



Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

1 The doctrine of issue exhaustion generally bars a litigant challenging agency action from
2 raising issues in court that were not raised with the agency. Although the doctrine originated in
3 the context of agency adjudication, it has been extended to judicial review of challenges to
4 agency rulemakings. Scholars have observed that issue exhaustion cases “conspicuously lack
5 discussion of whether, when, why, or how [the issue] exhaustion doctrine developed in the
6 context of adjudication should be applied to rulemaking.”¹ The Administrative Conference has
7 studied the issue exhaustion doctrine in order to bring greater clarity to its application in the
8 context of preenforcement review of agency rules.² The Conference believes it would be useful
9 to set forth a series of factors that courts may consider when examining issue exhaustion in
10 that context.

11 **Evolution of the Issue Exhaustion Doctrine**

12 The requirement that parties exhaust their administrative remedies (“remedy
13 exhaustion”) is a familiar feature of U.S. administrative law. This doctrine generally bars a party
14 from appealing a final agency action to a court until it exhausts prescribed avenues for relief

¹ JEFFREY S. LUBBERS, FAIL TO COMMENT AT YOUR OWN RISK: DOES ISSUE EXHAUSTION HAVE A PLACE IN JUDICIAL REVIEW OF RULES? 11 (May 5, 2015) (Report to the Administrative Conference of the U.S.) [hereinafter Lubbers Report] (citing PETER L. STRAUSS, ET AL, GELHORN AND BYSE’S ADMINISTRATIVE LAW 1246 (10th ed. 2003)); *see also* Koretoff v. Vilsack, 707 F.3d 394, 399 (D.C. Cir. 2013) (Williams, J., concurring) (joining a decision to preclude preenforcement review of new issues but writing separately “primarily to note that in the realm of judicial review of agency rules, much of the language of our opinions on ‘waiver’ has been a good deal broader than the actual pattern of our holdings”).

² This Statement does not address the application of the doctrine in the context of a challenge to a rule in an agency enforcement action, where the passage of time and new entrants may complicate the inquiry. The Conference has previously identified issues that Congress should not ordinarily preclude courts from considering when rules are challenged in enforcement proceedings. *See* Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings* (Dec. 17, 1982), <http://www.acus.gov/82-7>.



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15 before the agency.³ Remedy exhaustion ordinarily applies only to administrative
16 adjudications.⁴

17 The related but distinct concept of “issue exhaustion” prevents a party from raising
18 issues in litigation that were not raised before the agency, even if the petitioner fully
19 participated in the administrative process.⁵ As with remedy exhaustion, the issue exhaustion
20 doctrine initially arose in the context of agency adjudications.⁶ Unlike remedy exhaustion,
21 however, issue exhaustion has often been applied by courts reviewing agency rulemakings.

22 As the Supreme Court has recognized, “administrative issue-exhaustion requirements
23 are largely creatures of statute.”⁷ Congress expressly required parties to raise all their
24 objections to agency action before adjudicatory agencies in several judicial review provisions
25 adopted during the 1930s, prior to the advent of the Administrative Procedure Act of 1946.
26 Since that time, Congress has included issue exhaustion provisions in many statutes governing
27 review of administrative adjudications and agency orders.⁸ The typical statute contains an

³ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

⁴ *See Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

⁵ *See FiberTower Spectrum Holdings, LLC v. FCC*, No. 14-1039, slip. op. at 9 (D.C. Cir. Apr. 3, 2015). Issue exhaustion statutes may not always be jurisdictional. *E.g.*, *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. FMSCA*, 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).

⁶ *See Lubbers Report, supra* note 1, at 2-3.

⁷ *Sims v. Apfel*, 530 U.S. 103, 107 (2000) (plurality opinion).

⁸ *See Lubbers Report, supra* note 1, at 4-6.



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28 exception for “reasonable grounds” or “extraordinary circumstances” and permits the court to
29 require an agency to take new evidence under certain conditions.⁹

30 Courts have also imposed issue exhaustion requirements in the adjudication context in
31 the absence of an underlying statute or regulation requiring it. The Supreme Court early on
32 characterized the “general rule that courts should not topple over administrative decisions
33 unless the administrative body not only has erred but has erred against objection made at the
34 time appropriate under its practice” as one of “simple fairness,” emphasizing that issue
35 exhaustion promotes orderly procedure and good administration by offering the agency an
36 opportunity to act on objections to its proceedings.¹⁰ But questions about the common law
37 application of the doctrine were later raised in *Sims v. Apfel*, where the Court held that a
38 judicial issue exhaustion requirement was inappropriate on review of the Social Security
39 Administration’s informal, non-adversarial adjudicatory benefit determinations, reasoning that
40 “the desirability of a court imposing a requirement of issue exhaustion depends on the degree
41 to which the analogy to normal adversarial litigation applies in a particular administrative
42 proceeding.”¹¹

43 Although the issue exhaustion doctrine originated in the adjudication context, it has
44 been extended to preenforcement review of agency rulemakings. Two statutes have been
45 identified by the Conference as explicitly requiring issue exhaustion for review of agency
46 rules—the Clean Air Act and the Securities Exchange Act of 1934.¹² Both statutes were

⁹ *E.g.*, 15 U.S.C. § 77i(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d)(1).

¹⁰ *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (reviewing an adjudicative order issued by the Interstate Commerce Commission after an adversarial hearing); *see also* *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

¹¹ *Sims v. Apfel*, 530 U.S. 103, 108-12 (2000) (plurality opinion).

¹² 42 U.S.C. § 7607(d)(7)(B); 15 U.S.C. § 78y(c)(1). However, provisions governing some agencies’ “orders” have been held to apply to judicial review of rules. *See* *Citizens Awareness Network v. U.S.*, 391 F.3d 338, 345-47 (1st Cir. 2004); *see also* *Inv. Co. Inst. v. Bd. of Gvs.*, 551 F.2d 1270, 1276-77 (D.C. Cir. 1977); *American Public Gas Ass’n v. Fed. Power Comm’n*, 546 F.2d 983, 986-88 (D.C. Cir. 1976).



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47 amended to incorporate issue exhaustion provisions in the 1970s, when Congress enacted
48 numerous regulatory statutes with significant rulemaking provisions.¹³

49 The doctrine has also been extended to the rulemaking context through common law.
50 Despite *Sims*' focus in the adjudication context on the extent to which the underlying
51 administrative proceeding resembled adversarial litigation for purposes of determining whether
52 the doctrine applied, appellate courts have increasingly applied the doctrine in the absence of a
53 statute requiring it when reviewing preenforcement challenges to agency rules enacted via
54 notice-and-comment proceedings.¹⁴ And at least two appellate courts have applied the
55 doctrine to review of administrative rulemaking after specifically considering *Sims*,¹⁵ although
56 *Sims* was recently cited by the Ninth Circuit as militating against issue exhaustion in an informal
57 rulemaking issued without notice-and-comment procedures.¹⁶

58 Relying on their equitable authority, courts have also fashioned exceptions to the issue
59 exhaustion doctrine, and have even read such exceptions into statutes where they were not
60 expressly prescribed.¹⁷ The Conference commissioned a consultant's report to identify and

¹³ Lubbers Report, *supra* note 1, at 4, 11, 13.

¹⁴ *E.g.*, *Koretov v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring) (“[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking”); *City of Portland, Or. v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007); *Military Toxics Project v. EPA*, 146 F.3d 948, 956-57 (D.C. Cir. 1998); *see also* Lubbers Report, *supra* note 1, at 27-30 (describing application of the doctrine as well as varied precedent in appellate courts other than the U.S. Court of Appeals for the D.C. Circuit). No cases were identified that applied the issue exhaustion doctrine in the context of new issues raised during enforcement challenges to rules.

¹⁵ *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1148-49 (D.C. Cir. 2005); *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004).

¹⁶ *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1080 (9th Cir. 2013) (describing a Surface Transportation Board (STB) exemption proceeding as a rulemaking but applying the *Sims* rationale to it because the STB's procedures were informal and public comments were not sought).

¹⁷ *E.g.*, *Washington Ass'n for Television and Children (“WATCH”) v. FCC*, 712 F.2d 677, 681-82 (D.C. Cir. 1983) (“[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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61 articulate the scope of these exceptions in federal appellate case law, as well as to examine the
62 general arguments for or against the doctrine in the rulemaking context.¹⁸ Without endorsing
63 every conclusion expressed therein, the Conference believes that the report of its consultant
64 can provide guidance to courts considering the application of the doctrine as it pertains to
65 preenforcement review of administrative rulemaking.

66 **Factors For Courts to Consider in Applying the Issue Exhaustion Doctrine**

67 The Administrative Conference believes that stakeholders, agencies, and courts benefit
68 when issues are raised during rulemaking proceedings with sufficient specificity to give the
69 agency notice and a fair opportunity to address them prior to judicial review.¹⁹ Many of the
70 justifications for applying the doctrine in judicial review of agency adjudicatory decisions apply
71 squarely to review of rulemakings. The doctrine promotes active public participation, creates
72 orderly processes for resolution of important legal and policy issues raised in agency
73 proceedings, ensures fully informed decisionmaking by administrative agencies, provides a
74 robust record for judicial review, and lends certainty and finality to agency decisionmaking.
75 Application of the doctrine spares courts from hearing issues that could have been cured at the
76 administrative level and reduces the need for agencies to create post-hoc rationalizations.²⁰

¹⁸ See generally Lubbers Report, *supra* note 1.

¹⁹ Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior, 134 F.3d 1095, 1111 (D.C. Cir. 1998); see also Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 602 (D.C. Cir. 2015) (holding on review of an agency adjudicatory decision that "the question in determining whether an issue was preserved, however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it").

²⁰ The argument for judicial application of the doctrine may be especially strong where the challenged issue concerns the factual basis of a rule, the agency's evaluation of alternatives, or the agency's failure to exercise its discretion in a particular manner. Judicial evaluation of the reasonableness of an agency's action in such cases under an arbitrary and capricious standard of review may depend heavily on the administrative record and on the agency's analysis of those issues. See generally Gage v. Atomic Energy Comm'n, 479 F.2d 1214, 1217-19 (D.C. Cir. 1973).



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77 On the other hand, the Conference also recognizes some practical and doctrinal
78 concerns with uncritically applying issue exhaustion principles developed in the context of
79 formal adversarial agency adjudications to the context of preenforcement rulemaking review.²¹
80 Overbroad application of the doctrine to rulemaking proceedings could serve as an undue
81 barrier to judicial review for persons or firms who reasonably do not find it worthwhile to
82 engage in continuous monitoring of the agency in question.²² Issue exhaustion requirements
83 may also contribute to the burdens of participating in a rulemaking proceeding, by exerting
84 pressure on commenters to raise at the administrative level every issue they might later seek to
85 invoke on judicial review.²³ These and other concerns have led some observers to question the
86 value of the doctrine as applied to rulemaking, or at least to call for limitations on its scope.

87 The Conference has compiled a list of factors that courts could consider when deciding
88 how far to limit the general principle that precludes litigants from raising issues for the first
89 time during preenforcement review of agency rules. Some of these factors may be dispositive,
90 and by compiling a list of such factors, the Conference does not intend to suggest that courts
91 should give equal weight to all of them. Specifically, except where a statute directs otherwise,
92 courts could consider whether:

²¹ See William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (“[u]nfortunately, 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”).

²² The impact of such barriers can fall most heavily on persons or entities whose interests are not in close alignment with the interests that have been advanced most forcefully by other participants in a given proceeding. See *Koretov v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring).

²³ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1363-64 (2010); Lubbers Report, *supra* note 1, at 38-40.



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- 93 • The issue was raised by a participant in the rulemaking other than the litigant.²⁴
- 94 • The issue was addressed by the agency on its own initiative in the rulemaking.²⁵
- 95 • The issue was so fundamental to the rulemaking proceeding or to the rule’s basis
96 and purpose that the agency had an affirmative responsibility to address it.²⁶
- 97 • The issue involves an objection that the rule violates the U.S. Constitution.²⁷
- 98 • It would have been futile to raise the issue during the rulemaking proceeding.²⁸
- 99 • The issue could not reasonably be expected to have been raised during the
100 rulemaking proceeding because of the procedures used by the agency. ²⁹
- 101 • The basis for the objection did not exist at a time when rulemaking participants
102 could raise it in a timely comment.³⁰

²⁴ See *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (“In general, we will not invoke the waiver rule in our review of a notice-and-comment proceeding if an agency has had an opportunity to consider the issue. This is true even if the issue was considered *sua sponte* by the agency or was raised by someone other than the petitioning party.”).

²⁵ *Id.*

²⁶ See *NRDC v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (declining to apply issue exhaustion because “even if a party may be deemed not to have raised a particular argument before the agency, EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule”) (internal quotation marks omitted).

²⁷ *Cf.*, *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (invoking “extraordinary circumstances” exception in statutory provision requiring issue exhaustion to address constitutional issue not raised with the NLRB because the issue went to the very power of the agency to act and implicated fundamental separation of powers concerns). It is worth emphasizing that regardless of whether the issue exhaustion doctrine would apply, participants in a rulemaking should raise constitutional issues during the rulemaking proceeding to give the agency an opportunity to adjust its rule to eliminate the constitutional objection or at least to explain in the administrative record why its rule does not raise constitutional concerns.

²⁸ *Cf. WATCH v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983) (remarking that “[a] reviewing court . . . may in some cases consider arguments that it would have been futile to raise before the agency,” but cautioning that “[f]utility should not lightly be presumed”).

²⁹ See *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073 (9th Cir. 2013) (declining to apply issue exhaustion because the agency’s procedures were informal and “never provided direct notice of or requested public comment” on challenged issue).



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- Subsequent to or contemporaneous with the rulemaking, the agency issued guidance or otherwise interpreted or clarified the rule as it relates to the issue.
- The issue arises from a change in circumstances in the regulated environment or the petitioner's activities or business.

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If an issue exhaustion question arises in litigation, litigants should be given an opportunity to demonstrate that some participant adequately raised the issue during the rulemaking or that circumstances exist to justify not requiring issue exhaustion. And if a court declines to apply issue exhaustion principles to preclude review of new issues, the agency should be given an opportunity to respond to new objections on the merits.³¹ Where application of the issue exhaustion doctrine forecloses judicial review, the Administrative Procedure Act, 5 U.S.C. § 553(e), can provide a procedural mechanism for the public to raise new issues that were not presented to the agency during a rulemaking proceeding: the right to petition agencies for amendment or repeal of rules.

Commented [GB1]:
Demetrios Kouzoukas commented as follows:
The first bullet is particularly important given the potential impact of applying administrative exhaustion in these circumstances in light of Mortgage Bankers and Auer.

³⁰ Cf. *CSX Transp., Inc., v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-81 (D.C. Cir. 2009) (declining to apply issue exhaustion to a litigant's argument that the final rule was not a logical outgrowth of the noticed rule).

³¹ Courts have a variety of options for soliciting the agency's views. In appropriate circumstances, these may include permitting the agency to brief the issue or supplement the administrative record, or ordering a remand for the limited purpose of soliciting the agency's views.