Memorandum

To: Committee on Judicial Review

From: Stephanie Tatham, Staff Counsel

Date: April ~~13~~21, 2015

Re: Revised Draft Recommendation – Issue Exhaustion

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.~~and April 17, 2015 meetings. This draft is intended to facilitate the Committee's discussion at its April ~~17~~27, 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

The requirement that parties exhaust their administrative remedies ("remedy exhaustion") is a familiar feature of U.S. administrative law. ~~Remedy exhaustion~~This doctrine bars a party from appealing ~~an~~a final agency action to a court until it exhausts prescribed avenues for relief before the agency.[1] ~~It~~Remedy exhaustion ordinarily applies only to administrative adjudications where an agency has established a mandatory appeals process~~.~~[2] by regulation or

[1] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

~~[2] Darby v, Cisneros, 509 U.S. 137 (1993).~~

statute.[3] The related but distinct concept of "issue exhaustion" ~~doctrine~~ would bar a petitioner for judicial review from raising issues in court it had not raised before the agency ~~in litigation~~, even if the petitioner had exhausted administrative remedies.[4] As with remedy exhaustion, the issue exhaustion doctrine initially arose in the context of agency ~~adjudication.[5]~~ adjudications.[6] Unlike remedy exhaustion, however, issue exhaustion can be applied by courts reviewing agency rulemakings.

Congress expressly required parties to raise all their objections before adjudicatory agencies in several judicial review provisions adopted during the 1930s, prior to the advent of modern rulemaking under the Administrative Procedure Act of 1946. Federal courts continue to enforce these provisions today~~.~~,[7] although they may not always be jurisdictional.[8] The typical statute applies to agency adjudications, contains an exception for "reasonable grounds" or

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[3] Darby v, Cisneros, 509 U.S. 137 (1993) (holding "[w]hile federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, [5 U.S.C. § 704] [], by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates").

[4] *See, e.g.,* FiberTower Spectrum Holdings, LLC v. ~~Fed'l Comm. Comm'n~~FCC, 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.").

~~[5] *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].~~

[6] *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].

[7] *E.g.*, Operative Plasterers' & Cement Masons' Int'l Ass'n v. NLRB, 547 Fed. Appx. 812 (9th Cir. 2013) (enforcing 29 U.S.C. § 160(e)); Hill v. FCC, 496 Fed. Appx. 396 (5th Cir. 2012) (applying 47 U.S.C. § 405).

[8] *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).

"extraordinary circumstances," and permits the court to require an agency to take new evidence under certain conditions.[9] Only two statutes were identified as explicitly requiring issue exhaustion for review of agency rules—the Clean Air Act and the Securities Exchange Act of 1934.[10] Both provisions were adopted in the 1970s, when Congress enacted numerous regulatory statutes with significant rulemaking provisions.[11] Since that time, appellate courts have increasingly applied issue exhaustion when reviewing facial challenges to agency rules.[12]

Judicial application of the issue exhaustion doctrine is often ~~prudential~~discretionary, particularly in rulemaking cases. Courts reviewing agency adjudications have inferred support for application of the issue exhaustion doctrine from remedy exhaustion statutes[13] or from agency regulations requiring issue exhaustion in administrative appeals.[14] Courts have also imposed issue exhaustion requirements in the absence of an underlying statute or regulation~~—~~, such as in the Supreme Court's 1952 decision in *United States v. L.A. Tucker Truck Lines, Inc.*,

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

[10] 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~~Fed. 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).

[11] Lubbers Report, *supra* note 6, at 13.

[12] *E.g.*, 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); 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* Lubbers Report, *supra note* 6, at 26-30 (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).

[13] *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).

[14] S*ee* Sims v. Apfel, 530 U.S. 103 (2000) (citing examples from the Fourth and Ninth Circuit Courts of Appeals).

which reviewed an adjudicative order issued by the Interstate Commerce Commission.[15] In this case, the Supreme Court described the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice" as one of "simple fairness."[16] It also said that issue exhaustion promotes orderly procedure and good administration by offering the agency an opportunity to act on objections to its proceedings.[17]

However, questions about ~~the general applicability~~common law application of the doctrine were raised by the Supreme Court's more recent decision in *Sims v. Apfel*, which held that ~~jurisprudential~~judicial application of an issue exhaustion requirement was inappropriate on review of the Social Security Administration's informal, non-adversarial ~~agency adjudications.~~[18] ~~Lower~~adjudicatory benefit determinations.[19] While at least two appellate courts have continued to apply the doctrine on review of administrative rulemaking after considering *Sims*, courts have inconsistently ~~grasped~~adhered to this distinction~~, and scholars.~~[20] Scholars have since observed

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[15] 344 U.S. 33, 37 (1952).

[16] *Id.*; *see* Advocates for Hwy. & Auto Safety v. FMCSA, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

[17] *Id.*; *see also* Ctr. for Sustainable Econ. v. Sally Jewell, Civ. No. 12-1431, slip. op. at 22 (D.C. Cir. Mar. 6, 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.").

~~[18] *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).~~

[19] *Sims*, 530 U.S. at 108-12 ("[T]he 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).

[20] *See* Advocates for Hwy. & Auto Safety v. FMCSA, 429 F.3d at 1148-49; Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1020 (9th Cir. 2004). *But see* Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073 (9th Cir. 2013)

that issue exhaustion "cases conspicuously lack discussion of whether, when, why, or how exhaustion doctrine developed in the context of adjudication should be applied to rulemaking."[21]

[**Alternate preamble language A:** The Administrative Conference's research highlighted, rather than resolved, competing claims about the advisability of the doctrine. Accordingly, the Recommendation does not advocate for or against general application of the doctrine in review of administrative rulemaking in cases where it is not statutorily compelled. It does, however, identify circumstances where common law application of an issue exhaustion requirement may not be appropriate. The Administrative Conference also urges agencies to only pursue an issue exhaustion defense in litigation when they have a good faith belief that none of the exceptions would apply.]

[**Alternate preamble language B:** The Administrative Conference's research identified competing claims about the advisability of the doctrine. Accordingly, its Recommendation advocates for a middle ground approach that cautions courts to carefully consider whether to apply the doctrine as a matter of common law, but also recognizes that courts generally should not resolve issues litigants did not raise during the administrative rulemaking proceeding. It also identifies circumstances where common law application of an issue exhaustion requirement may

(describing a Surface Transportation Board (STB) exemption as a rulemaking but applying the *Sims* rationale to it because "the STB's procedures were informal and provided no notice to interested parties that to later challenge the STB's decision one must submit comments during the exemption process.").

[21] Lubbers Report, *supra* note 6, 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.").~~Koretoff v. Vilsack, 707 F.3d 394, 399 (D.C. Cir. 2013) (Williams, J., concurring) (concurring in 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, and that that pattern itself may unfairly disadvantage parties that are generally not well represented by interest groups").

not be appropriate, and urges agencies to only pursue an issue exhaustion defense in litigation when they have a good faith belief that none of the exceptions would apply.]

[**Alternate preamble language C:** Although the Administrative Conference's research identified competing claims about the advisability of the doctrine, its Recommendation recognizes that courts generally should not resolve issues litigants did not raise during the administrative rulemaking proceeding. It does, however, identify circumstances where common law application of an issue exhaustion requirement may not be appropriate. The Administrative Conference also urges agencies to only pursue an issue exhaustion defense in litigation when they have a good faith belief that none of the exceptions would apply.]

Although the Administrative Conference believes that statutes should be read to the extent possible to include the exceptions it sets forth in the Recommendation, it did not consider whether Congress should enact new statutory issue exhaustion requirements. The Recommendation is limited in scope to preenforcement review of agency rulemaking, where litigants seek direct review of a rule prior to its application to particular persons in enforcement proceedings.[22]

Support for an Issue Exhaustion Requirement in Preenforcement Review of Administrative Rulemaking

Many of the justifications for application of the issue exhaustion doctrine in judicial review of agency adjudicatory decisions apply squarely to review of rulemakings. ~~The Supreme Court has described the "general rule that courts should not topple over administrative decisions~~

[22] The passage of time and new entrants may complicate the inquiry in cases where a rule is challenged in response to an agency enforcement action. The Conference has previously identified issues that Congress should not ordinarily preclude judicial review of when reviewing challenges to judicial rules raised in an enforcement proceeding. *See* Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings* (Dec. 17, 1982), *available at* www.acus.gov/82-7.

~~unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice" as one of "simple fairness."[23]~~ Issue exhaustion is said to promote ~~orderly procedure and good administration by offering the agency an opportunity to act on objections to its~~ active public participation in rulemaking proceedings~~.~~[24] ~~—~~, create orderly processes for resolution of important legal and policy issues raised in rulemakings, ensure fully informed decisionmaking by administrative agencies and a robust record for judicial review, and provide a certainty and finality to rulemakings that conserves the resources of agencies, courts, and the regulated parties. There is also a concern that, without issue exhaustion, agencies may feel the need to try to anticipate new arguments in court that were not brought to their attention earlier, thus producing problematic delays and overburdening agencies.

The argument for ~~prudential~~judicial application of the doctrine in rulemaking ~~is~~may be especially strong in challenges under an arbitrary and capricious standard of review, such as where the challenge is to the factual basis of the rule or a claim is made that reasonable alternatives ~~of a rule, where~~should have been adopted, or to an agency's failure to exercise its discretion in a particular manner. In those cases, judicial evaluation of the reasonableness of an agency's action may depend heavily on ~~what~~ the administrative record or on contentions that were presented to the agency during the rulemaking. Application of the doctrine in such cases spares courts from hearing issues that could have been cured at the administrative level and ~~avoids agency~~justifies denying agencies the opportunity to create post hoc rationalizations. ~~It~~

Judicial application of the issue exhaustion doctrine is arguably also compelling in challenges to rulemakings of particular applicability or more formal rulemakings, such as those that include a right to ~~a~~an evidentiary hearing. Even in informal rulemakings, would-be litigants may have some responsibility to comment ~~(if they are able)~~ on a rule they seek to challenge prior

~~[23] 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).~~

~~[24] *Id.*~~

to its enforcement. ~~This responsibility may be greater where a rule is likely to involve complex~~[25] Many agencies have adopted procedures ~~or highly technical~~for obtaining input on their rulemakings from interested stakeholders and the widespread use of electronic rulemaking dockets and other Internet- and social media-based outlets for public involvement have increased the public's access to the government rulemaking process.[26] Moreover, the Administrative Procedure Act, 5 U.S.C. § 553(e), provides a procedural mechanism for addressing issues~~, or~~ that were not presented to ~~impose substantial and immediate costs due~~the agency during a rulemaking proceeding—the public's right to ~~the need for prompt compliance.~~petition agencies for amendment or repeal of rules. Additionally, several statutes containing issue exhaustion requirements, including the Clean Air Act and the Federal Communications Act, specifically provide for an agency reconsideration process.[27]

~~Conversely,~~**Concerns with an Issue Exhaustion Requirement in Preenforcement Review of Administrative Rulemaking**

Nonetheless, some scholars and practitioners argue that courts should not uncritically apply issue exhaustion principles developed in the context of adversarial agency adjudications to the frequently distinguishable context of rulemaking.[28] They query whether judicial precedent

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[25] *See* Koretoff v. Vilsack, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring) (commenting that "[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking").

[26] *See, e.g.,* Transparency in EPA's Operations, Memorandum from Lisa P. Jackson, Administrator to All EPA Employees (Apr. 2009); *see also* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking* (Dec. 5, 2013), *available at* www.acus.gov/2013-5; *see also* Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking* (Dec. 9, 2011) (describing observations of a variety of innovative public engagement practices at federal agencies), *available at* www.acus.gov/2011-8.

[27] *E.g.,* 42 U.S.C. 7607(d)(7)(B); 47 U.S.C. 405(a).

[28] *See* William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (offering examples to support the argument that "[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").

that fails to make such distinctions strongly supports general application of the doctrine in judicial review of administrative rulemaking. Critics of a prudential issue exhaustion requirement also cite the presumption of reviewability for final agency actions established by Administrative Procedure Act.[29] Some would go so far as to say that issue exhaustion should generally not apply in the absence of an authorizing statute, particularly in light of the high level of deference given to agencies on judicial review.

Those who are wary of generally applying the doctrine in review of administrative rulemaking also offer some policy arguments against its application. They point out that administrative agencies have an affirmative responsibility ~~to examine key assumptions and issues, as well as to~~in rulemaking proceedings to adequately explain the basis and purpose of the rule, and to necessarily raise and decide issues that will affect persons who may not be represented ~~in a rulemaking proceeding. In addition, some judges have raised concerns that~~. Some fear that overbroad application of the doctrine to rulemakings could serve as a barrier to judicial review for under-resourced non-participants in ~~rulemaking~~rulemakings of general applicability.[30] ~~It may~~

There is also a concern that issue exhaustion requirements may induce rulemaking participants to try to comment on every possible issue, or to save their comments for the last minute.[31] Some scholars fear that issue exhaustion requirements import the threat of litigation into administrative rulemakings, resulting in voluminous administrative records that raise further apprehensions regarding information overload or ~~ossification of rulemaking.~~[32] ~~There is a lack of~~

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[29] 5 U.S.C. § 702; 5 U.S.C. § 704.

[30] ~~*See* Koretoff 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.").~~ Supra note 21.

[31] *See* Lubbers Report, *supra* note 6, at 38-40.

[32] ~~*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~~

~~empirical evidence demonstrating that issue exhaustion contributes to these potential problems. There is also a counterargument that, without issue exhaustion, agencies may feel the need to try to anticipate new arguments in court that were not brought to their attention earlier, thus producing equally problematic delays and overload for agencies. The Administrative Conference did not try to resolve these competing claims—but the concerns do lend additional support for a careful delineation of the circumstances in which issue exhaustion is most appropriately enforced on review of agency rulemaking~~regulatory ossification.[33] Although some degree of foresight may fairly be expected, stakeholders may not be able to predict and comment on every contingency.

~~Even~~Exceptions

Both sides agree that, even where statutes prescribe issue exhaustion, the case law recognizes certain exceptions ~~may exist.~~[34] For example, ~~the Supreme Court recently held that the Clean Air Act's statutory issue exhaustion provision was not "jurisdictional."~~[35] ~~And~~ courts have relied on their equitable authority to read ~~good cause~~extraordinary circumstances exceptions, such as those traditionally applicable in remedy exhaustion cases, into statutes where they were lacking.[36] ~~Courts~~The Conference recognizes that courts applying the issue exhaustion doctrine

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~~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.").~~

[33] *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1363–64 (2010).

[34] Washington Ass'n for Television and Children 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).

~~[35] 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).~~

~~[36] Washington Ass'n for Television and Children v. FCC, 712 F.2d 677, 681-82 (D.C. Cir. 1983).~~ *Id*. (collecting cases); *see generally* Lubbers Report.

prudentially retain some discretion to waive its application.[37] The following Recommendation seeks to offer guidance to the judiciary regarding when exceptions to application of the doctrine on review of administrative rulemaking ~~might~~may be appropriate~~, while recognizing that judicial application of the doctrine~~. Its focus on "extraordinary circumstances" rather than "reasonable grounds" is ~~inherently discretionary and flexible where it is not statutorily compelled.~~ more limited than many statutory exception provisions.[38]

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

RECOMMENDATION

[**Alternate Recommendation language A:** 1. Courts should ~~take care to ensure that they do not uncritically extend~~proceed cautiously in applying issue exhaustion principles developed in the context of adversarial agency adjudications to the frequently distinguishable context of rulemaking review~~.~~.]

~~[~~**Alternate Recommendation language B:** Precede Recommendation below with "As a general principle, in preenforcement review of administrative rulemaking, courts should not resolve issues that were not raised with sufficient specificity in the rulemaking proceeding to give the agency ~~was not given~~ an opportunity to address ~~during a rulemaking proceeding because no participant raised~~ them ~~with sufficient precision,~~

~~[37] *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).~~

[38] *E.g.*, 15 U.S.C. § 77i(a); 15 U.S.C. § 78y(c)(1) (applicable to both adjudication and rulemaking); 27 U.S.C. § 204(h); 49 U.S.C. § 1153(b)(4).

~~clarity, or emphasis~~. This is particularly true for challenges to the factual support for the rule in the administrative record or to an agency's failure to exercise its discretion~~.~~ ~~However, judicial consideration of previously unstated objections to a rule may be warranted under some circumstances, including where:~~ in a particular manner. However," followed by conforming edits.]

1. Except where a statute directs otherwise, judicial consideration of previously unstated objections to an administrative rulemaking may be warranted under the following circumstances:

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

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

i. basic obligations of rulemaking procedure, such as well-recognized requirements of the Administrative Procedure Act ~~or the~~, governing ~~statute~~statutes, or regulations; or

~~ii.~~ explicit or well established substantive criteria prescribed by ~~the agency's~~ governing ~~statute~~statutes or regulations~~; or~~

~~iii.~~ii. ~~key assumptions that were central to the rulemaking~~.

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

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

~~i. the basis for the challenger's objection did not exist during the proceeding,~~ such as ~~issues arising from an unforeseeable variance between the proposed and final rule; or~~

(d) ~~the~~ because the procedures used by the agency ~~otherwise created an impediment to raising the~~precluded it.

~~ii. This issue, such as where rules were promulgated without an opportunity for public participation; or~~

~~iii. other circumstances have materially changed since the rule was issued.~~

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

~~i.~~ unconstitutional~~;~~

~~ii.~~ , patently in excess of ~~the agency's~~ statutory authority~~;~~, or

(e) in violation of an unambiguous statutory requirement~~.~~, and a strong public interest favors judicial resolution of the issue.

(f) ~~Extraordinary~~Other extraordinary circumstances excuse the failure to raise the objection ~~below~~in the rulemaking proceeding.

~~3.~~2. Reviewing courts should allow litigants challenging ~~rules~~administrative rulemakings to have a full opportunity to demonstrate that they did in fact raise ~~the~~an issue first with the agency or that any of the above circumstances—militating against application of the issue exhaustion doctrine—are present.

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

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

~~5.~~4. Agencies should consider the foregoing circumstances when deciding whether to

assert issue exhaustion as a litigation defense.

~~6.~~5. To the extent possible, statutory requirements for issue exhaustion should be construed and applied in accordance with the foregoing recommendations.

~~7.~~6. If Congress adopts new statutory issue exhaustion requirements, it should include ~~an~~exceptions for extraordinary ~~circumstance or reasonable grounds exception~~circumstances.