Statement # 19 (2015) **[JUDITH STARR COMMENTS]** **[DRAFT – August 10, 2015]**

Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

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

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

[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.

from appealing a final agency action to a court until it exhausts prescribed avenues for relief before the agency.[3] Remedy exhaustion ordinarily applies only to administrative adjudications.[4]

The related but distinct concept of "issue exhaustion" prevents a party from raising issues in litigation that were not raised before the agency, even if the petitioner fully participated in the administrative process.[5] As with remedy exhaustion, the issue exhaustion doctrine initially arose in the context of agency adjudications.[6] 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."[7] Congress expressly required parties to raise all their objections to agency action before adjudicatory agencies in several judicial review provisions adopted during the 1930s, prior to the advent of the Administrative Procedure Act of 1946. Since that time, Congress has included issue exhaustion provisions in many statutes governing review of administrative adjudications and agency orders.[8] The typical statute contains an exception for

[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.

"reasonable grounds" or "extraordinary circumstances" and permits the court to require an agency to take new evidence under certain conditions.[9]

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.[10] 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."[11]

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 Air Act and the Securities Exchange Act of 1934.[12] Both statutes were amended to incorporate

[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 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).

issue exhaustion provisions in the 1970s, when Congress enacted numerous regulatory statutes with significant rulemaking provisions.[13]

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.[14] And at least two appellate courts have applied the doctrine to review of administrative rulemaking after specifically considering *Sims*,[15] although *Sims* was recently cited by the Ninth Circuit as militating against issue exhaustion in an informal rulemaking issued without notice-and-comment procedures.[16]

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

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

[14] *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.

[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).

expressly prescribed.[17] The Conference commissioned a consultant's report to identify and articulate the scope of these exceptions in federal appellate case law, as well as to examine the general arguments for or against the doctrine in the rulemaking context.[18] Without endorsing every conclusion expressed therein, the Conference believes that the report of its consultant can provide guidance to courts considering the application of the doctrine as it pertains to preenforcement review of administrative rulemaking.

Factors For Courts to Consider in Applying the Issue Exhaustion Doctrine

The Administrative Conference believes that stakeholders, agencies, and courts benefit when issues are raised during rulemaking proceedings with sufficient specificity to give the agency notice and a fair opportunity to address them prior to judicial review.[19] Many of the justifications for applying the doctrine in judicial review of agency adjudicatory decisions apply squarely to review of rulemakings. The doctrine promotes active public participation, creates orderly processes for resolution of important legal and policy issues raised in agency proceedings, ensures fully informed decisionmaking by administrative agencies, provides a robust record for judicial review, and lends certainty and finality to agency decisionmaking. Application of the

[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).

[18] S*ee 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").

doctrine spares courts from hearing issues that could have been cured at the administrative level and reduces the need for agencies to create post-hoc rationalizations.[20]

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.[21] Overbroad application of the doctrine to rulemaking proceedings could serve as an undue barrier to judicial review for persons or firms who reasonably do not find it worthwhile to engage in continuous monitoring of the agency in question.[22] 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.[23] These and other concerns have led some observers to 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 that courts could consider when deciding how far to limit the general principle that precludes litigants from raising issues for the first time during preenforcement review of agency rules. Some of these factors may be dispositive, and by

Commented [SJ1]: I'm not convinced this is a problem. Why is this a worse outcome than having issues raised for the first time on judicial review? If an issue is important enough to bring to a court (and important enough for a court to determine that it should decide the issue) what should we not require it to be raised before the agency? By definition, we are talking about issues that go to a rule's ultimate validity, not minutiae. This appears to be a concern more theoretical than real.

Commented [SJ2]: One way to balance the concerns underlying the pro and con positions is to be more precise about what the remedy is. Per my comments to note 31 and accompanying text infra, if a really important issue somehow wasn't addressed in the rulemaking, remanding to the agency addresses both the concerns of public participation and agency consideration, as well as those expressed in this paragraph. Letting the court have first crack keeps these interests in opposition (or exalts the latterconcerns over the former). My point is the remedy can be as important as the standard for requiring/not requiring issue exhaustion in terms of serving the underlying interests and therefore should not be relegated to a footnote at the end.

[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).

[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* Koretoff 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.

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 where a statute directs otherwise, courts could consider whether:

- The issue was raised by a participant in the rulemaking other than the litigant.[24]
- The issue was addressed by the agency on its own initiative in the rulemaking.[25]
- The issue 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.[26]
- The issue involves an objection that the rule violates the U.S. Constitution.[27]
- It would have been futile to raise the issue during the rulemaking proceeding.[28]

Commented [SJ3]: Is there an example of what futility would encompass? I can't think of any. Commenters frequently ask agencies to reexamine their own precedent and agencies are not subject to stare decisis, so that would not be futile. The futile comments I have seen from time immemorial involve asking the agency to do something the statute won't allow. Since the courts can't do that either, this type of fuitility does not suffice here. If we can't come up with a realistic scenario in which a comment would be futile (on an objective basis) we should delete this.

[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").

- The issue could not reasonably be expected to have been raised during the rulemaking proceeding because of the procedures used by the agency. [29]

- The basis for the objection did not exist at a time when rulemaking participants could raise it in a timely comment.[30]

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 [SJ4]: This paragagraph and footnote 31 umderstate the depth of the problem with the administrative record and scope of judicial review. We are positing here a situation where there is no record on an issue and the agency has not had an opportunity to address it at all. Stating that "in appropriate circumstances" the court would permit the agency to brief the issue implies there are circumstances in which it would not. How could a court perform the proper review under the APA without the agency's views and a record? Not only would such a circumstance lead to de novo review but also a non-adversarial proceeding. Permitting the agency to brief should be the absolute minimum a court would have to do to conduct a review in accordance with APA – remand to build a record would be more consistent with the APA's standard of judicial review and the interests underlying issue exhaustion, both pro and con.

[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).

[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.