ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

~~Statement # 19 (2015)~~ ~~[DRAFT – August 10, 2015]~~

Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

Ad Hoc Committee on Issue Exhaustion

Proposed Statement | September 18-25, 2015

1 The doctrine of issue exhaustion generally bars a litigant challenging agency action from
2 raising issues in court that were not raised first with the agency. Although the doctrine originated
3 in 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~~an effort to bring greater clarity to its application
8 in the context of preenforcement review of agency rules.~~[2]~~ The Conference believes ~~it would~~ that
9 this Statement may be useful ~~to set~~by setting forth a series of factors that it invites courts ~~may~~to
10 consider when examining issue exhaustion in that context.[3]

[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, GELLHORN 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.~~

[3] 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.

Evolution of the Issue Exhaustion Doctrine

The requirement that parties exhaust their administrative remedies ("remedy exhaustion") is a familiar feature of U.S. administrative law. This doctrine generally bars a party from appealing a final agency action to a court ~~until it~~unless the party exhausts prescribed avenues for relief before the agency.[4] ~~Remedy exhaustion ordinarily applies only to administrative adjudications.[5]~~

The related but distinct concept of "issue exhaustion" prevents a party from raising issues in litigation that were not first raised before the agency, even if the petitioner ~~fully~~ participated in the administrative process.[6] As with remedy exhaustion, the issue exhaustion doctrine initially arose in the context of agency adjudications.[7] ~~Unlike remedy exhaustion, however, issue exhaustion has often been applied by courts reviewing agency rulemakings.~~

As the Supreme Court has recognized, "administrative issue-exhaustion requirements are largely creatures of statute."[8] ~~Congress expressly required parties to raise all their objections to agency action before adjudicatory agencies in~~In several judicial review provisions adopted during the 1930s, prior to the advent of the Administrative Procedure Act of 1946~~.~~, Congress expressly required parties to raise all their objections to agency action before adjudicatory agencies. Since

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

~~[5] *See* Darby v. Cisneros, 509 U.S. 137, 146 (1993).~~

[6] *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).

[7] *See* Lubbers Report, *supra* note 1, at 2-3.

[8] Sims v. Apfel, 530 U.S. 103, 107 (2000) (plurality opinion).

that time, Congress has included issue exhaustion provisions in many statutes governing review of ~~administrative adjudications and~~ agency orders.[9] The typical statute contains an exception for "reasonable grounds" or "extraordinary circumstances" and permits the court to require an agency to take new evidence under certain conditions.[10]

Courts have also imposed issue exhaustion requirements in the adjudication context in the absence of an underlying statute or regulation requiring it. The Supreme Court early on characterized 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," emphasizing that issue exhaustion promotes orderly procedure and good administration by offering the agency an opportunity to act on objections to its proceedings.[11] But questions about the common law application of the doctrine were later raised in *Sims v. Apfel*, where the Court held that a judicial issue exhaustion requirement was inappropriate on review of the Social Security Administration's informal, non-adversarial adjudicatory benefit determinations, reasoning that "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."[12]

Although the issue exhaustion doctrine originated in the adjudication context, it has been extended to preenforcement review of agency rulemakings. Two statutes have been identified by the Conference as explicitly requiring issue exhaustion for review of agency rules—the Clean

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[9] *See* Lubbers Report, *supra* note 1, at 4-6.

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

[11] 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).

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

Air Act and the Securities Exchange Act of 1934.[13] Both statutes were amended to incorporate issue exhaustion provisions in the 1970s, when Congress enacted numerous regulatory statutes with significant rulemaking provisions.[14]

The doctrine has also been extended to the rulemaking context through common law. Despite *Sims'* focus in the adjudication context on the extent to which the underlying administrative proceeding resembled adversarial litigation for purposes of determining whether the doctrine applied, appellate courts have increasingly applied the doctrine in the absence of a statute requiring it when reviewing preenforcement challenges to agency rules enacted via notice-and-comment proceedings.[15] And at least two appellate courts have applied the doctrine to review of administrative rulemaking after specifically considering *Sims*,[16] although *Sims* was recently cited by the Ninth Circuit as militating against issue exhaustion in an informal rulemaking issued without notice-and-comment procedures.[17]

Relying on their equitable authority, courts have also fashioned exceptions to the issue exhaustion doctrine~~, and have even read such exceptions into statutes where they were not~~

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[13] 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 Govs., 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).

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

[15] *E.g.*, Koretoff 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.

[16] 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).

[17] *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).

60 ~~expressly prescribed~~.[18] The Conference commissioned a consultant's report to identify and
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.[19] Without endorsing
63 every conclusion expressed therein, the Conference believes that the report of its consultant can
64 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.[20] 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 proceedings,
73 ensures fully informed decisionmaking by administrative agencies, provides a robust record for
74 judicial review, and lends certainty and finality to agency decisionmaking. Issue exhaustion also
75 avoids the potential for significant disruption to extensive work by the agency, which can result
76 if an issue is raised only during judicial review, after the rule has been developed. Application of

[18] *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).

[19] S*ee generally* Lubbers Report, *supra* note 1.

[20] 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").

the doctrine spares courts from hearing ~~issues~~objections that could have been cured at the administrative level and reduces the need for agencies to create post-hoc rationalizations.[21]

On the other hand, the Conference also recognizes some practical and doctrinal concerns with uncritically applying issue exhaustion principles developed in the context of formal adversarial agency adjudications to the context of preenforcement rulemaking review.[22] Overbroad application of the doctrine to rulemaking proceedings could serve as ~~an undue~~a barrier to judicial review for persons or firms who reasonably ~~do~~did not ~~find it worthwhile to~~ engage in continuous monitoring of the agency in question.[23] Issue exhaustion requirements may also contribute to the burdens of participating in a rulemaking proceeding, by exerting pressure on commenters to raise at the administrative level every issue ~~they might later seek to invoke on judicial review.[24]~~that they might conceivably invoke on judicial review.[25] Also, an overbroad exhaustion requirement may result in unnecessary uncertainty and inefficiencies by leaving unaddressed fundamental legal questions – such as a rule's constitutionality or validity under a substantive federal statute. These and other concerns have led some observers to

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[21] 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).

[22] *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").

[23] 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* Koretoff v. Vilsack, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring).

~~[24] *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.~~

[25] *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.

question the value of the doctrine as applied to rulemaking, or at least to call for limitations on its scope.

The Conference has compiled a list of factors~~-~~—some of which may be dispositive in particular cases—that it invites courts ~~could~~to consider when deciding ~~how far to limit the general principle that precludes litigants~~whether to preclude a litigant from raising issues for the first time during preenforcement review of an agency ~~rules. Some of these~~rule. The list should be understood as a checklist of potentially relevant factors~~ may be dispositive~~, not a fixed doctrinal formula, and ~~by compiling a list of such factors, the Conference does not intend to suggest that courts should give equal weight to all of them. Specifically, except~~as inapplicable where a statute directs otherwise~~, courts could consider~~. Specifically, the list includes consideration of whether:

- The issue was raised by a participant in the rulemaking other than the litigant.[26]
- The issue was addressed by the agency on its own initiative in the rulemaking.[27]
- The agency failed to address an issue that was so fundamental to the rulemaking proceeding or to the rule's basis and purpose that the agency had an affirmative responsibility to address it.[28]

[26] *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.").

[27] *Id.*

[28] *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). This factor may include issues arising under the applicable substantive statute or the APA.

107 • The issue involves an objection that the rule violates the U.S. Constitution.[29]

108 • It would have been futile to raise the issue during the rulemaking proceeding
109 because the agency clearly indicated that it would not entertain comments on or
110 objections regarding that issue.[30]

111 • The issue could not reasonably be expected to have been raised during the
112 rulemaking proceeding because of the procedures used by the agency. [31]

113 • The basis for the objection did not exist at a time when rulemaking participants
114 could raise it in a timely comment.[32]

115 If an issue exhaustion question arises in litigation, litigants should be given an opportunity
116 to demonstrate that some participant adequately raised the issue during the rulemaking or that
117 circumstances exist to justify not requiring issue exhaustion. And if a court declines to apply issue
118 exhaustion principles to preclude review of new issues, the agency should be given an
119 opportunity to respond to new objections on the merits.[33] Where application of the issue
120 exhaustion doctrine forecloses judicial review, the Administrative Procedure Act, 5 U.S.C. §

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[29] *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.

[30] ~~*Cf.*~~ *See* Comite De Apoyo A Los Trabajadores Agricolas v. Solis, No. 09-240, 2010 WL 3431761, at *18 (E.D. Pa. Aug. 31, 2010); *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").

[31] *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).

[32] *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).

[33] Courts have a variety of options for soliciting the agency's views~~. In appropriate~~ that should vary depending on the circumstances~~, these may~~. These options 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.

121 553(e), can provide a procedural mechanism for the public to raise new issues that were not
122 presented to the agency during a rulemaking proceeding: the right to petition agencies for
123 amendment or repeal of rules.