



Committee on Judicial Review

April 1, 2015 Public Meeting Agenda

- I. Meeting Opening—Ron Levin, Committee Chair
- II. Welcome—Paul R. Verkuil, Chairman
- III. Discussion of the Issue Exhaustion in Administrative Rulemaking Project
 - A. Presentation of the Draft Report—Jeffrey Lubbers, Professor of Practice in Administrative Law, Washington College of Law, American University
 - B. Committee Discussion—Ron Levin, Committee Chair
 1. General discussion
 2. Should there be a default rule for or against judicial common law application of the issue exhaustion doctrine in the context of administrative rulemaking?
 3. What considerations might guide whether to apply the issue exhaustion doctrine on review of agency rules?
 - a) Type of rulemaking (informal, hybrid, formal, etc.)
 - b) Regulatory environment (highly technical, sophisticated stakeholders, immediate hazards, etc.)
 - c) Obviousness of issue (issues so clearly important to the rulemaking that the agency should be expected to raise them on its own, issues that were raised before the agency by another stakeholder, etc.)
 - d) Type of challenge (arbitrary and capricious/factual, statutory, constitutional, ultra vires, etc.)
 - e) Enforcement stage (preenforcement or as-applied)

Note: Recommendation 82-7 (www.acus.gov/82-7) ¶ 2 offers recommendations for Congress when it decides to limit the availability of judicial review of rules at the enforcement stage.



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4. Should exceptions to the exhaustion of administrative remedies doctrine also be available in cases applying the issue exhaustion doctrine?
5. Should the recommendation address potential remedies where an issue is raised on judicial review that was not raised before the agency (*e.g.*, when a remand to the agency for further consideration is appropriate)?
6. Should there be a recommendation to Congress?

For example, should Congress adopt a statutory safe harbor (*i.e.*, “reasonable grounds” or “exceptional circumstances” exceptions) where it enacts an issue exhaustion requirement for challenges to agency rules?

7. Should there be a recommendation to agencies?

For example, such as regarding when to pursue issue exhaustion or provide notice to parties of issue exhaustion requirements?

- IV. Discussion and Summary of Additional Research Requested (If Any)
- V. Comments by Public Attendees (if Committee Consents)
- VI. Closing Remarks