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## Opinion of the Tax Commissioner

Date Issued: November 20, 2008

Opinion No: 08-0009

Tax: Corporate Franchise

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Subject: Appreciation After Merger

XXXX through its counsel has requested an Opinion of the Tax Commissioner (“Opinion”) pursuant to Ohio Revised Code (“R.C.”) 5703.53. The request was received October 28, 2008 and supplemented by additional information received November 6, 2008.

### FACTS

XXXX is a “bank holding company” as defined by the Bank Holding Company Act of 1956, as amended, 12 U.S.C. 1841(a). XXXX has a wholly-owned bank holding company subsidiary, AAAA (“[HOLDING CORP]”). HOLDING CORP has a number of wholly-owned subsidiaries including BBBB, [a STATE-1] banking corporation (“[STATE-1 BANK]”), and CCCC, [a STATE-2] banking corporation (“[STATE-2 BANK]”), each of which qualifies as a financial institution, pursuant to R.C. 5725.01.

The transaction under consideration is the statutory merger of STATE-1 BANK and STATE-2 BANK whereby one financial institution will merge into the second financial institution. Once the merger is complete, the survivor of the merger (“Taxpayer”) will remain a wholly-owned subsidiary of HOLDING CORP and will have all of the assets, liabilities and other attributes of the non-survivor. At the time of the application for Opinion, the identity of the Taxpayer--whether STATE-1 BANK or STATE-2 BANK--had not yet been determined.

Because the two parties to the merger are under common control, the merger will not be accounted for as a purchase under Statement of Financial Accounting Standards No. 141, Business Combinations (“FAS 141”). Instead, Taxpayer as the surviving financial institution, recognizes the assets and liabilities transferred at their carrying amounts in the accounts of the transferring entity at the date of transfer (FAS 141 at ¶D12). Those carrying amounts do not differ from the historical cost of the parent of the entities under common control. Prior to the merger, the books and records of both merging financial institutions reflect appreciation.

For federal income tax purposes, the merger will be treated as a tax-free exchange. The basis in the assets will not change for federal income tax purposes nor for any other purpose immediately following the merger.

### **QUESTION FOR WHICH OPINION IS REQUESTED**

Whether the survivor of a statutory merger between financial institutions that are commonly owned may deduct the appreciation arising from the non-surviving financial institution's investment in subsidiaries or arising under Statement of Financial Accounting Standards No. 115, Accounting for Certain Investments in Debt and Equity Securities ("FAS 115") and transferred to the survivor by merger, having first appeared on the books of the non-surviving financial institution, so long as (1) the appreciation existed before the merger, and (2) surviving financial institution received the transfer of the appreciation at the carryover value of the non-surviving financial institution.

### **DISCUSSION**

The base or measure of the franchise tax liability of a financial institution is set forth, in part, in Division (B) of R.C. 5733.056 in the following terms:

(B) The annual financial institution report determines the value of the issued and outstanding shares of stock of the taxpayer, and is the base or measure of the franchise tax liability. Such determination shall be made as of the date shown by the report to have been the beginning of the financial institution's annual accounting period that includes the first day of January of the tax year. For purposes of this section, division (A) of section 5733.05, and division (D) of section 5733.06 of the Revised Code, the value of the issued and outstanding shares of stock of the financial institution shall include the total value, as shown by the books of the financial institution, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

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(4) Goodwill, **appreciation**, and abandoned property as set up in the annual report of the financial institution, provided a certified balance sheet of the company is made available upon the request of the tax commissioner. Such balance sheet shall not be a part of the public records, but shall be a confidential report for use of the tax commissioner only.

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A definition of “appreciation” as used in former R.C. 5733.05 was set forth in the per curiam decision in *Edwards Industries, Inc. v. Tracy* (1996), 74 Ohio St.3d 643 at 645, in the following terms:

“appreciation” as used in R.C. 5733.05 is an increase in value over some period of time.

“Appreciation” for purposes of R.C. 5733.056 is used in a comparable sense to its use in former R.C. 5733.05.

In *Sun Refining & Marketing v. Limbach* (June 20, 1993), BTA No. 90-R-464, unreported, a company was permitted to exclude appreciation attributable to a former wholly owned subsidiary that merged into a new wholly-owned subsidiary in a tax free IRC 368(a)(1)(D) reorganization. In *Sun Refining* the appreciation existed before the reorganization.

The merger of the two financial institutions would have no effect on the appreciation values and would create no new investment or change the aggregate values of the investments in subsidiaries or the carrying values of marketable securities. The carrying values of the appreciation are unchanged by the merger.

### OPINION

Therefore, it is the Opinion of the Tax Commissioner that Taxpayer, as the survivor of a statutory merger between financial institutions that are commonly owned, may deduct the appreciation arising from an investment in subsidiaries or arising under FAS 115 and transferred to the survivor by merger, so long as (1) the appreciation existed before the merger, and (2) Taxpayer received the transfer of the appreciation at the carryover value of the non-surviving financial institution.

This Opinion is limited to the legal issue addressed in this Opinion. This Opinion applies only to the Taxpayer and may not be transferred or assigned. In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of Taxpayer to be aware of such changes. R.C. 5703.53(E).

Richard A. Levin  
Tax Commissioner

cc: XXXX  
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