ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum MORRISON COMMENTS 4-15-15

To: Committee on Judicial Review

From: Stephanie Tatham, Staff Counsel

Date: April 13, 2015

Re: 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. This draft is intended to facilitate the Committee's discussion at its April 17, 2015 public meeting, and not to preempt Committee discussion and consideration of recommendations. In keeping with Conference practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Issue Exhaustion in Preenforcement

Judicial Review of Administrative Rulemaking

The requirement that parties exhaust their administrative remedies ("remedy exhaustion") is a familiar feature of U.S. administrative law. Remedy exhaustion bars a party from appealing an agency action – including both rulemakings and adjudications - to a court until it exhausts prescribed avenues for relief before the agency.[1] ~~It ordinarily~~ As applie~~s~~d ~~only~~ to administrative adjudications the doctrine is followed only where an agency has established a mandatory appeals process.[2] The related "issue exhaustion" doctrine would bar a petitioner for judicial review from

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

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

raising issues in court that it had not raised before the agency ~~in litigation~~, even if the petitioner had exhausted administrative remedies.[3] As with remedy exhaustion, the issue exhaustion doctrine initially arose in the context of agency adjudication.[4]

Congress has 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. The typical statute applies to agency adjudications, contains an exception for "reasonable grounds" or "extraordinary circumstances," and permits the court to require an agency to take new evidence under certain conditions.[5] 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.[6] Both provisions were adopted in the 1970s, when Congress enacted numerous regulatory statutes with significant rulemaking provisions.[7] Since that time, appellate courts have increasingly applied issue exhaustion when reviewing agency rules.

Commented [ABM1]: 15 USC 3416 applies to FERC orders including rules. The federal Power Act may have a similar requirement of seeking rehearing and pointing out specific objections as a pre-requisite for judicial review

Judicial application of the issue exhaustion doctrine is often prudential, particularly in rulemaking cases. Courts reviewing agency adjudications have inferred support for application of the issue exhaustion doctrine from remedy exhaustion statutes[8] or from agency regulations

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

[4] *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].

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

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

[7] Lubbers Report at 13.

[8] *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).

requiring issue exhaustion in administrative appeals.[9] Courts have also imposed issue exhaustion requirements in the absence of an underlying statute or regulation. However, questions about the general applicability of the doctrine were raised by the Supreme Court's decision in *Sims v. Apfel*, which held that **jurisprudential** application of an issue exhaustion requirement was inappropriate on review of the Social Security Administration's non-adversarial agency adjudications.[10] Lower courts have inconsistently grasped this distinction, and scholars have since observed 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."[11]

Commented [ABM2]: What does that word mean? Is it necessary or helpful?

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 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."[12] Issue exhaustion is said to promote orderly procedure and good administration by offering the agency an opportunity to act on objections to its proceedings.[13] The argument for prudential application of the doctrine in rulemaking is especially strong in challenges under an arbitrary and capricious standard of review, such as where the challenge is to the factual basis or a claim is made that reasonable alternatives should have been adopted. In those cases~~of a rule~~, ~~where~~ judicial evaluation of the reasonableness of an agency's action may depend heavily on what contentions were presented to the agency during the rulemaking. Application of the doctrine in such cases spares courts from hearing issues that

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

[10] *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).

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

[12] 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).

[13] *Id.*

could have been cured at the administrative level and ~~avoids~~justifies denying agencies the opportunity to create~~y~~ post hoc rationalizations. It is also compelling in challenges to rulemakings of particular applicability or more formal rulemakings, such as those that include a right to a hearing. Even in informal rulemakings, litigants may have some responsibility to comment (if they are able) on a rule they seek to challenge prior to its enforcement. *This responsibility may be greater where a rule is likely to involve complex procedures or highly technical issues, or to impose substantial and immediate costs due to the need for prompt compliance.*

Commented [ABM3]: I dod not understand the rationale for this assertion.

Conversely, agencies have an affirmative responsibility to examine key assumptions and issues, as well as to 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 application of the doctrine to rulemakings could serve as a barrier to judicial review for under-resourced non-participants in rulemaking.[14] It may also induce rulemaking participants to try to comment on every possible issue, resulting in voluminous administrative records that raise further apprehensions regarding information overload or ossification of rulemaking.[15] However, t~~T~~here is a lack of 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.

[14] *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.").

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

Even where statutes prescribe issue exhaustion, exceptions may exist. For example, the Supreme Court recently held that the Clean Air Act's statutory issue exhaustion provision was not "jurisdictional."[16] And courts have relied on their equitable authority to read good cause exceptions, such as those traditionally applicable in remedy exhaustion cases, into statutes where they were lacking.[17] Courts applying the issue exhaustion doctrine prudentially retain some discretion to waive its application.[18] The following Recommendation seeks to offer guidance to the judiciary regarding when exceptions to application of the doctrine on review of rulemaking might be appropriate, while recognizing that judicial application of the doctrine is inherently discretionary and flexible where it is not statutorily compelled. It also urges agencies not to argue for issue exhaustion unless they have a good faith belief that none of the exceptions in this Recommendation would apply.

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

1. Courts should take care to ensure that they do not uncritically extend issue exhaustion principles developed in the context of adversarial agency adjudications to the frequently distinguishable context of rulemaking review.

2. As a general principle in p-re-enforcement judicial proceedings, courts should not

[16] 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).

[17] Washington Ass'n for Television and Children v. FCC, 712 F.2d 677, 681-82 (D.C. Cir. 1983).

[18] *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).

resolve issues the agency was not given an opportunity to address during a rulemaking proceeding because no participant raised them with sufficient precision, 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~~.~~ in a particular manner However, judicial consideration of previously unstated objections to a rule may be warranted under some circumstances, including where:

(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 requirements of the Administrative Procedure Act or the governing statute or regulations;
ii. explicit or well established criteria prescribed by the agency's governing statute or regulations; or
iii. key assumptions that were central to the rulemaking.

Commented [ABM4]: Does failure to do anything about NEPA apply? I think the answer should be yes and we should say so.

(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 could not reasonably have been expected to raise the issue 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
ii. the procedures used by the agency otherwise created an impediment to raising the issue, such as where rules were promulgated without an opportunity for public participation; or

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

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

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

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

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

4. Agency counsel~~ies~~ should not assert issue exhaustion as a litigation defense unless they have a good faith belief that none of the exceptions to issue exhaustion set forth in this Recommendation applied.~~in the foregoing limited circumstances.~~

5. 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.

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

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