12503, 333-52631, 333-62333, 333-72149, 333-35068, 333-35074, 333-37892, 333-44608, 333-44610, 333-54904, 333-56002, 333-113558, 333-91534, 333-125351

/s/ Deloitte & Touche LLP

McLean, Virginia
March 1, 2006

**CERTIFICATION PURSUANT TO RULE 13a-14(a)/15d-14(a), AS ADOPTED PURSUANT TO
SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002**

I, Mitchell H. Caplan, certify that:

1. I have reviewed this annual report on Form 10-K of E*TRADE Financial Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Dated: March 1, 2006

/s/ MITCHELL H. CAPLAN

By:

Mitchell H. Caplan
Chief Executive Officer

**CERTIFICATION PURSUANT TO RULE 13a-14(a)/15d-14(a), AS ADOPTED PURSUANT TO
SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002**

I, Robert J. Simmons, certify that:

1. I have reviewed this annual report on Form 10-K of E*TRADE Financial Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Dated: March 1, 2006

By: /s/ ROBERT J. SIMMONS
Robert J. Simmons
Chief Financial Officer

