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FIRST MERCHANTS CORP  
Form 8-K  
March 09, 2006

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, DC 20549

FORM 8-K

CURRENT REPORT

PURSUANT TO SECTION 13 OR 15(d) OF THE  
SECURITIES EXCHANGE ACT OF 1934

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DATE OF REPORT (Date of earliest event reported): March 9, 2006

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FIRST MERCHANTS CORPORATION  
(Exact Name of Registrant as Specified in its Charter)

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INDIANA	0-17071	35-1544218
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

200 East Jackson Street  
P.O. Box 792  
Muncie, IN 47305-2814  
(Address of Principal Executive Offices, including Zip Code)

(765) 747-1500  
(Registrant's Telephone Number, including Area Code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

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ITEM 1.01 ENTRY INTO A MATERIAL DEFINITIVE AGREEMENT.

(a) On February 14, 2006, First Merchants Corporation (the "Corporation") amended the Change of Control Agreement (the "Amendment") with Mark K. Hardwick, Executive Vice President and Chief Financial Officer of the Corporation. The Amendment changes the "Compensation Upon Termination" section within item 4.(B) to provide for a lump sum severance payment to Mr. Hardwick, in cash, equal to two and ninety-nine hundredths (2.99), times the sum of the defined base salary rate and bonus as per the Agreement. The salary multiple utilized in his previous change of control agreement was 2.00. A copy of the Agreement, as amended, is attached hereto as Exhibit 10.1.

ITEM 9.01 FINANCIAL STATEMENTS AND EXHIBITS.

- (a) None
- (b) None
- (c) Exhibits.

Exhibit 10.1 Change of Control Agreement, as amended, between First Merchants Corporation and Mark K. Hardwick, dated February 14, 2006.

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SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

FIRST MERCHANTS CORPORATION  
(Registrant)

By: /s/ Mark K. Hardwick

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Mark K. Hardwick  
Executive Vice President and  
Chief Financial Officer  
(Principal Financial and Chief  
Accounting Officer)

Dated: March 9, 2006

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EXHIBIT INDEX  
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Exhibit No. -----	Description -----
10.1	Change of Control Agreement, as amended, between

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First Merchants Corporation and Mark K. Hardwick,  
dated February 14, 2006.

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First Merchants Corporation

Exhibit No. 10.1

CHANGE OF CONTROL AGREEMENT  
(AS AMENDED)

This Agreement is made and entered into as of February 14, 2006, by and between First Merchants Corporation, an Indiana corporation (hereinafter referred to as "Corporation"), with its principal office located at 200 East Jackson Street, Muncie, Indiana, and Mark K. Hardwick (hereinafter referred to as "Executive"), of Yorktown, Indiana.

WHEREAS, the Corporation considers the continuance of proficient and experienced management to be essential to protecting and enhancing the best interests of the Corporation and its shareholders; and

WHEREAS, the Corporation desires to assure the continued services of the Executive on behalf of the Corporation; and

WHEREAS, the Corporation recognizes that if faced with a proposal for a Change of Control, as hereinafter defined, the Executive will have a significant role in helping the Board of Directors assess the options and advising the Board of Directors on what is in the best interests of the Corporation and its shareholders; and it is necessary for the Executive to be able to provide this advice and counsel without being influenced by the uncertainties of the Executive's own situation; and

WHEREAS, the Corporation desires to provide fair and reasonable benefits to the Executive on the terms and subject to the conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and undertakings herein contained and the continued employment of the Executive by the Corporation as its Executive Vice President and Chief Financial Officer, the Corporation and the Executive, each intending to be legally bound, covenant and agree as follows:

1. Term of Agreement.

This Agreement shall continue in effect through December 31, 2006; provided, however, December 31, 2006 and each December 31 thereafter, the term of this Agreement shall automatically extend for one additional year unless, not later than October 31, 2006 or October 31 immediately preceding thereafter, the Corporation shall have given the Executive notice that it does not wish to extend the term of this Agreement; and provided further, that if a Change of Control of the Corporation, as defined in Section 2.1 hereof, occurred during the original or extended term of this Agreement, this Agreement shall continue in effect for a period of not less than twenty-four (24) months beyond the month in which such Change of Control occurs.

2. Definitions.

For purposes of this Agreement, the following definitions shall apply:

A. Cause: "Cause" shall mean:

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- (1) professional incompetence;
- (2) willful misconduct;
- (3) personal dishonesty;
- (4) breach of fiduciary duty involving personal profit;
- (5) intentional failure to perform stated duties;
- (6) willful violation of any law, rule or regulation (other than violations or similar offenses) or final cease and desist order;
- (7) any intentional material breach of any term, condition or covenant of the Agreement.

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(B) Change of Control: "Change of Control" shall mean:

- (1) any person (as such term is used in Sections 13(d) and 14(d) of the Exchange Act of 1934 ["Exchange Act"]), other than the Corporation, becomes the Beneficial Owner (as defined in Rule 13d-3 under the Exchange Act) of twenty-five percent (25%) or more of the combined voting power of the Corporation's then outstanding securities;
- (2) persons constituting a majority of the Board of Directors of the Corporation were not directors of the Corporation for at least the twelve (12) months preceding months;
- (3) the stockholders of the Corporation approve a merger or consolidation of the Corporation with any other corporation, other than a consolidation which would result in the voting securities of the Corporation outstanding immediately prior thereto continuing to represent (a) more than fifty percent (50%) of the combined voting power of the voting securities of the Corporation or such other corporation outstanding immediately after such a merger or consolidation or consolidation effected to implement a recapitalization (or similar transaction) in which no person acquires fifty percent (50%) or more of the combined voting power of the Corporation's then outstanding securities; or
- (4) the stockholders of the Corporation approve a plan of complete liquidation of the Corporation or an agreement for the sale or disposition of all or substantially all of the Corporation's assets.

(C) Date of Termination: "Date of Termination" shall mean the date of such notice, as hereinafter defined, whichever comes first.

(D) Disability: "Disability" shall mean the definition of such term in the disability policy then in effect for the Corporation, and a determination of disability by the Corporation; provided that in the event there is no disability insurance then in force, "disability" shall mean incapacity due to illness which will have caused the Executive to have been unable to perform his duties with the Corporation on a full time basis for one hundred eighty (180) calendar days.

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- (E) Notice of Termination: "Notice of Termination" shall mean a communicated to the other parties hereto, which shall indicate termination provisions of this Agreement relied upon and set forth in detail the facts and circumstances claimed to provide a basis for termination of Executive's employment under the provisions so indicated.
- (F) Retirement: "Retirement" shall mean termination of employment by the Corporation in accordance with the Corporation's normal retirement policy generally applicable to salaried employees in effect at the time of a Change of Control.

3. Termination.

- (A) General. If any of the events described in Section 2 constituting a Change of Control of the Corporation shall have occurred, the Executive shall be entitled to the benefits described in Section 4 upon the subsequent termination of his employment during the term of this Agreement, unless such termination is due to the death or Disability of the Executive, (b) by the Corporation or by the Executive other than on account of Constructive Termination (as defined).
- (B) If, following a Change of Control, the Executive's employment shall be terminated for Cause, the Corporation shall pay him his salary through the Date of Termination at the rate in effect on the date of the Notice of Termination, and the Corporation shall have no further obligations under this Agreement. If, following a Change of Control, the Executive's employment shall be terminated as a result of death or Disability, compensation to the Executive shall be made pursuant to the Corporation's then existing policies on death or Disability, and the Corporation shall have no further obligations under this Agreement. If, following a Change of Control, the Executive's employment is terminated by and at the request of the Executive on account of Retirement, compensation to the Executive shall be made pursuant to the Corporation's normal retirement policy generally applicable to its salaried employees in effect at the time of the Change of Control, and the Corporation shall have no further obligations under this Agreement.

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- (C) Constructive Termination. The Executive shall be entitled to termination of his employment upon the occurrence of Constructive Termination. For purposes of this Agreement, "Constructive Termination" shall mean, without the Executive's express consent, the occurrence, after a Change of Control of the Corporation, of any of the following circumstances:
  - (1) the assignment to the Executive of any duties inconsistent with the nature of a promotion) with the position in the Corporation held immediately prior to the Change of Control of the Corporation or a significant adverse reduction or alteration in the nature of the Executive's position, duties or responsibilities or the termination of the Executive's employment from those in effect immediately prior to the Change of Control;
  - (2) a reduction in the Executive's annual base salary, as in effect immediately prior to the Change of Control of the Corporation or as adjusted from time to time, except for across-the-board salary adjustments similarly affecting all management personnel of the Corporation;
  - (3) the Corporation requires the Executive to be relocated anywhere other than its offices in Muncie, Indiana;
  - (4) the taking of any action to deprive the Executive of any benefit enjoyed by him at the time of the Change of Control, or to provide him with the number of paid vacation days to which he is entitled.

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the basis of years of service with the Corporation and in accordance with the Corporation's normal vacation policy in effect at the time of the Change of Control;

- (5) the failure to continue to provide the Executive with benefits similar to those enjoyed by the Executive under any of the Corporation's life, health, dental, vision, disability, or long-term care insurance, medical, health and accident, or disability insurance, or the Executive was participating at the time of the Change of Control of the Corporation, or the taking of any action which would directly or indirectly materially reduce any of such benefits; or
- (6) the failure of the Corporation to continue this Agreement or to obtain a satisfactory agreement from any successor to the Corporation to perform this Agreement, as contemplated in Section 5 hereof.

#### 4. Compensation Upon Termination.

Following a Change of Control, if his employment by the Corporation shall be terminated on account of Constructive Termination or by the Corporation other than for Cause, death or Retirement (by and at the request of the Executive), then the Executive shall be entitled to the compensation provided below:

- (A) No later than the fifth day following the Date of Termination, the Corporation shall pay to the Executive his full base salary through the Date of Termination in effect at the time Notice of Termination is given, plus all other compensation the Executive is entitled under any incentive, bonus or other compensation plan of the Corporation in effect at the time such payments are due;
- (B) In lieu of any further salary payments to the Executive for periods following the Date of Termination, no later than the fifth day following the Date of Termination, the Corporation shall pay to the Executive a lump sum severance payment equal to two and ninety-nine hundredths (2.99) times the sum of (a) the Executive's annual base salary rate as in effect on the date of the Notice of Termination and (b) the largest bonus received by the Executive during the two (2) years immediately preceding the Date of Termination under the Corporation's Management Incentive Plan covering the Executive;
- (C) During the period beginning with the Executive's Date of Termination and continuing until the earlier of (a) the second anniversary of such Date of Termination or (b) the Executive's sixty-fifth (65th) birthday, the Corporation shall arrange to provide the Executive with life, disability, accident and health insurance benefits similar to those which the Executive was receiving immediately prior to the Date of Termination and shall pay the same percentage of the cost of such insurance as the Corporation was paying on the Executive's behalf on the date of such Termination;
- (D) In lieu of shares of common stock of the Corporation ("Corporation Shares") upon the exercise of outstanding options ("Options"), if any, granted to the Executive under any Corporation stock option plan (which Options shall be exercisable upon the making of the payment referred to below), the Executive shall receive a cash payment equal to the product of (a) the excess of the higher of the closing price of Corporation Shares as reported on the NASDAQ National Market System or the New York Stock Exchange, wherever listed, on the Date of Termination or the highest per share price for Corporation Shares in the 60 days in connection with any Change of Control of the Corporation, over the exercise price of each Option held by the Executive (whether or not then exercisable) multiplied times (b) the number of Corporation Shares covered by each such Option;
- (E) If the payments or benefits, if any, received or to be received by the Executive (whether under this Agreement or under any other plan, arrangement or agreement)

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between the Executive and the Corporation), in connection with Constructive Termination of the Executive's employment following a constitute an "excess parachute payment" within the meaning of ss. Revenue Code ("Code"), the Corporation shall pay to the Executive, fifth day following the Date of Termination, an additional amount the Corporation's independent public accountants) equal to the ex imposed on the "excess parachute payment" under ss.4999 of the Code; if the amount of such excise tax is finally determined to be more amount paid to the Executive hereunder, the Corporation (or the finally determined amount is less than the original amount paid difference between the amount originally paid and the finally determined other party no later than the fifth day following the date such final made;

- (F) The Corporation shall pay to the Executive all reasonable legal incurred by the Executive as a result of such termination (including expenses, if any, incurred in contesting or disputing any such seeking to obtain or enforce any right or benefit provided by this A the decision-maker in any proceeding, contest, or dispute arising formal finding that the Executive did not have a reasonable basis for proceeding, contest, or dispute;
- (G) The Corporation shall provide the Executive with individual out-plac accordance with the general custom and practice generally accorded the Executive's position.

### 5. Successors; Binding Agreement.

- (A) The Corporation shall require any successor (whether direct or indir merger, consolidation or otherwise) to all or substantially all of t assets of the Corporation to expressly assume and agree to perform the same manner and to the same extent that the Corporation would perform it if no such succession had taken place. Failure of th obtain such assumption and agreement prior to the effectiveness of a shall be a breach of this Agreement and shall entitle the Executive from the Corporation in the same amount and on the same terms to wh would be entitled hereunder if the Executive terminates his employ Constructive Termination following a Change of Control of the Corpora for the purposes of implementing the foregoing, the date on which a becomes effective shall be deemed the Date of Termination. As used "the Corporation" shall mean the Corporation and any successor to i assets as aforesaid which assumes and agrees to perform this Agreem of law or otherwise.
- (B) This Agreement shall inure to the benefit of and be enforceable by his personal or legal representatives, executors, administrators, s distributees, devisees and legatees. If the Executive should di would still be payable to the Executive hereunder had the Executive all such amounts, unless otherwise provided herein, shall be paid the terms of this Agreement to the devisee, legatee or other design no such designee, to his estate.

### 6. Miscellaneous.

No provision of this Agreement may be modified, waived or discharged unless such waiver discharge is agreed to in writing and signed by the Executive and such officer as may be specif by the Corporation. No waiver by either party hereto at the time of any breach by the other p compliance with, any condition or provision of this Agreement to be performed by such other par a waiver of similar or dissimilar provisions or conditions at the same or at any prior or su agreement or representations, oral or otherwise, express or implied, with respect to the subj have been made by either party which are not expressly set forth in this Agreement interpretation, construction and performance of this Agreement shall be governed by the la

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Indiana without regard to its conflicts of law principles. All references to a section of the Code shall be deemed also to refer to any successor provisions to such section. Any payment hereunder shall be paid net of any applicable withholding required under federal, state or obligations of the Corporation under Section 4 shall survive the expiration of the term of this Agreement.

7. Validity.

The invalidity or unenforceability of any provision of this Agreement shall not affect the enforceability of any other provision of this Agreement, which shall remain in full force and effect.

8. Counterparts.

This Agreement may be executed in several counterparts, each of which shall be deemed to be a copy of the Agreement, but all of which together shall constitute one and the same instrument.

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9. Arbitration.

Any dispute or controversy arising under or in connection with this Agreement shall be resolved exclusively by arbitration, conducted before a panel of three (3) arbitrators in Muncie, Indiana, in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrator's award in any court having jurisdiction; provided, however, that the Executive shall not seek specific performance of his right to be paid until the Date of Termination during the pendency of the dispute or controversy arising under or in connection with this Agreement.

10. Entire Agreement.

This Agreement sets forth the entire agreement of the parties hereto in respect of the subject matter contained herein and supersedes all prior agreements, promises, covenants, arrangements, representations or warranties, whether oral or written, by any officer, employee or representative of the Corporation hereto; and any prior agreement of the parties hereto in respect of the subject matter contained herein is terminated and cancelled.

IN WITNESS WHEREOF, the Corporation has caused this Agreement to be executed by its duly authorized officers, and the Executive has hereunder subscribed his name, as of the day and year first above written.

"CORPORATION"

"EXECUTIVE"

FIRST MERCHANTS CORPORATION

By \_\_\_\_\_  
Michael L. Cox,  
President & Chief Executive Officer

By \_\_\_\_\_  
Mark K. Hardwick