UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF EDWARD TOWE, FORMER PRESIDENT AND DIRECTOR, and THOMAS TOWE, FORMER DIRECTOR AND CHAIRMAN OF THE BOARD OF DIRECTORS FIRST NATIONAL BANK & TRUST WIBAUX, MONTANA	AA-EC-93-42 AA-EC-93-43

DECISION AND ORDER ON
REQUEST FOR A PRIVATE HEARING

Respondents Edward Towe, former President and Director, and Thomas Towe, former Director and Chairman of the Board of Directors of the First National Bank and Trust, Wibaux, Montana ("Bank"), have requested a private hearing in the above-captioned administrative proceeding. The Enforcement and Compliance Division (E&C) of the Office of the Comptroller of the Currency ("OCC") opposes the request.

After considering the applicable law and arguments of the parties, the Comptroller has determined that the Respondents' request for a private hearing must be denied.

I. APPLICABLE LAW

Until 1990, OCC administrative hearings were required by statute to be private unless the Comptroller determined that a public hearing was in the public interest. See 12 U.S.C. § 1818(h)(1) (1989). However, section 2547 of the Crime Control Act of 1990, Public Law No. 101-647, enacted on November 29, 1990, repealed the private hearing presumption in section

1818(h)(1) and amended section 8(u)(2) of the Federal Deposit Insurance Act to establish a presumption in favor of open hearings:

> All hearings on the record with respect to any notice of charges issued by a Federal banking agency shall be open to the public, unless the agency, in its discretion, determines that holding an open hearing would be contrary to the public interest.

12 U.S.C. § 1818(u)(2).

In apparent recognition of the need to protect confidential information in an open hearing, Congress also provided:

> The appropriate Federal banking agency may file any document or part of a document under seal in any administrative enforcement hearing commenced by the agency if disclosure of the document would be contrary to the public interest.

12 U.S.C. § 1818(u)(6).

On August 9, 1991, the OCC promulgated at 12 C.F.R. Part 19 new Rules of Practice and Procedure applicable to all actions commenced on or after that date. The Rules reiterate the statutory presumption in favor of a public hearing:

> (a) General Rule. All hearings shall be open to the public, unless the Comptroller, in his or her discretion, determines that holding an open hearing would be contrary to the public interest.

12 C.F.R. § 19.33(a).

With respect to preserving confidentiality where necessary, the Rules state in part:

> (b) Filing document under seal. Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the

hearing to the public.

12 C.F.R. § 19.33(b).

II. PROCEDURAL BACKGROUND

The OCC initiated proceedings against the Respondents by service of a Notice of Assessment of Civil Money Penalty and a Notice of Intention to Prohibit Further Participation, both dated March 29, 1993. In their Answer, the Respondents asked the Comptroller to determine that a public hearing would be contrary to the public interest. Subsequently, the Respondents filed a motion requesting a private hearing and a memorandum in support thereof. Respondents argue that a public hearing would violate the confidential relationship between the Bank and its customers and that some of the evidence would compromise customer financial integrity and privacy. The Respondents further assert that a public hearing would reveal confidential information about financial transactions involving individuals, a partnership, a corporation and a nonprofit organization that are not parties to the proceeding.

On May 26, 1993, E&C filed an opposition. E&C argues that the Respondents have failed to meet their burden of showing that an open hearing would be contrary to the public interest. According to E&C, the Respondents' claim that a public hearing would violate confidential relationships and compromise customers' financial privacy is without merit because 12 U.S.C. § 1818(u)(6) and 12 C.F.R. § 19.33(b) provide procedures to protect confidentiality where warranted. E&C indicates its

willingness to file documents under seal and to agree to close portions of the hearing to the public when necessary to protect customer confidentiality. E&C further argues that, with possible exceptions, most of the customer information will be presented through documentary evidence rather than through testimony.

With regard to the Respondents' objections that a public hearing would permit disclosure of financial information about a consultant who provided services to the Bank, E&C argues that the information in question has already been made public in another case, U.S. v. Edward Towe and Cora Florence Towe, No. 91/00011 (Bankr. D. Mont.).

In response to the Respondents' contention that a public hearing would disclose confidential information concerning the partnership, the corporation and the nonprofit organization, E&C argues that the Right to Privacy Act, 12 U.S.C. § 3401 et seq., does not cover partnerships of more than five individuals, or corporations, or nonprofit organizations. Accordingly, E&C maintains that the Respondents have no reasonable expectation of privacy with respect to these entities.

On June 21, 1993, the Respondents filed a reply contending that an open hearing would be so confusing and disjointed as to be unworkable, since many documents pertaining to individual loans would have to be redacted or sealed and portions of the hearings closed to the public. A private hearing, in the Respondents' view, "would be a less cumbersome proceeding and could be conducted in a more workable and orderly fashion."

III. DISCUSSION

Section 1818(u)(2) establishes a presumption favoring an open hearing, unless the Comptroller determines that an open hearing is contrary to the public interest. In the Comptroller's opinion, the Respondents' argument that an open hearing would not be in the public interest is without merit. The Civil Money Penalty and Prohibition Notices allege that the Respondents engaged in serious violations of law. An open hearing would serve the public interest by apprising the public of actions that adversely affect the safety and soundness of the Bank. A public hearing would also demonstrate that the OCC will take strong enforcement action against directors and officers alleged to have engaged in such practices.

Even when a hearing is public, safeguards are available to protect the confidentiality of persons who are not parties to the proceeding. As noted earlier, the OCC's Rules of Practice and Procedure authorize the filing of any document or part of any document under seal. E&C has indicated it is prepared to take measures authorized by the Rules to preserve confidentiality where necessary. In addition, the administrative law judge has broad authority to address any remaining concerns regarding confidential information by ordering that documents be produced, and portions of the hearing be held, in private. 12 C.F.R. § 19.33(b) (1993). While the redaction of documents and the possibility of closing portions of the hearing may make the proceeding more cumbersome than otherwise, the Comptroller

believes that the previous experience of the administrative law judges with this format will assure an orderly and meaningful hearing for both parties.

V. ORDER

The Comptroller is unable to find that an open hearing would be contrary to the public interest, and therefore it is ordered that the Respondents' request for a private hearing is denied.

So ordered this 14th day of October, 1993.

Eugene Ludwig
Comptroller of the Currency