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

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| IN THE MATTER OF: | ) | |
| | ) | |
| MICHAEL R. MORGAN, | ) | |
| FORMER VICE PRESIDENT AND DIRECTOR, | ) | |
| ROBERT S. MORGAN, | ) | |
| FORMER CHAIRMAN OF THE BOARD, AND | ) | |
| TODD W. MORGAN, | ) | |
| FORMER DIRECTOR | ) | |
| | ) | |
| THE FIRST NATIONAL BANK & TRUST OF PIPESTONE | ) | AA-EC-2000-18 |
| PIPESTONE, MINNESOTA, AND | ) | |
| | ) | |
| THE FIRST NATIONAL BANK IN GARRETSON | ) | AA-EC-2000-19 |
| GARRETSON, SOUTH DAKOTA | ) | |
| | ) | |

## DECISION AND ORDER ON REQUEST FOR A PRIVATE HEARING

Respondents Robert S. Morgan, former chairman of the board, and Todd W. Morgan, former director, of both The First National Bank & Trust of Pipestone, Pipestone, Minnesota and The First National Bank in Garretson, Garretson, South Dakota ("Banks"), have requested a private hearing in the above-captioned administrative proceedings.[1] 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.

[1]As Respondents submitted nearly identical requests for each administrative proceeding, this Decision and Order addresses both requests.

## 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 However, section 2547 of the Crime Control Act of 1990, Public Law No. 101-647, enacted on November 29, 1990, repealed the private hearing presumption in section 1818 (h)(1) and amended section 8(u)(2) of the Federal Deposit Insurance Act to establish a presumption in favor of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)(5).

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 the Comptroler's discretion, determines that holding a public 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 Michael R. Morgan and Respondents by service of a Notice of Intention to Prohibit Further Participation, a Notice of Charges for Issuance of an Order to Cease and Desist for Affirmative Relief Including Restitution and Guaranty Against Future Loss, and a Notice of Assessment of Civil Money Penalties, all dated March 14, 2000. These proceedings against Michael R. Morgan and Respondents concern both The First National Bank & Trust of Pipestone, Pipestone, Minnesota and The First National Bank in Garretson, Garretson, South Dakota. Respondents submitted a Request for a Hearing with Respect to Civil Money Penalties on March 30, 2000. On April 4, 2000, Respondents filed an Amended Request for a Private Hearing with Respect to Civil Money Penalties. In their Amended Request, Respondents argue that a public hearing would involve an unwarranted invasion of personal privacy due to the disclosure of financial and other confidential nonpublic personal information concerning Respondents and individuals and entities not party to this action. Respondents also argue that disclosure of loan terms and conditions would result in undue competitive harm to individuals and entities involved in the loan and other transactions. Lastly, Respondents assert that a public hearing would present reputational risks to the Banks.

On April 14, 2000, Enforcement Counsel filed an Opposition. E&C argues that Respondents have failed to meet their burden of showing that an open hearing would be contrary to the public interest. E&C states that an administrative law judge, pursuant to 12 C.F.R. § 19.5(b)(2) and 12 C.F.R. § 19.33(b), has the power to issue protective orders in order to maintain the confidentiality of certain information.

With respect to Respondents' contention that public disclosure of financial and other nonpublic personal information would result in an unwarranted invasion of personal privacy, E&C argues that the claim is too vague to overcome Congress' clear intent that administrative hearings be open to the public. E&C also argues that Respondents have neither identified any non-party to these administrative proceedings that may be harmed by a public hearing nor cited any statutory or case law authority for the proposition that Respondents' right to a private hearing can be derived from harms that may befall third parties or unrelated entities.

In response to Respondents' claim that disclosure of terms and conditions of loans and other transactions not in the public domain would result in undue competitive harm to individuals and entities involved in those transactions, E&C states that these transactions, at least with respect to The First National Bank & Trust of Pipestone, Pipestone, Minnesota, occurred more than two years ago. Moreover, E&C argues that if the applicable transactions reflect market terms, no competitive disadvantage will befall the parties involved. E&C states that Respondents do not argue that disclosure of terms of less than arms-length transactions will now harm the entities involved.

As to Respondents' argument that a public hearing would present reputational risks to the

Banks, E&C counsel provides a lengthy newspaper article, which, in part, discusses matters at the bank in Pipestone, Minnesota. E&C argues that as Respondents are no longer involved in the ownership or management of either Bank, they, again, are improperly asserting an alleged harm to third parties as the basis for the relief they seek.

In its Opposition, E&C points out that only two of the three Respondents in these administrative proceedings are seeking a private hearing.

## 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, Respondents' arguments in support of a private hearing do not overcome the statutory presumption in favor of a public hearing. While Respondents claim that a public hearing would be contrary to the public interest, Respondents fail to address this issue, but rather, concentrate on personal or nonparty interests.

An open hearing would serve the public interest by apprising the public of actions that adversely affect the safety and soundness of the Banks. 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, proper safeguards are available to protect the confidentiality of persons who are not parties to the proceedings. As noted earlier, the OCC's Rules of Practice and Procedure authorize the filing of any document or part of any document under seal. The administrative law judge has broad authority to address 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). 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 judge with this format will assure an orderly and meaningful hearing for both parties.

## IV. ORDER

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

So ordered this 17th day of July, 2000.

John D. Hawke, Jr.
Comptroller of the Currency