

# PD2000117447

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## BASIC AMENDMENT

### LYDIAN PREFERRED CAPITAL CORPORATION

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ARTICLES OF AMENDMENT

ESTABLISHING

SERIES 2003A NONCUMULATIVE EXCHANGEABLE FIXED/FLOATING RATE  
PREFERRED STOCK

OF

LYDIAN PREFERRED CAPITAL CORPORATION

LYDIAN PREFERRED CAPITAL CORPORATION, a corporation organized and existing under the laws of the State of Florida (the "Corporation"), HEREBY CERTIFIES that the following resolution was duly adopted by the Board of Directors of the Corporation on December 12, 2003 pursuant to authority conferred upon the Board of Directors by the provisions of the First Amended and Restated Articles of Incorporation of the Corporation (as the same may be amended or restated from time to time, the "Articles of Incorporation"), which authorize the issuance and classification of up to 10,000 shares of common stock, \$0.01 par value per share (the "Common Stock") and up to 5,000,000 shares of preferred stock, no par value per share (the "Preferred Stock"):

RESOLVED, that the issuance and classification of 15,000 shares of Series 2003A Noncumulative Exchangeable Fixed/Floating Rate Preferred Stock, no par value per share, of the Corporation is hereby authorized, and the designation, preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends, qualifications and terms and conditions of all shares of this series, in addition to those set forth in the Articles of Incorporation, are hereby fixed as follows:

**Section 1. Designation.** The designation of this Series shall be Series 2003A Noncumulative Exchangeable Fixed/Floating Rate Preferred Stock (hereinafter referred to as the "Series A Preferred Stock"), and the number of shares of Series A Preferred Stock constituting this series shall be 15,000.

**Section 2. Liquidation Value.** In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, the holders of the Series A Preferred Stock at the time outstanding will be entitled to receive out of the assets of the Corporation available for distribution to stockholders, before any distribution of assets is made to holders of Common Stock, the Series 2002 Preferred Stock or any other class of stock ranking junior to the Series A Preferred Stock upon liquidation, dissolution or winding up of the affairs of the Corporation, liquidating distributions in the amount of \$1,000.00 per share, plus the amount of accrued and unpaid dividends thereon (whether or not declared) from the beginning of the quarterly dividend period in which the liquidation occurs to the date of liquidation.

After payment of the full amount of the liquidating distributions to which they are entitled pursuant to the preceding paragraph, the holders of Series A Preferred Stock will have no right or claim to any of the remaining assets of the Corporation. In the event that, upon any such voluntary or involuntary liquidation, dissolution or winding up, the available assets of the Corporation are insufficient to pay the full amount of the liquidating distributions on all outstanding Series A Preferred Stock and the corresponding amounts payable on all shares of other classes or series of capital stock of the Corporation ranking on a parity with the Series A Preferred Stock in the distribution of assets upon any liquidation, dissolution or winding up of the affairs of the Corporation, then the holders of the Series A Preferred Stock and such other classes or series of capital stock shall share ratably in any such distribution of assets in proportion to the full liquidating distributions to which they otherwise respectively would be entitled.

For the purposes of this Section 2, the consolidation or merger of the Corporation with or into any other entity, or the sale, lease or conveyance of all or substantially all of the property or business of the Corporation, shall not be deemed to constitute the liquidation, dissolution or winding up of the Corporation.

### **Section 3. Dividends.**

(a) **Payment of Dividends.** Holders of Series A Preferred Stock shall be entitled to receive, if, when and as authorized and declared by the Board of Directors, out of assets of the Corporation legally available therefor, cash dividends at the annual rate equal to 8.00% to and including December 30, 2008 (the "Fixed Rate Period") and thereafter at the annual rate equal to the Three-month LIBOR (as defined below) plus 445 basis points (the "Floating Rate Period") on the \$1,000.00 liquidation preference per share and no more. Such noncumulative cash dividends shall be payable, if authorized and declared, quarterly in arrears on March 30, June 30, September 30 and December 30 of each year, or, if any such day is not a Business Day (as defined herein), on the preceding Business Day (each such date, a "Dividend Payment Date"). Each authorized and declared dividend shall be payable to holders of record of the Series A Preferred Stock as they appear on the stock books of the Corporation at the close of business on the last Business Day preceding the applicable Dividend Payment Date (as defined herein) (each such date, a "Record Date"); provided, however, that if the date fixed for redemption of any of the Series A Preferred Stock occurs after a dividend is authorized and declared but before it is paid, such dividend shall be paid as part of the redemption price to the person to whom the redemption price is paid. Quarterly dividend periods (each, a "Dividend Period") shall commence on and include the first day, and shall end on and include the last day, of the quarterly period in which the corresponding Dividend Payment Date occurs; provided, however, that the first Dividend Period (the "Initial Dividend Period") shall commence on and include December 17, 2003 and shall end on and include March 30, 2004. The term "Business Day" means any day other than a Saturday, Sunday or a day on which banking institutions in the State of Florida or the State of New York are authorized or obligated by law or executive order to close.

The amount of dividends payable for the Initial Dividend Period and for any other Dividend Period which, as to any shares of Series A Preferred Stock (determined by reference to the issuance date and the redemption or retirement date thereof), is greater or less than a full

Dividend Period shall be computed on the basis of the number of days elapsed in the period using a 360-day year composed of twelve 30-day months; provided, however, that in the event of the Automatic Exchange (as defined herein), any accrued and unpaid dividends on the Series A Preferred Stock as of the Time of Exchange (as defined herein) for the Dividend Period in which the Time of Exchange occurs shall be deemed to be accrued and unpaid dividends on the Bank Preferred Stock (as defined herein).

The dividend rate on the Series A Preferred Stock during the Floating Rate Period will be reset on a quarterly basis on each Dividend Payment Date for the subsequent Dividend Period in accordance with a determination by the Calculation Agent (as defined below) of the Three-month LIBOR on the related LIBOR Determination Date (as defined below).

Holders of the Series A Preferred Stock shall not be entitled to any interest, or any sum of money in lieu of interest, in respect of any dividend payment or payments on the Series A Preferred Stock authorized and declared by the Board of Directors that may be unpaid. Any dividend payment made on the Series A Preferred Stock shall first be credited against the earliest authorized and declared but unpaid cash dividend with respect to the Series A Preferred Stock.

(b) **Dividends Noncumulative.** The right of holders of Series A Preferred Stock to receive dividends is noncumulative. Accordingly, except as hereinafter expressly provided, if the Board of Directors does not authorize or declare a dividend payable in respect of any Dividend Period, holders of Series A Preferred Stock shall have no right to receive a dividend in respect of such Dividend Period and the Corporation shall have no obligation to pay a dividend in respect of such Dividend Period, whether or not dividends are authorized and declared payable in respect of any subsequent Dividend Period.

(c) **Priority as to Dividends; Limitations on Dividends on Junior Equity.** If full dividends on the Series A Preferred Stock for any completed Dividend Period shall not have been declared and paid, or declared and a sum sufficient for the payment thereof shall not have been set apart for such payments, no dividends or distributions shall be authorized, declared or paid or set aside for payment with respect to the Common Stock, the Series 2002 Preferred Stock or any other stock of the Corporation ranking junior to the Series A Preferred Stock as to dividends or amounts upon liquidation (together with the Common Stock and the Series 2002 Preferred Stock, "Junior Equity") or any stock which ranks on a parity with the Series A Preferred Stock as to dividends or amounts upon liquidation ("Parity Stock") (other than (i) as provided in the second paragraph of this Section 3(c) with respect to Parity Stock and (ii) any dividend or other distribution on Junior Equity which is necessary to maintain the Corporation's status as a real estate investment trust under the Internal Revenue Code of 1986, as amended (the "Code")), nor shall any Junior Equity or Parity Stock be redeemed, purchased or otherwise acquired for any consideration (or any monies to be paid to or made available for a sinking fund for the redemption of any such stock) by the Corporation (except by conversion into or exchange for other Junior Equity), until such time as dividends on all outstanding Series A Preferred Stock have been (i) authorized, declared and paid for four consecutive Dividend Periods and (ii) authorized, declared and paid or authorized, declared and a sum sufficient for the payment thereof set apart for payment for the fifth consecutive Dividend Period.

When dividends are not paid in full (or a sum sufficient for such full payment is not so set apart) for any Dividend Period on the Series A Preferred Stock, all dividends declared on the Series A Preferred Stock and any other series ranking on a parity as to dividends with the Series A Preferred Stock shall be declared pro rata so that the amount of dividends declared per share on the Series A Preferred Stock and each such other series of capital stock shall in all cases bear to each other the same ratio that full dividends, for the then current Dividend Period, per share of Series A Preferred Stock (which shall not include any accumulation in respect of unpaid dividends for prior Dividend Periods) and full dividends, including required or permitted accumulations, if any, on the stock of each such other series ranking on a parity as to dividends with the Series A Preferred Stock bear to each other.

(d) Any reference to "dividends" or "distributions" in this Section 3 shall not be deemed to include any distribution made in connection with any voluntary or involuntary dissolution, liquidation or winding up of the Corporation.

**Section 4. Optional Redemption.** The Series A Preferred Stock will not be redeemable prior to December 31, 2008, except upon the occurrence of a Tax Event, a Capital Event or an Investment Company Act Event (as such terms are hereinafter defined). On or after such date, the Series A Preferred Stock will be redeemable at the option of the Corporation, in whole or in part, at any time or from time to time, at a cash redemption price equal to the sum of the liquidation preference thereof, plus the amount of the accrued and unpaid dividends thereon (whether or not declared) from the beginning of the Dividend Period in which the redemption occurs to the date of redemption.

In the event that fewer than all the outstanding shares of Series A Preferred Stock are to be redeemed, the number of shares of Series A Preferred Stock to be redeemed shall be determined by the Board of Directors, and the shares to be redeemed shall be determined by lot or pro rata as may be determined by the Board of Directors or by any other method as may be determined by the Board of Directors, in its sole discretion, to be equitable, provided that such method satisfies any applicable requirements of any securities exchange (if any) on which the shares of Series A Preferred Stock are then listed.

Unless full dividends on the Series A Preferred Stock have been or contemporaneously are declared and paid or declared and a sum sufficient for the payment thereof has been set apart for payment for the then current Dividend Period, no Series A Preferred Stock shall be redeemed unless all outstanding Series A Preferred Stock are redeemed and the Corporation shall not purchase or otherwise acquire any Series A Preferred Stock; provided, however, that the Corporation may purchase or acquire Series A Preferred Stock pursuant to a purchase or exchange offer made on the same terms to holders of all outstanding Series A Preferred Stock.

The Corporation shall not redeem or set aside funds for the redemption of any stock of the Corporation ranking on parity with the Series A Preferred Stock as to dividends or amounts upon liquidation unless prior to or contemporaneously therewith it redeems, or sets aside funds for the redemption of, a number of shares of Series A Preferred Stock whose liquidation preference bears the same relationship to the aggregate liquidation preference of all shares of

Series A Preferred Stock then outstanding as the liquidation preference of such parity stock to be redeemed bears to the aggregate liquidation preference of all parity stock then outstanding.

The Corporation also will have the right at any time, upon the occurrence of a Tax Event, a Capital Event or an Investment Company Act Event, to redeem the Series A Preferred Stock, in whole (but not in part) at a redemption price of \$1,000.00 per share, plus the amount of accrued and unpaid dividends thereon (whether or not declared) from the beginning of the Dividend Period in which the date of redemption occurs to the date of redemption. "Tax Event" means the receipt by the Corporation of an opinion of a nationally-recognized law firm experienced in such matters to the effect that, as a result of: (i) any amendment to, clarification of or change (including any announced prospective change) in the laws or treaties (or any regulations thereunder) of the United States or any political subdivision or taxing authority thereof or therein affecting taxation; (ii) any judicial decision, official administrative pronouncement, published or private ruling, regulatory procedure, notice or announcement (including any notice or announcement of intent to adopt such procedures or regulations) ("Administrative Action"); or (iii) any amendment to, clarification of, or change in the official position or the interpretation of such Administrative Action or any interpretation or pronouncement that provides for a position with respect to such Administrative Action that differs from the theretofore generally accepted position, in each case, by any legislative body, court, governmental authority or regulatory body, irrespective of the manner in which such amendment, clarification or change is made known, which amendment, clarification or change is effective or such pronouncement or decision is announced on or after the date of issuance of the Series A Preferred Stock, there is a material risk that (A) dividends paid or to be paid by the Corporation with respect to the capital stock of the Corporation are not, or will not be, fully deductible by the Corporation for United States federal income tax purposes or (B) the Corporation is, or will be subject to more than a de minimis amount of other taxes, duties or other governmental charges. "Capital Event" means the receipt by the Corporation of an opinion of a nationally-recognized law firm experienced in such matters to the effect that, as a result of: (i) any amendment to, clarification of or change (including any announced prospective change) in the laws, rules or regulations of the United States or any political subdivision thereof or therein, or any rules, guidelines or policies of an applicable regulatory authority for the Bank, (ii) any Administrative Action; or (iii) any amendment to, clarification of, or change in the official position or the interpretation of such Administrative Action or any interpretation or pronouncement that provides for a position with respect to such Administrative Action that differs from the theretofore generally accepted position, in each case, by any legislative body, court, governmental authority or regulatory body, irrespective of the manner in which such amendment, clarification or change is made known, which amendment, clarification or change is effective or such pronouncement or decision is announced on or after the date of issuance of the Series A Preferred Stock, there is a material risk that the Bank cannot or within 90 days after the date of such opinion will not be entitled to treat all, or a portion of, the aggregate liquidation amount of the Series A Preferred Stock as "Tier 1 Capital" to the same extent that the Bank could treat the Series A Preferred Stock as "Tier 1 Capital" at the date of issuance of the Series A Preferred Stock. "Investment Company Act Event" means the receipt by the Corporation of an opinion of a nationally-recognized law firm experienced in such matters to the effect that, as a result of: (i) any amendment to, clarification of or change (including any announced prospective change) in the laws, rules or regulations of the United States or any political subdivision thereof or therein, or any rules, guidelines or policies of an applicable

regulatory authority for the Corporation; (ii) any Administrative Action; or (iii) any amendment to, clarification of, or change in the official position or the interpretation of such Administrative Action or any interpretation or pronouncement that provides for a position with respect to such Administrative Action that differs from the theretofore generally accepted position, in each case, by any legislative body, court, governmental authority or regulatory body, irrespective of the manner in which such amendment, clarification or change is made known, which amendment, clarification or change is effective or such pronouncement or decision is announced on or after the date of issuance of the Series A Preferred Stock, there is a material risk that the Corporation is or will be considered an "investment company" that is required to be registered under the Investment Company Act of 1940, as amended.

A notice by the Corporation pursuant to this Section 4 shall be sufficiently given if in writing and mailed, first class postage prepaid, to each record holder of Series A Preferred Stock at the holder's address as it appears in the records of the Corporation or its transfer agent. In any case where notice is given by mail, neither the failure to mail such notice nor any defect in the notice to any particular holder shall affect the sufficiency of such notice to any other holder. Any notice mailed to a holder in the manner described above shall be deemed given on the date mailed, whether or not the holder actually receives the notice. A notice of redemption shall be given not less than 30 days and not more than 60 days prior to the date of redemption specified in the notice, and shall specify: (i) the redemption date; (ii) the number of shares of Series A Preferred Stock to be redeemed; (iii) the redemption price; and (iv) the manner in which holders of Series A Preferred Stock called for redemption may obtain payment of the redemption price in respect of those shares.

Any shares of Series A Preferred Stock that are duly called for redemption pursuant to this Section 4 shall be deemed no longer to be outstanding for any purpose from and after that time that the Corporation shall have irrevocably deposited with the paying agent identified in the notice of redemption funds in an amount equal to the aggregate redemption price. From and after that time, the holders of the Series A Preferred Stock so called for redemption shall have no further rights as stockholders of the Corporation and in lieu thereof shall have only the right to receive the redemption price, without interest.

Series A Preferred Stock redeemed pursuant to this Section 4 or purchased or otherwise acquired for value by the Corporation shall, after such acquisition, have the status of authorized and unissued shares of Preferred Stock and may be reissued by the Corporation at any time as shares of any series of Preferred Stock, other than as Series A Preferred Stock.

Any optional redemption of the Series A Preferred Stock shall be subject to the receipt of any required regulatory approval of the Office of Thrift Supervision or any other governmental banking authority.

#### **Section 5. Automatic Exchange.**

(a) **General.** Subject to the terms and conditions of this Section 5, each share of Series A Preferred Stock will be exchanged automatically for one newly-issued share of preferred stock of Lydian Private Bank (the "Bank") which has, except to the extent otherwise

required by applicable laws regulations, substantially similar terms with the Series A Preferred Stock (the "Bank Preferred Stock"), in the event that the Office of Thrift Supervision ("OTS") or other appropriate federal regulatory authority directs such an exchange in writing because: (i) the Bank has become "undercapitalized" under the applicable "prompt corrective action" regulations established pursuant to the Federal Deposit Insurance Corporation Improvement Act of 1991, as amended; (ii) the Bank is placed into bankruptcy, reorganization, conservatorship or receivership; or (iii) the OTS or other appropriate federal regulatory authority, in its sole discretion, anticipates that the Bank may become "undercapitalized" in the near term and so advises the Bank in writing (each, an "Exchange Event"). Upon the occurrence of an Exchange Event, each holder of Series A Preferred Stock shall be unconditionally obligated to surrender to the Bank the certificates representing each share of Series A Preferred Stock of such holder, and the Bank shall be unconditionally obligated to issue to such holder in exchange for each such share of Series A Preferred Stock a certificate representing one share of Bank Preferred Stock (the "Automatic Exchange"). Any Series A Preferred Stock purchased or redeemed by the Corporation prior to the Time of Exchange (as defined below) shall not be deemed outstanding and shall not be subject to the Automatic Exchange. Holders of Series A Preferred Stock cannot exchange their Series A Preferred Stock for Bank Preferred Stock voluntarily. In addition, absent the occurrence of an Exchange Event and the subsequent Automatic Exchange provided for in this Section 5, holders of Series A Preferred Stock will have no dividend, voting, liquidation preference or other rights with respect to any security of the Bank; such rights as are conferred by the Series A Preferred Stock exist solely as to the Corporation.

(b) **Effectiveness of and Procedure for Exchange.** The Automatic Exchange shall occur as of 8:00 a.m., Eastern Time, on the earliest possible Business Day such an exchange could occur following the Exchange Event (the "Time of Exchange"), as evidenced by the issuance by the Bank of a press release prior to such time. As of the Time of Exchange, all of the Series A Preferred Stock will be deemed canceled without any further action by the Corporation, all rights of the holders of Series A Preferred Stock as stockholders of the Corporation will cease and such persons shall thereupon and thereafter be deemed to be for all purposes the holders of Bank Preferred Stock. The Corporation will mail notice of the occurrence of the Exchange Event to each holder of Series A Preferred Stock within 30 days of such event, and the Bank will deliver to each such holder certificates for Bank Preferred Stock upon surrender of certificates for Series A Preferred Stock. Until such replacement stock certificates are delivered (or in the event such replacement certificates are not delivered), certificates previously representing Series A Preferred Stock shall be deemed for all purposes to represent Bank Preferred Stock.

(c) **Status of Shares Redeemed; Treatment of Dividends.** Any Series A Preferred Stock purchased or redeemed by the Corporation in accordance with Section 4 hereof prior to the Time of Exchange shall not be deemed outstanding and shall not be subject to the Automatic Exchange. In the event of the Automatic Exchange, any accrued and unpaid dividends on the Series A Preferred Stock as of the Time of Exchange shall be deemed to be accrued and unpaid dividends on the Bank Preferred Stock.

#### **Section 6. Voting Rights.**

(a) **General.** Except as expressly provided in this Section 6 and as required by law,



holders of Series A Preferred Stock shall have no voting rights. When the holders of Series A Preferred Stock are entitled to vote, each share of Series A Preferred Stock will be entitled to one vote.

(b) **Right to Elect Directors as a result of Failure to Pay Dividends.** If, at any time, the Corporation has failed to pay or declare and set aside for payment all scheduled dividends on the Series A Preferred Stock for six Dividend Periods, whether or not consecutive, then, subject to the provisions of Section 6(f) hereof, the number of directors then constituting the Board of Directors of the Corporation will be increased by two, and the holders of the Series A Preferred Stock, voting as a single class together with the holders of each other series of Parity Stock then entitled by the terms of such Parity Stock to vote for additional directors, will be entitled to elect such two additional directors to serve on the Corporation's Board of Directors. Each director elected by the holders of shares of the Series A Preferred Stock (a "Preferred Director") pursuant to this Section 6(b) shall continue to serve as such until the payment of four consecutive quarterly dividends on the Series A Preferred Stock, subject to renewal from time to time in the event of subsequent failures to pay or to declare and set aside for payment dividends for an aggregate of six full Dividend Periods. Any Preferred Director elected pursuant to this Section 6(b) may be removed by, and shall not be removed except by, the vote of the holders of record of the outstanding Series A Preferred Stock entitled to vote, voting together as a single class with the holders of all other series of Parity Stock entitled to vote on the matter, at a meeting of the Corporation's stockholders, or of the holders of the Series A Preferred Stock and all other series of Parity Stock so entitled to vote thereon, called for that purpose. As long as dividends on the Series A Preferred Stock shall not have been paid for the preceding quarterly Dividend Period: (i) any vacancy in the office of any Preferred Director pursuant to this Section 6(b) may be filled (except as provided in the following clause (ii)) by an instrument in writing signed by the remaining Preferred Director and filed with the Corporation; and (ii) in the case of the removal of any Preferred Director pursuant to this Section 6(b), the vacancy may be filled by the vote of the holders of the outstanding Series A Preferred Stock entitled to vote, voting together as a single class with the holders of all other series of Parity Stock entitled to vote on the matter, at the same meeting at which such removal shall be voted. Each director appointed as aforesaid by the remaining Preferred Director shall be deemed, for all purposes hereof, to be a Preferred Director.

(c) **Right to Elect a Director in the Event of Certain Distributions on Junior Equity.** If the Corporation shall, without the approval of the holders of the Series A Preferred Stock contemplated by Section 6(d) hereof, declare, pay or set aside for payment any dividend or other distribution on Junior Equity which is necessary to maintain the Corporation's status as a real estate investment trust within the meaning of the Code, notwithstanding that, after such declaration, setting aside or payment, the Asset Coverage Test (as defined below) is not met on such date or the Cash Flow Test (as defined below) would not be met on the Dividend Payment Date immediately succeeding the date of such declaration, set aside or payment (as authorized in clause (iii) of the first sentence of Section 6(d)), then, subject to the provisions of Section 6(f) hereof, the number of directors then constituting the Board of Directors of the Corporation shall be increased by two, and the holders of the Series A Preferred Stock, voting as a single class with the holders of each other series of Parity Stock then entitled by the terms of such Parity Stock to vote for additional directors, will be entitled to elect two additional directors to serve on the

Corporation's Board of Directors. A Preferred Director who has been elected pursuant to this Section 6(c) shall continue to serve as such until such date as the Corporation satisfies both the Asset Coverage Test and the Cash Flow Test (as determined in writing by the Corporation's independent accountants), subject to renewal from time to time in the event of a subsequent distribution to preserve the Corporation's status as a real estate investment trust under the circumstances set forth above. Any Preferred Director elected pursuant to this Section 6(c) may be removed by, and shall not be removed except by, the vote of the holders of the Series A Preferred Stock, voting together as a single class with the holders of all other series of Parity Stock entitled to vote on the matter. Any vacancy in the office of a Preferred Director elected pursuant to this Section 6(c) may be filled by the vote of the holders of the Series A Preferred Stock, voting together as a single class with the holders of all other series of Parity Stock entitled to vote on the matter.

(d) **Certain Voting Rights.** The affirmative vote or consent of the holders of at least 67% of the outstanding Series A Preferred Stock, voting as a class, will be required: (i) to create any class or series of stock which shall, as to dividends or distribution of assets, rank senior to or on a parity with the Series A Preferred Stock, provided, however, that if at the time of such issuance, the Corporation has paid or declared and set aside for payment all scheduled dividends on the Series A Preferred Stock for the lesser of the eight immediately preceding Dividend Periods and such period as the Series A Preferred Stock shall have been outstanding and, after giving effect to the creation and issuance of any class or series of Parity Stock, the Corporation would meet the Asset Coverage Test on the date of issuance of such Parity Stock and the Cash Flow Test would be met on the Dividend Payment Date immediately succeeding the date of such issuance, no vote shall be required of the holders of Series A Preferred Stock in connection with the creation or issuance of any Parity Stock; (ii) to alter or change the provisions of the Articles of Incorporation (including the terms of the Series A Preferred Stock), including by consolidation or merger, so as to adversely affect the voting powers, preferences or special rights of the holders of the Series A Preferred Stock; (iii) to declare, pay or set aside for payment any dividend or other distribution on any Junior Equity, if after such declaration, setting aside or payment of such dividend or other distribution, the Asset Coverage Test is not met on such date or the Cash Flow Test would not be met on the Dividend Payment Date immediately succeeding the date of such declaration, set aside or payment, provided that no such vote or consent shall be needed with respect to any dividend or other distribution on Junior Equity which is necessary to maintain the Corporation's status as a real estate investment trust within the meaning of the Code; or (iv) to authorize the use of any assets of the Corporation for the redemption, retirement, purchase or other acquisition, directly or indirectly, of any Junior Equity, if after such redemption, retirement, purchase or other acquisition, the Asset Coverage Test is not met on such date or the Cash Flow Test would not be met on the Dividend Payment Date immediately succeeding the date of such redemption, retirement, purchase or other acquisition. Notwithstanding the foregoing, an alteration or change to the provisions of the Articles of Incorporation shall not be deemed to affect the voting powers, preferences or special rights of the holders of the Series A Preferred Stock, provided that: (x) the Series A Preferred Stock remains outstanding with the terms thereof unchanged; or (y) the Series A Preferred Stock is converted in a merger or consolidation transaction into shares of the surviving or successor corporation or the direct or indirect parent of the surviving or successor corporation having terms identical to the terms of the Series A Preferred Stock set forth herein. Additionally, an increase in the amount of

the authorized Preferred Stock or the creation or issuance of any other series of Preferred Stock or an increase in the amount of authorized shares of any such series, in each case ranking junior to or, when issued pursuant to clause (i) of the first sentence of this paragraph (d), on a parity with, the Series A Preferred Stock with respect to payment of dividends or distribution of assets upon liquidation, dissolution or winding up, shall not be deemed to adversely affect the voting powers, preferences or special rights of the holders of the Series A Preferred Stock. The voting rights provided by this Section 6(d) are not a limitation on any voting rights which holders of Series A Preferred Stock may have by law.

(e) **Procedure for Election of Directors.** Whenever the right to elect directors shall vest pursuant to Section 6(b) or Section 6(c) hereof, it may be exercised initially by the vote of the holders of a majority of the shares of Series A Preferred Stock and, if applicable, the holders of each other series of Parity Stock, present and voting, in person or by proxy, at a special meeting called for such purpose or at the next annual meeting of stockholders of the Corporation, or by written consent of the holders of record of a majority of the outstanding shares of Series A Preferred Stock and, if applicable, Parity Stock, without a meeting. Unless such action shall have been taken by written consent as aforesaid, a special meeting for the exercise of such right shall be called by the Secretary of the Corporation as promptly as possible, and in any event within 10 days after receipt of a written request signed by the holders of record of at least 10% of the outstanding shares of Series A Preferred Stock or, if applicable, of Parity Stock, subject to any applicable notice requirements imposed by law or regulation. Notwithstanding the provisions of this paragraph, no such special meeting shall be held during the 90-day period preceding the date fixed for the annual meeting of stockholders. At any meeting of the holders of the Series A Preferred Stock and Parity Stock entitled to vote thereat, the presence in person or by proxy of the holders of one-third of the total number of shares of the Series A Preferred Stock and any Parity Stock shall be required to constitute a quorum; in the absence of a quorum, a majority of the holders present in person or by proxy shall have power to adjourn the meeting from time to time without notice other than an announcement at the meeting, until a quorum shall be present.

(f) **Limitation on Number of Directors.** Notwithstanding anything to the contrary contained in paragraphs (b) or (c) of this Section 6, the number of directors of the Corporation which may be elected pursuant to such sections may not exceed two in the aggregate. In the event that directors have been elected pursuant to Section 6(b) and are still in office, no directors may be elected pursuant to Section 6(c), and in the event that directors have been elected pursuant to Section 6(c) and are still in office, no directors may be elected pursuant to Section 6(b). In the event that holders of Series A Preferred Stock are entitled to elect additional directors pursuant to both Section 6(b) and Section 6(c), the additional directors shall be elected pursuant to the provisions of Section 6(b), provided that any Preferred Directors elected pursuant to such provision shall continue to serve until the Corporation has satisfied both the requirements of Section 6(b) (i.e., has paid dividends on the Series A Preferred Stock for four consecutive Dividend Periods) and Section 6(c) (i.e., complies with the Asset Coverage Test and the Cash Flow Test).

**Section 7. Ranking.** The Series A Preferred Stock shall, with respect to rights to dividends and rights upon liquidation, dissolution or winding up, rank senior to the Common

Stock and the Series 2002 Preferred Stock, the terms of which are set forth in the Articles of Incorporation, and any other shares of Preferred Stock ranking junior to the Series A Preferred Stock in this regard.

**Section 8. No Conversion Rights.** The holders of Series A Preferred Stock shall not have any rights to convert such shares into shares of any other class or series of stock or into any other securities of, or any interest in, the Corporation.

**Section 9. No Sinking Fund.** No sinking fund shall be established for the retirement or redemption of Series A Preferred Stock.

**Section 10. Preemptive or Subscription Rights.** No holder of Series A Preferred Stock shall, as such holder, have any preemptive right to purchase or subscribe for any additional shares of stock of the Corporation or any other security of the Corporation that it may issue or sell.

**Section 11. No Other Rights.** The Series A Preferred Stock shall not have any designations, preferences or relative, participating, optional or other special rights except as set forth in the Corporation's Articles of Incorporation or as otherwise required by law.

**Section 12. Compliance with Applicable Law.** Declaration by the Board of Directors and payment by the Corporation of dividends to holders of the Series A Preferred Stock and the repurchase, redemption or other acquisition by the Corporation of Series A Preferred Stock shall be subject in all respects to any and all restrictions and limitations placed on dividends, redemptions or other distributions by the Corporation under applicable laws and regulations and any agreements with applicable regulatory authorities.

**Section 13. Certain Definitions.** For the purposes of these Articles of Amendment, the following terms shall have the meanings indicated:

"Asset Coverage Test" shall be deemed to have been met, as of a particular date, if the total stockholders' equity of the Corporation (determined in accordance with GAAP) as of the end of the fiscal quarter immediately preceding such date, minus the sum of the book values (determined in accordance with GAAP) of: (i) all assets of the Corporation which have been pledged as of such date to secure borrowings of Lydian Private Bank (or any successor thereto); (ii) all loans past due more than 45 days as of such date; and (iii) all real estate acquired by foreclosure or by deed-in-lieu thereof as of such date, would be greater than or equal to 150% of the aggregate liquidation preference of all of the then outstanding shares of the Series A Preferred Stock, provided that if the Asset Coverage Test is not met as of the end of such fiscal quarter but is met as of such particular date (as determined by the Corporation's independent public accountants) as a result of actions (such as the contribution of assets to the Corporation) subsequent to the end of such fiscal quarter, then the Asset Coverage Test will be deemed to have been met.

"Calculation Agent" means any Person authorized by the Corporation to determine the dividend rate on the Series A Preferred Stock, which initially shall be Lydian Private Bank.

"Cash Flow Test" shall be deemed to have been met, as of a particular date, if the Corporation's FFO over the period of the four consecutive fiscal quarters immediately preceding such date would be greater than or equal to 150% of the sum of: (i) the aggregate of the then-current annual dividend obligations of all outstanding shares of the Series A Preferred Stock; plus (ii) the annualized interest payments on any Indebtedness incurred by the Corporation.

"FFO" means funds from operations and is equal to net income, calculated according to GAAP, before giving effect to any declaration and payment of dividends, plus depreciation of assets used to generate income, less any gain on the sale of assets plus any loss on the sale of assets.

"GAAP" means generally accepted accounting principles in the United States of America.

"Indebtedness" means all outstanding indebtedness for borrowed money and any outstanding guarantees of indebtedness for borrowed money.

"LIBOR Determination Date" means, with respect to any Dividend Period, the date that is two London Business Days prior to the first day of such Dividend Period.

"London Business Day" means any day, other than a Saturday or Sunday, on which commercial banks and foreign exchange markets are open for business, including dealings in foreign exchange and foreign currency deposits, in London.

"Moneyline Telerate Page 3750" means the display on Moneyline Telerate (or any successor service) on such page (or any other page as may replace such page on such service) for the purpose of displaying the London interbank rates of major banks for deposits in United States dollars.

"Three-month LIBOR" for any Dividend Period, means:

(a) the rate (expressed as a percentage per annum) for U.S. dollar deposits having a three-month maturity that appears on Moneyline Telerate Page 3750 as of 11:00 a.m. (London time) on the related LIBOR Determination Date. "Moneyline Telerate Page 3750" means the display designated as "Page 3750" on the Moneyline Telerate, Inc. service or such other page as may replace Page 3750 on that service or such other service or services as may be nominated by the British Bankers' Association as the information vendor for the purpose of displaying London interbank offered rates for U.S. dollar deposits;

(b) if such rate cannot be identified on the related LIBOR Determination Date, the Calculation Agent will request the principal London offices of four leading banks in the London interbank market to provide such banks' offered quotations (expressed as percentages per annum) to prime banks in the London interbank market for U.S. dollar deposits having a three-month maturity as of 11:00 a.m. (London time) on such LIBOR Determination Date and in an amount that is representative for a single transaction in U.S. dollars in that market at that time. If at least two quotations are provided, LIBOR will be the arithmetic mean of such quotations;

(c) if fewer than two such quotations are provided as requested in clause (b) above, the Calculation Agent will request three major New York City banks to provide such banks' offered quotations (expressed as percentages per annum) to leading European banks for loans in U.S. dollars as of 11:00 a.m. (London time) on such LIBOR Determination Date and in an amount that is representative for a single transaction in U.S. dollars in that market at that time. If at least two such quotations are provided, LIBOR will be the arithmetic mean of such quotations; and

(d) if fewer than two such quotations are provided as requested in clause (c) above, LIBOR will be LIBOR as determined with respect to the Dividend Period immediately preceding such current Dividend Period.

If the rate for U.S. dollar deposits having a three-month maturity that initially appears on Moneyline Telerate Page 3750 as of 11:00 a.m. (London time) on the related LIBOR Determination Date is superseded on Moneyline Telerate Page 3750 by a corrected rate by 12:00 noon (London time) on such LIBOR Determination Date, then the corrected rate as so substituted on the applicable page will be the applicable LIBOR rate for such LIBOR Determination Date.

[signatures on following page]

IN WITNESS WHEREOF, LYDIAN PREFERRED CAPITAL CORPORATION has caused these Articles of Amendment to be signed and acknowledged in its name and on its behalf by its Chairman and Chief Executive Officer and attested to by its Secretary on this 16th day of December 2003.

LYDIAN PREFERRED CAPITAL  
CORPORATION

ATTEST:

Stephen C. Wilhoit

Name: Stephen C. Wilhoit  
Title: Executive Vice  
President and Secretary

By: Kory A. Brown

Name: Kory A. Brown  
Title: Chairman and Chief  
Executive Officer