APPENDIX E

PROCEDURES IN DEFAULT CASES

In chapter III, at page 41, and in the individual recommendations in chapter IX, the Committee has recommended the elimination of hearings in cases where the parties in interest have failed to avail themselves of their opportunity to be heard. The Committee's recommendations are predicated upon the following analysis of procedures currently followed by the Federal administrative agencies. While some attention has been given in this appendix to the procedures preceding the issuance of notices of hearing, the treatment of this phase of the problem has been restricted to those proceedings which are not disciplinary in nature; a full discussion of precomplaint procedures in disciplinary matters may be found in appendix D of this report. The major emphasis in the following analysis has been placed upon variations in the statutory provisions and the rules of practice under which the several agencies confronted with defaults operate, variations which may conceivably require the holding of hearings prior to the entry of a dispositive order in some situations.

Alcohol Tax Unit (Bureau of Internal Revenue, Treasury Department).—The problem of default hearings arises here in connection with proceedings looking either to the denial of applications for permits, or to the revocation of such permits. No hearing is required by statute prior to the denial of an application for permit, but prior to the entry of an order of revocation it is provided that the Commissioner shall "issue an order citing such person to appear before him * * * at which time a hearing shall be had * * *."[30] The administrative practice is to hold brief hearings when the applicant or permittee has defaulted and even if the permittee has signed a "waiver" consenting to the entry of an order of revocation without a formal hearing. The investigating agent is placed under oath and identifies his report, which is then admitted into evidence. A stenographic record of the brief oral testimony is made. The usual findings and recommendations are then prepared by the hearing officer, and are transmitted to the District Supervisor for final action.

Civil Aeronautics Administration.[31]—The problem of default hearings arises here in connection with applications for airman certificates and proceedings to revoke, suspend, or modify such certificates. Under Section 602 (b) of the act, a hearing must be held in application matters only if a petition for reconsideration of a denial is received. Hearings have accordingly not been held after the denial of applications unless a petition for reconsideration has been filed.

Disciplinary action may not be taken, under Section 609, except "after investigation, and upon notice and hearing." The agency has

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[30] Internal Revenue Code (1939), sec. 3114.

[31] The functions of the Authority have been transferred, by the President's Reorganization Plans III and IV, to the Department of Commerce and are now administered by the Civil Aeronautics Board and the Administrator of Civil Aeronautics. For a discussion of the changes wrought by the reorganization, see this Committee's Monograph No. 19, "Civil Aeronautics Authority," Appendix B.

construed this provision as requiring merely that an airman be given an opportunity to be heard prior to the suspension or revocation of his certificate. If it is determined, after investigation, that disciplinary action should be taken, a letter is sent to the airman apprising him of all the facts upon which the decision was predicated. He is informed of his right to be heard and advised that, if he desires to dispense with the hearing by signing the enclosed waiver, the matter will be disposed of on the basis of the information available, including any statements the airman may desire to make; a hearing is held only upon receipt of a written request. During the year ended March 1, 1940, the use of this procedure necessitated the holding of only 11 hearings in the 73 cases in which airman certificates were revoked or suspended.

Federal Alcohol Administration (now absorbed by the Alcohol Tax Unit, Bureau of Internal Revenue).—The problem of default hearings arises here in two types of cases: proceedings in which the Administration has indicated that it contemplates the denial of an application for a permit; and proceedings instituted by the Administration looking toward the annulment, suspension, or revocation of a permit. In all of these cases a thorough investigation, usually involving field work, is made by the staff, whose recommendations are carefully reviewed by the Chief of the trial section and then by the Administrator prior to the apprisal of the interested parties of the proposed action.

Procedure in application cases is based upon Section 4 (b) of the Federal Alcohol Administration Act which requires the Administrator, prior to the denial of an application, to afford "due notice and opportunity for hearing." The rules of practice provide that the applicant, if he desires to be heard, shall request a hearing within 15 days after the issuance of the notice of contemplated denial.[32] Failure to request a hearing, or the nonappearance of the applicant at a hearing scheduled pursuant to his request, is followed by the entry of a final order denying the application.[33] This procedure has enabled the Administration to dispense with hearings in over 40 percent of the cases in which applications were not withdrawn after the issuance of notices of contemplated denial.

Section 4 (e) of the act, which is the governing statutory provision in annulment, revocation, and supervision cases, requires that the Administrator's order be preceded by "due notice and opportunity for hearing to the permittee." While the procedure contemplated by the rules of practice is identical with that utilized in application cases,[34] the Administration has in fact pursued a different course in these proceedings. Even when requests for hearings have not been made, the Administration has designated the matter for hearing, and presented its entire case. Records consisting of a mere translation of the contents of the Administration's informal files have thus been compiled in a large number of cases, the vast majority of which involved the revocation of permits for failure to exercise the privileges attaching thereto for a period of two years.[35] Following the hearing, the customary inter-

[32] Regulations No. 1 (1935), art. II, sec. 7 (a).
[33] *Id.*, sec. 7 (b), (d).
[34] Regulations No. 1 (1935), art. III, sec. 5.
[35] During 1938, the first year in which nonuser revocation proceedings were available, hearings were held in 84 cases in which the permittees failed to file answers. During the first 9 months of 1939, 38 cases were designated for hearing after default. An appreciable increase is anticipated in the number of these proceedings during the next year or two when the Administration intends to investigate the status of its largest group of permittees, the wholesalers.

mediate report has been served on the interested parties and, after the period for filing exceptions has expired—invariably without any indication of interest on the part of the permittee—the Administrator has issued a final order.

Federal Communications Commission.—Section 309 (a) of the Communications Act requires the Commission, if it is unable to find that a grant of a license would serve the public interest, convenience, and necessity, to notify the applicant thereof, fix and give notice of a time and place for hearing, and "afford such applicant an opportunity to be heard." If, as a result of the study of an application made by the Engineering, Accounting, and Legal Departments, it is concluded by the staff and ultimately by the Commission, that a license should not be granted on the basis of the information available, a notice is sent to the applicant advising him of his right to request a hearing on the issues set forth in the notice. If the applicant fails to file an appearance requesting a hearing within 15 days, he is held in default and the application is denied. Approximately 10 percent of all applications designated for hearing have been disposed of in this manner.

If, after investigation by the staff, the Commission determines that cause for the revocation of a station license exists, proceedings are instituted by the service of an order of revocation. This is in conformity with section 312 (a) of the act which further provides that, if the licensee requests a hearing within 15 days, the order of revocation is to be stayed until the conclusion of the hearing; otherwise, the order becomes effective without further consideration or action of the commission.[36]

Federal Deposit Insurance Corporation.—The Board of Directors of the Corporation is empowered, whenever it shall find that certain conditions exist, to institute proceedings which, if not successful in achieving a correction of the conditions, lead to the termination of the insured status of the bank in question. Action by the Board is predicated upon the reports of the Supervising Examiner for the district in which the bank is located, and the recommendations of the Review Examiner, the Legal Department and the Board of Review in Washington. If correction of the practices or violations is not had within 120 days, the evidence is reconsidered and, if deemed sufficient, notice of intention to terminate the insured status of the bank is given. Subsection (i) (1) of the deposit insurance law provides that "Unless the Bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank." In the one situation in which a default occurred, however, the Corporation's case, consisting almost entirely of reports of examination, was presented before a trial examiner and the matter treated in the same fashion as a contested proceeding.

Federal Power Commission.—Under section 13 of the act, the Commission is authorized to terminate licenses, "after due notice given," for failure of the licensee to commence construction within a prescribed period. Proceedings under this section are instituted by

[36] The statutory procedure has been embodied in Rules and Regulations (1939), sec. 1.401. The same procedure governs proceedings to suspend operators' licenses. Section 303 (m) (2) of the act; Rules and Regulations (1939), secs. 1,411, 1,412.

the service of an order to show cause and, if no hearing is requested within the specified time, an order of termination issues as of course.

Federal Trade Commission.—Complaints are issued by the Commission only after a thorough investigation, generally involving considerable field work, has been made, and the Commission itself concurs in the recommendation of the Chief Examiner's Division that proceedings should be instituted. Under section 5 (b) of the Federal Trade Commission Act, the party complained against is given "the right to appear at the place and time so fixed [in the complaint] and show cause why an order should not be issued by the Commission." The rules of practice (rule VII) require the filing of an answer within 20 days, but failure to answer and nonappearance carry no unfavorable consequences to the respondent; the Commission's counsel presents the evidence at a public hearing before a trial examiner in the same manner that he would had the case been contested. The usual trial examiner's report then issues and the Commission proceeds to make its decision in the customary manner. This procedure is believed by the Commission to be necessary because of the provisions of section 5 (b) of the act that "The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission," and that "If upon such hearing the Commission shall be of the opinion that the method * * * is prohibited by this act, it shall make a report in writing * * *."

The National Labor Relations Board, while it has thus far had no cases in which defaults have occurred, has stated that, because of a similar statutory provision, it would feel constrained to proceed with a hearing prior to the issuance of an order. Section 10 (c) of the National Labor Relations Act authorizes the entry of a cease and desist order "if upon all the testimony taken the Board shall be of the opinion" that unfair labor practices have been committed.

General Land Office (Department of the Interior).—While the public lands statutes do not prescribe any procedure prior to the cancellation of entries, the rules of practice of the General Land Office provide for hearings in contest proceedings.[37] Notice of contest is given to the person whose entry is in question and apprises him that, if he fails to answer within 30 days, the allegations of the contest will be taken as confessed.[38] If a default occurs, the register sends the file of the case forthwith to the General Land Office where it is reviewed prior to the cancellation of the entry. Review by the Office is ordinarily directed solely to an examination of the documents relating to the service of notice of contest. In private contests, however, a further check is made on the sufficiency of the grounds for contest because the Office desires to avoid the possibility that the contestant will obtain a preference right to enter the lands where legal grounds for cancellation have not been furnished.

Grain and Seed Division (Department of Agriculture).—Under Section 7 of the Grain Standards Act, the Secretary of Agriculture is authorized to suspend or revoke grain inspectors' licenses "whenever, after opportunity for hearing is given to the licensee, the Secretary shall determine" that specified conditions exist.[39] Pro-

[37] Rules of Practice (1926).
[38] *Id.*, Rule 14. Defaults occur in more than one-third of all contests.
[39] The procedure is identical with that utilized in cases leading to the publication of the Secretary's findings that misrepresentation has been made of the grade of grain. Under Section 5 of the Act, "opportunity for hearing" is a condition precedent to such publication

ceedings are instituted only after a district supervisor's report has convinced the officer in charge of General Field Headquarters, the Chief of the Grain and Seed Division, and the Chief of the Agricultural Marketing Service that disciplinary action is warranted. The inspector is notified of the contemplated action and given a stated period in which to answer or request a hearing. Failure to file an answer or to request hearing, the notice states, is deemed to satisfy the statutory requirement of opportunity for hearing. The right to a hearing has almost invariably been exercised; in the remaining cases, the Department has entered an order forthwith on the basis of the information contained in its files.

Packers and Stockyards Division (Department of Agriculture).—Applicants for licenses to engage in the live poultry trade are entitled, under Section 502 (b) of the Act, to an "opportunity for hearing," prior to the denial of their applications by the Secretary of Agriculture. After an examination of an application and a limited field investigation, an order to show cause why the application should not be denied is prepared by the Solicitor's office if denial appears to be justified by the report and recommendation of the Packers and Stockyards Division, concurred in by the Assistant Chief of the Agricultural Marketing Service. If the applicant fails to appear at the time set for hearing, the Department does not proceed to adjudicate the matter.

Proceedings to suspend the registration of a market agency, usually on the grounds of insolvency, are instituted after investigation of the field staff of the Packers and Stockyards Division, and upon the recommendation of the Chief of the Division, concurred in by the Assistant Chief of the Agricultural Marketing Service and the Solicitor's office. The annual appropriation act, under which these proceedings are brought, authorizes the Secretary to suspend registration "whenever, after due notice and hearing, the Secretary finds" that certain conditions exist. The notice of inquiry which is sent to the respondent is in the form of an order to show cause. In the few cases in which he has failed to appear, the Department has nevertheless gone through all the steps of a contested proceeding leading to the order of the Secretary.

Post Office Department.—Applications for second-class mailing permits are considered by the Division of Classification or, where the question of unmailability arises, by the Solicitor's office. Correspondence and field investigations serve to complete the record upon which is made the decision to grant or deny the application. If grounds for denial appear to exist, the applicant is informed thereof informally, although no provision is made by statute or regulation for such notice or for the holding of hearings prior to denial. Unless the applicant seeks to press his case in a conference with the Third Assistant Postmaster General, in whom the authority to grant permits has been vested, the matter is presumably closed.

Before a second-class mailing permit may be revoked, however, the statute requires that the interested parties be granted a "hearing" (38 U. S. C. Sec. 232). In these cases in which a notice of contemplated revocation is sent to the publisher, failure to assume the burden of this command to show cause is followed by the immediate entry of a revocation order.

Substantially different from the Department's procedure in second-class mailing privilege matters is the practice followed in fraud order proceedings. The sole statutory prerequisite to the issuance of a fraud order is that the Postmaster General act on "evidence satisfactory to him" (39 U. S. C. Sec. 259). The citation to show cause why a fraud order should not issue apprises the respondent that the hearing will be held at a certain time and place whether or not the respondent files an answer (which he may do at any time up to the hearing) or appear at the hearing. As a result, the Department has found it necessary, in a substantial number of cases, to hold a hearing and present its entire case although the respondent failed either to answer or appear. The usual post-hearing procedure has then been followed prior to the entry of a final order. It is said that in one situation in which the respondent failed to appear (although he did file an answer), however, the failure of the evidence, on oral presentation, to develop in the manner expected resulted in the dismissal of the charges.

Securities and Exchange Commission.—Section 8 of the Securities Act requires that "an opportunity for hearing" be given prior to the issuance of an order refusing to permit a registration statement to become effective or suspending its effectiveness. An "opportunity for hearing" is also provided by Section 15 of the Securities Exchange Act prior to the revocation of a broker-dealer registration. The Commission's practice has been, however, to hold hearings in these cases when the respondent has defaulted and then to go through the usual post-hearing procedure followed in contested cases.

There is no statutory provision governing the procedure to be followed prior to the issuance of an order refusing a registration statement of an unissued security for "when issued" trading to become effective. In these cases, a deficiency letter is sent to the registrant apprising him that certain material appears to be untrue or misleading, or that essential information has been omitted. Rule X–12D3–8(c) gives the registrant and the exchange 40 days in which to request a hearing to determine whether the registration should become effective; failure to act results in the Commission's treating the registration as withdrawn.

In oil and gas offering sheet suspension proceedings, which likewise are not referred to in the statutes, the Commission has prescribed that failure to make a written request for hearing will be followed by the immediate entry of a final order (Reg. B., Rule 340).

United States Employees' Compensation Commission.—Section 32 (b) of the Longshoremen's and Harbor Workers' Compensation Act authorizes the Commission to suspend or revoke the authorization of an insurance carrier "for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence." In each instance of revocation, the Commission's act has come after the carrier's affairs had been taken over by a state insurance department or its authority to write insurance otherwise suspended by the state of incorporation. Since the carrier's ability to write insurance under the Act had in fact been terminated, the Commission has not found it necessary even to offer the right to be heard prior to the entry of a revocation order.

Veterans' Administration.—The adjudicative activities of the Administration may be divided roughly into two categories: (1) The disposition of claims for benefits, and (2) forfeiture, reduction, and recovery of overpayment cases. Because of its unusual organizational structure and the almost complete absence of the traditional type of hearing, the procedural problems of the Administration are couched in terms somewhat different from those of most agencies. The problems are, however, basically the same.

While the veterans' laws do not prescribe any procedure prior to the denial of claims for benefits, and the descisions of the Administration are not subject to judicial review, the rules of practice do provide for hearings before both the initial adjudicating bodies—the rating boards—and the Board of Veterans' Appeals, which entertains appeals from rating board determinations. The rating boards, which combine investigating and adjudicating functions, ordinarily act on evidence submitted orally by the claimant, or obtained by correspondence or, on rare occasions, by field investigations. Hearings are held prior to adjudication only upon the request of the claimant, and serve only as an alternative method of conducting the investigation (R. & P. 1081).

If the rating board determines, either with or without a hearing, that the claimant is not entitled to the benefits sought, it notifies him of its decision and apprises him of his right to appeal to the Board of Veterans' Appeals within one year. This appeal is in reality a de novo consideration of the case, and represents approximately the same stage in the Administration's procedure as do hearings at the other agencies. Unless an appeal is sought, the Board of Veterans' Appeals does not consider disallowed claims and the decision of the rating board is regarded as final (R. & P. R–1008).

In cases involving proposed forfeiture, reduction, or recovery of overpayments, the Administration is required to give "due notice to the grantee" and "after hearing all the evidence" to render its decisions (28 Stat. 18). While the rules of practice reiterate the requirement of notice, hearings are not held unless the pensioner indicates his desire to be heard. In actuality, whenever the pensioner is likely to be of assistance in collating the necessary evidence, notice is given prior to any formal expression by the Administration of even a tentative position. In forfeiture cases, for example, the Central Committee on Waivers and Forfeitures is forbidden to consider the matter unless the files reveal that opportunity for explanation or defense has been given (R. & P. 1557). When grounds for forfeiture, reduction, or recovery of overpayment appear to exist, as a result of the examination of the Administration's records, and such field investigation as may be deemed essential, notice is given to the pensioner of the contemplated action together with an admonition that, if no reply is received within a specified time (30 or 60 days, depending upon the type of case), the pension will be forthwith reduced, suspended, or terminated. Upon the failure of the pensioner to assume the burden of coming forward, the proposed action thus becomes effective.

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