

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

In the Matter of:)
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Borrego Springs Bank, N.A.)
Borrego Springs, California)
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_____)

OCC AA-WE-11-99

**COMPTROLLER'S DECISION ON MOTION FOR PRIVATE HEARING AND FOR
TREATMENT OF NOTICE AND DOCUMENTS AS NONPUBLIC**

These issues arise in connection with an enforcement proceeding initiated on January 13, 2012 by the issuance of a Notice of Charges by the Enforcement and Compliance Division ("E&C") of the Office of the Comptroller of the Currency ("OCC") seeking a cease and desist order against Borrego Springs Bank, N.A., Borrego Springs, California ("the Bank"). Under the applicable statute, the Federal Deposit Insurance Act (the "FDI Act"), a notice of charges initiates an adversary adjudication that proceeds to a hearing before an Administrative Law Judge ("ALJ"), and a recommended decision, before the final decision on the adjudication is made by the Comptroller.

On January 27, 2010, Borrego Springs filed a motion with the Acting Comptroller ("Comptroller") asking for an order: 1) that the proceedings and notice of charges not be commenced or filed on a public basis; 2) granting a private hearing; and 3) requiring the filing of all documents under seal. The motion was supported by the affidavits of William P. Rhulman, II, the Bank's Chief Executive Officer, and Jeffrey A. Tisdale, the Bank's attorney. The motion and affidavits together purport to justify the Bank's request for a nonpublic hearing and for

nonpublic treatment of related pleadings and other documents by projecting a number of negative consequences for the Bank that would result from public proceedings. E&C has opposed the request in an Opposition, filed February 6, 2012 and supported by the Declaration of Richard C. Stearns, the Director of the OCC's Enforcement and Compliance Division.

Upon review of the submissions, the Comptroller determines that the attached order issue declaring: 1) that the motion to treat the Notice of Charges as nonpublic is denied; 2) that the motion for a nonpublic hearing is denied; and 3) remanding to the Administrative Law Judge the motion to file all documents under seal.

A. Request to Treat the Notice of Charges as Nonpublic.

Under the statutory scheme, an adversary adjudication is commenced by the issuance of a notice of charges. Accordingly, any decisions that precede the issuance of the notice, including the decision whether or not to make the notice of charges public, are statutorily not subject to the rules that govern the adversary proceeding. The wording of the applicable regulation reflects that structure: "All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller." 12 C.F.R. § 19.131(b). Accordingly, the decision is to be made in the discretion of the Comptroller. Contrary to the Bank's argument, the fact that the Comptroller has the discretion to make the notice of charges nonpublic does not imply that adversary procedures apply. Bank Reply 2-3. Because that decision will be made before the initiation of the adversary proceeding, the Comptroller's discretion may be informed by information and judgments available to the OCC notwithstanding the absence of pleadings by the Bank.

By operation of the OCC's delegation rules, the Comptroller has designated subordinate OCC officials to exercise his discretion over the notice of charges. Here, E&C has submitted the Declaration of the director of E&C, Richard C. Stearns, detailing how the Comptroller's discretion was exercised in this case. The Western District Deputy Comptroller, Kay Kowitt, was delegated the discretion to determine whether publication of the notice of charges would be contrary to the public interest. Stearns Decl. ¶ 2. Prior to the exercise of that authority, District Deputy Comptroller Kowitt consulted with Director Stearns and with Senior Deputy Comptroller of Midsized and Community Bank Supervision Jennifer C. Kelley. Stearns Decl. ¶ 3. Deputy Comptroller Kowitt thereupon determined that publication of the notice was not contrary to the public interest. Stearns Decl. ¶ 4-5.

The rules of delegation functioned appropriately. Moreover, for the reasons addressed below, even if the issue were subject to adjudication in the adversary proceeding, the Bank has not demonstrated that the public interest weighs against public awareness of the notice of charges. The Bank's objection to the publication of the notice is denied.

B. Request for A Private Hearing.

The Bank requests that the Comptroller exercise his discretion to reverse the statutory presumption that the adversary adjudication be open to the public, projecting a number of adverse consequences that would likely result from a public hearing. The request is denied.

The governing statute provides:

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).

The Bank has filed the Ruhlman Declaration in support of its forecast of potential harms. The Bank argues that public commencement of the proceedings would be detrimental to the reputation and image of the Bank in the eyes of its existing and potential customer base, likely causing the withdrawal of deposits and a decline in other business. Motion at 2; Ruhlman Decl. ¶ 3. The Bank predicts that a public enforcement proceeding will cause productive bank officers to leave the Bank. Motion at 2-3; Ruhlman Decl. ¶ 4. The Bank predicts that the public enforcement proceeding may cause it to lose its status as a lender in the Preferred Lenders Program of the Small Business Administration which would cost it business. Motion at 3-4; Ruhlman Decl. ¶ 5. The Bank predicts that the public enforcement proceeding will jeopardize its participation in a Certificate of Deposit Account Registry, which would negatively affect the Bank's ability to attract large deposits in the event of an emergency liquidity crisis. Motion at 4; Ruhlman Decl. ¶ 6. The Bank predicts that the public enforcement proceeding will "scare off" a potential capital investor with whom the Bank is currently in negotiations, and other potential investors or merger partners. Motion at 4-5; Ruhlman Decl. ¶ 7. The Bank predicts that the public enforcement proceeding will negatively affect a pending sale of a portfolio of loans. Motion at 5; Ruhlman Decl. ¶ 8. The Bank is concerned that the public proceeding and the filing of documents in public could threaten the continued viability of the Bank. Motion at 5; Ruhlman Decl. ¶ 9. The Bank argues that failure of the Bank "in whole or in part" would be contrary to the public interest, including the interests of the Bank's depositors, other third parties, the Deposit Insurance Fund, and the market interest in a significant provider of small business lending. Motion at 5-6; Ruhlman Decl. ¶ 10.

In Opposition to the Motion, E&C argues that Congress created a statutory presumption that public hearings would be in the public interest, and that the Bank's arguments address primarily the interests of the Bank rather than those of the public. Opp. at 2-7. E&C responds to the Bank's argument that the charges are as yet "unproven" by pointing out that, because the public hearing decision is necessarily made at the outset of an adversary proceeding, the charges will necessarily be unproven at that point. Opp. at 4. E&C does not deny the possibility of economic harm to the Bank from a public hearing, but E&C argues that, to the extent that such harm flows from an awareness of the proceedings by third parties, – such as the Small Business Administration, or potential investors – the public interest favors such awareness. Opp. at 4-6. E&C acknowledges that the Bank is concerned that the public hearing could threaten the Bank's viability by, among other things, depositor withdrawal, but argues that those concerns are raised in every public enforcement proceeding, and that the statutory presumption of open hearings establishes a difference between the institution's interests and those of the public. Opp. at 6-7.

After carefully weighing the arguments of the Bank and E&C, the Comptroller concludes that there is no demonstrated basis in the public interest for the exercise of his discretion to order that the hearing in this matter be nonpublic. Accordingly, the Bank's motion is denied.

C. The Motion for an Order that Documents be Filed Under Seal.

The Bank requests an order that all documents in the proceeding be filed under seal, relying upon the same basis as its request for the closure of the hearing. The Comptroller agrees with E&C's argument that such issues are to be addressed in the first instance, not by the Comptroller, but by the ALJ. Opp. At 7. The rules provide the ALJ with "all powers necessary

to conduct a proceeding in a fair and impartial manner * * *." 12 C.F.R. § 19.5. Accordingly, the issue is remanded to the ALJ to be resolved in the course of the proceeding.

SO ORDERED this 21st day of February 2012.

John Walsh
Acting Comptroller of the Currency