



**Memorandum**

**To:** Committee on Judicial Review  
**From:** Stephanie Tatham, Staff Counsel  
**Date:** April 13, 2015  
**Re:** Draft Recommendation – Issue Exhaustion

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The following draft recommendation is based on Special Counsel Jeffrey Lubbers’ report, “Fail to Comment at Your Own Risk: Does Exhaustion of Administrative Remedies Have a Place in Judicial Review of Rules” and was informed by the Committee’s discussion at its April 1, 2015 meeting. This draft is intended to facilitate the Committee’s discussion at its April 17, 2015 public meeting, and not to preempt Committee discussion and consideration of recommendations. In keeping with Conference practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

**Issue Exhaustion in Preenforcement**

**Judicial Review of Administrative Rulemaking**

1           The requirement that parties exhaust their administrative remedies (“remedy exhaustion”)  
2 is a familiar feature of U.S. administrative law. Remedy exhaustion bars a party from appealing  
3 an agency action to a court until it exhausts prescribed avenues for relief before the agency.<sup>1</sup> It  
4 ordinarily applies only to administrative adjudications where an agency has established a  
5 mandatory appeals process.<sup>2</sup> The related “issue exhaustion” doctrine would bar a petitioner for  
6 judicial review from raising issues it had not raised before the agency in litigation, even if the

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<sup>1</sup> Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

<sup>2</sup> Darby v. Cisneros, 509 U.S. 137 (1993).



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7 petitioner had exhausted administrative remedies.<sup>3</sup> As with remedy exhaustion, the issue  
8 exhaustion doctrine arose in the context of agency adjudication.<sup>4</sup>

9 Congress required parties to raise objections before adjudicatory agencies in several  
10 judicial review provisions adopted during the 1930s, prior to the advent of modern rulemaking  
11 under the Administrative Procedure Act of 1946. Federal courts continue to enforce these  
12 provisions today. The typical statute applies to agency adjudications, contains an exception for  
13 “reasonable grounds” or “extraordinary circumstances,” and permits the court to require an  
14 agency to take new evidence under certain conditions.<sup>5</sup> Only two statutes were identified as  
15 explicitly requiring issue exhaustion for review of agency rules—the Clean Air Act and the  
16 Securities Exchange Act of 1934.<sup>6</sup> Both provisions were adopted in the 1970s, when Congress  
17 enacted numerous regulatory statutes with significant rulemaking provisions.<sup>7</sup> Since that time,  
18 appellate courts have increasingly applied issue exhaustion when reviewing agency rules.

19 Judicial application of the issue exhaustion doctrine is often prudential, particularly in  
20 rulemaking cases. Courts reviewing agency adjudications have inferred support for application  
21 of the issue exhaustion doctrine from remedy exhaustion statutes<sup>8</sup> or from agency regulations

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<sup>3</sup> See, e.g., *FiberTower Spectrum Holdings, LLC v. Fed’l Comm. Comm’n*, No. 14-1039 slip. op. at 9 (D.C. Cir. Apr. 3, 2015) (“Because FiberTower failed to present its § 309(j)(4)(B) argument to the Commission, the Commission never had an opportunity to pass on it, and FiberTower thereby failed to exhaust its administrative remedies.”).

<sup>4</sup> See JEFFREY S. LUBBERS, *FAIL TO COMMENT AT YOUR OWN RISK: DOES EXHAUSTION OF ADMINISTRATIVE REMEDIES HAVE A PLACE IN JUDICIAL REVIEW OF RULES?* at 2-3 (DRAFT April 10, 2015) (Report to the Administrative Conference of the U.S.) [hereinafter *Lubbers Report*].

<sup>5</sup> E.g., 15 U.S.C. § 77i(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d).

<sup>6</sup> 42 U.S.C. § 7607(d)(7)(B); 15 U.S.C. § 78y(c)(1). Provisions governing agency “orders” have been held to apply to judicial review of rules. See discussion in *Citizens Awareness Network v. U.S.*, 391 F.2d 338, 345-47 (1st Cir. 2004). See also *Investment Co. Inst. v. Bd. of Govs.*, 551 F.2d 1270, 1276-77 (D.C. Cir. 1977); *American Public Gas Ass’n v. Federal Power Comm’n*, 546 F.2d 983, 986-88 (D.C. Cir. 1976). Issue exhaustion may be enforced when rules are reviewed under these provisions. See, e.g., *ECEE, Inc. v. FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980).

<sup>7</sup> *Lubbers Report* at 13.

<sup>8</sup> E.g., *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (interpreting 8 U.S.C. § 1252(d)(1)—which states that “A court may review a final order only if — (1) the alien has exhausted all administrative remedies”—to require issue exhaustion).



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22 requiring issue exhaustion in administrative appeals.<sup>9</sup> Courts have also imposed issue exhaustion  
23 requirements in the absence of an underlying statute or regulation. However, questions about the  
24 general applicability of the doctrine were raised by the Supreme Court’s decision in *Sims v.*  
25 *Apfel*, which held that jurisprudential application of an issue exhaustion requirement was  
26 inappropriate on review of the Social Security Administration’s non-adversarial agency  
27 adjudications.<sup>10</sup> Lower courts have inconsistently grasped this distinction, and scholars have  
28 since observed that issue exhaustion “cases conspicuously lack discussion of whether, when,  
29 why, or how exhaustion doctrine developed in the context of adjudication should be applied to  
30 rulemaking.”<sup>11</sup>

31 Many of the justifications for application of the issue exhaustion doctrine in judicial  
32 review of agency adjudicatory decisions apply squarely to review of rulemakings. The Supreme  
33 Court has described the “general rule that courts should not topple over administrative decisions  
34 unless the administrative body not only has erred but has erred against objection made at the time  
35 appropriate under its practice” as one of “simple fairness.”<sup>12</sup> Issue exhaustion is said to promote  
36 orderly procedure and good administration by offering the agency an opportunity to act on  
37 objections to its proceedings.<sup>13</sup> The argument for prudential application of the doctrine in  
38 rulemaking is especially strong in challenges under an arbitrary and capricious standard of  
39 review, such as to the factual basis or alternatives of a rule, where judicial evaluation of the

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<sup>9</sup> See *Sims v. Apfel*, 530 U.S. 103 (2000) (citing examples from the Fourth and Ninth Circuit Courts of Appeals).

<sup>10</sup> *Id.* at 108-12 (“the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding”); see also *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626 (9th Cir. 2008) (declining to apply issue exhaustion in the inquisitorial ERISA context where a claimant was not notified of any issue exhaustion requirement).

<sup>11</sup> Lubbers Report, *supra* note 4 at 40 (citing PETER L. STRAUSS, ET AL, GELLHORN AND BYSE’S ADMINISTRATIVE LAW 1246 (10th ed. 2003)); see also William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (“Unfortunately, some courts have ignored the specific statutory origin for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute.”).

<sup>12</sup> *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); see *Advocates for Hwy. & Auto Safety v. FMCSA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

<sup>13</sup> *Id.*



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40 reasonableness of an agency’s action may depend heavily on what contentions were presented to  
41 the agency during the rulemaking. Application of the doctrine in such cases spares courts from  
42 hearing issues that could have been cured at the administrative level and avoids agency post hoc  
43 rationalizations. It is also compelling in challenges to rulemakings of particular applicability or  
44 more formal rulemakings, such as those that include a right to a hearing. Even in informal  
45 rulemakings, litigants may have some responsibility to comment (if they are able) on a rule they  
46 seek to challenge prior to its enforcement. This responsibility may be greater where a rule is  
47 likely to involve complex procedures or highly technical issues, or to impose substantial and  
48 immediate costs due to the need for prompt compliance.

49 Conversely, agencies have an affirmative responsibility to examine key assumptions and  
50 issues, as well as to raise and decide issues that will affect persons who may not be represented  
51 in a rulemaking proceeding. In addition, some judges have raised concerns that application of the  
52 doctrine to rulemakings could serve as a barrier to judicial review for under-resourced non-  
53 participants in rulemaking.<sup>14</sup> It may also induce rulemaking participants to try to comment on  
54 every possible issue, resulting in voluminous administrative records that raise further  
55 apprehensions regarding information overload or ossification of rulemaking.<sup>15</sup> There is a lack of  
56 empirical evidence demonstrating that issue exhaustion contributes to these potential problems.  
57 There is also a counterargument that, without issue exhaustion, agencies may feel the need to try  
58 to anticipate new arguments in court that were not brought to their attention earlier, thus  
59 producing equally problematic delays and overload for agencies. The Administrative  
60 Conference did not try to resolve these competing claims—but the concerns do lend additional  
61 support for a careful delineation of the circumstances in which issue exhaustion is most  
62 appropriately enforced on review of agency rulemaking.

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<sup>14</sup> See *Korettoff v. Vilsack*, 707 F.3d 394, 401 (2013) (Williams, J., concurring) (“Firms filling niche markets, for example, as appellants appear to be, may be ill-represented by broad industry groups and unlikely to be adequately lawyered-up at the rulemaking stage.”).

<sup>15</sup> See *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 n. 13 (9th Cir. 2007) (“If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency’s action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties.”).



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63 Even where statutes prescribe issue exhaustion, exceptions may exist. For example, the  
64 Supreme Court recently held that the Clean Air Act’s statutory issue exhaustion provision was  
65 not “jurisdictional.”<sup>16</sup> And courts have relied on their equitable authority to read good cause  
66 exceptions, such as those traditionally applicable in remedy exhaustion cases, into statutes where  
67 they were lacking.<sup>17</sup> Courts applying the issue exhaustion doctrine prudentially retain some  
68 discretion to waive its application.<sup>18</sup> The following Recommendation seeks to offer guidance to  
69 the judiciary regarding when exceptions to application of the doctrine on review of rulemaking  
70 might be appropriate, while recognizing that judicial application of the doctrine is inherently  
71 discretionary and flexible where it is not statutorily compelled.

72 This Recommendation is limited to pre-enforcement review of agency rulemaking. The  
73 passage of time and new entrants may complicate the inquiry in cases where a rule is challenged  
74 in response to an agency enforcement action. Further, the Administrative Conference’s  
75 recommendations do not take a position on whether Congress should enact new statutory issue  
76 exhaustion requirements.

### RECOMMENDATION

- 77 1. Courts should take care to ensure that they do not uncritically extend issue exhaustion  
78 principles developed in the context of adversarial agency adjudications to the frequently  
79 distinguishable context of rulemaking review.
- 80 2. As a general principle, courts should not resolve issues the agency was not given an

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<sup>16</sup> EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1602-03 (2014) (“A rule may be ‘mandatory,’ yet not ‘jurisdictional,’ we have explained. Section 7607(d)(7)(B), we hold, is of that character. It does not speak to a court’s authority, but only to a party’s procedural obligations.”) (citations omitted). *See also* Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1148 (D.C. Cir. 2005) (“as a general matter, a party’s presentation of issues during a rulemaking proceeding is not a *jurisdictional* matter”) (emphasis in original).

<sup>17</sup> Washington Ass’n for Television and Children v. FCC, 712 F.2d 677, 681-82 (D.C. Cir. 1983).

<sup>18</sup> *Id.* (“[Our] cases assume that § 405 contains implied exceptions without explaining why. We understand these cases, however, as implicitly interpreting § 405 to codify the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion.”) (footnotes omitted).



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81 opportunity to address during a rulemaking proceeding because no participant raised them with  
82 sufficient precision, clarity, or emphasis. This is particularly true for challenges to the factual  
83 support for the rule in the administrative record or to an agency's failure to exercise its  
84 discretion. However, judicial consideration of previously unstated objections to a rule may be  
85 warranted under some circumstances, including where:

86 (a) The agency addressed the issue on its own initiative in the rulemaking proceeding or  
87 in response to a comment submitted by another participant in the proceeding.

88 (b) The issue was so fundamental to the rulemaking proceeding or the rule's basis and  
89 purpose that the agency had a responsibility to address it regardless of whether any  
90 participant in the proceeding asked it to do so. This narrow exception may include:

- 91 i. basic obligations of rulemaking procedure, such as requirements of the  
92 Administrative Procedure Act or the governing statute or regulations;  
93 ii. explicit or well established criteria prescribed by the agency's governing  
94 statute or regulations; or  
95 iii. key assumptions that were central to the rulemaking.

96 (c) Circumstances make it clear that the agency's established position on the issue would  
97 have made raising the issue in the rulemaking proceeding futile. Futility should not,  
98 however, be lightly presumed.

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

- 101 i. the basis for the challenger's objection did not exist during the proceeding,  
102 such as issues arising from an unforeseeable variance between the proposed  
103 and final rule; or  
104 ii. the procedures used by the agency otherwise created an impediment to raising  
105 the issue, such as where rules were promulgated without an opportunity for  
106 public participation; or  
107 iii. other circumstances have materially changed since the rule was issued.



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108 (e) A strong public interest favors judicial resolution of the issue. Such issues are likely  
109 purely legal in nature, so that the agency's perspective would not be entitled to significant  
110 deference or weight. Examples may include objections that the rule is:

- 111 i. unconstitutional;
- 112 ii. patently in excess of the agency's statutory authority; or
- 113 iii. in violation of an unambiguous statutory requirement.

114 (f) Extraordinary circumstances excuse the failure to raise the objection below.

115 3. Reviewing courts should allow litigants challenging rules to have a full opportunity to  
116 demonstrate that they did in fact raise the issue first with the agency or that any of the above  
117 circumstances—militating against application of the doctrine—are present.

118 4. Agencies should not assert issue exhaustion as a litigation defense in the foregoing  
119 limited circumstances.

120 5. Agencies should be given an opportunity to defend the merits of a rulemaking against  
121 new objections raised in the judicial review proceeding. A remand to the agency may be  
122 appropriate where the new issue is capable of administrative resolution.

123 6. To the extent possible, statutory requirements for issue exhaustion should be  
124 construed and applied in accordance with the foregoing recommendations.

125 7. If Congress adopts new statutory issue exhaustion requirements, it should include an  
126 extraordinary circumstance or reasonable grounds exception.