



**Memorandum**

**To:** Committee on Judicial Review  
**From:** Stephanie Tatham, Staff Counsel  
**Date:** March 31, 2015  
**Re:** Draft Levin Recommendation – Issue Exhaustion

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The following draft recommendation was proposed by Chairman Ron Levin based on Special Counsel Jeffrey Lubbers’ March 18, 2015 draft report, “Fail to Comment at Your Own Risk: Does Exhaustion of Administrative Remedies Have a Place in Judicial Review of Rules.” This draft is intended to facilitate the Committee’s discussion at its April 1, 2015 public meeting, and not to preempt Committee discussion and consideration of alternate approaches or recommendations.

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1. In a rulemaking proceeding, agencies have an affirmative responsibility to raise and decide issues that will affect persons who may not be represented in the proceeding. Consequently, the doctrine of issue exhaustion should, in some circumstances, have narrower application to judicial review of agency rules than to judicial review of adversarial agency adjudication. Courts should take care to ensure that they do not uncritically extend issue exhaustion principles developed in cases involving review of adjudication to the frequently distinguishable context of rulemaking review.

2. Where none of the exceptions to issue exhaustion discussed in paragraph 3 is present, a court should not resolve an issue during rulemaking review unless the challenging party raised that issue during the rulemaking proceeding with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it.

3. Unless a statute otherwise requires, a court should not apply issue exhaustion in rulemaking review if one or more of the following factors is present:

(a) The issue was sufficiently raised by another participant in the rulemaking proceeding, or the agency addressed the issue on its own initiative.



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(b) The issue was so clearly implicated in the rulemaking proceeding that the agency had a responsibility to address it regardless of whether any participant in the proceeding asked it to do so. Typically, this category would include:

- i. explicit or well established criteria prescribed by the agency's governing statute or regulations;
- ii. issues that the agency would obviously need to address in order to reach a rational decision by applying those criteria; and
- iii. basic obligations of rulemaking procedure.

(c) The agency has a clear-cut position on the issue, demonstrating that raising the issue in the rulemaking proceeding would have been futile.

(d) The challenging party could not reasonably have been expected to foresee a need to raise the issue during the rulemaking proceeding, because:

- i. the basis for the challenger's objection did not exist during the proceeding (such as a variance between the proposed and final rule), or
- ii. the agency has interpreted the rule in a manner that the challenging party could not be expected to have anticipated; or
- iii. other circumstances have materially changed since the rule was issued.

(e) The nature of the issue is such that the agency's view on that issue would not be helpful to the court or would not be entitled to significant deference or weight. Typically, such issues would include claims that the rule is unconstitutional or violates the unambiguous requirements of a statute or regulation. Questions about how the agency should have used its discretion would typically not fall within this category.

(f) The issue is presented in the context of an enforcement proceeding that the agency has brought against the challenging party, rather than in a direct review proceeding initiated by that party.



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(g) A strong public interest in judicial resolution of the issue during the review proceeding outweighs the agency's interest in having a prior opportunity to address the issue at the administrative level.

4. To the extent possible, statutory requirements for issue exhaustion should be construed and applied in accordance with the foregoing principles.