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The Administrative Law of Borrowed Regulations: Legal Questions Regarding the Bankruptcy Law's Incorporation of IRS Standards

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I. Introduction

Bankruptcy is a rarity in modern American regulation: It is a major federal program that is administered exclusively through adjudication, without a central rulemaking agency to establish substantive regulations and to issue authoritative constructions of the principal statute. Perhaps for this reason, bankruptcy judges and lawyers spend considerably less time than their counterparts in other fields worrying about bread-and-butter administrative law issues, such as the procedural and substantive validity of agency rules, the appropriate level of judicial deference to agency decisions, and the like. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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(BAPCPA), Congress (perhaps unintentionally) thrust bankruptcy lawyers and judges into the administrative law thicket by giving the determinations of a previously unrelated federal agency, the Internal Revenue Service (IRS), binding effect in individual Chapter 7 and Chapter 13 bankruptcy cases. This unusual statutory scheme raises a number of difficult administrative law problems that bankruptcy practitioners will have to address. The purpose of this essay is to provide a brief survey of the administrative law aspects of the BAPCPA regime, to sketch some of the main administrative law problems that are likely to come up in bankruptcy cases, and to suggest some possible approaches to these problems.

A bit of preliminary explanation is in order for those who do not regularly deal with consumer bankruptcy issues. Prior to BAPCPA, 11 U.S.C. § 707(b) required dismissal of a Chapter 7 petition if the bankruptcy judge found that "the granting of relief would be a substantial abuse" of Chapter 7, and bankruptcy judges had generally interpreted this language as authorizing consideration of the totality of the debtor's circumstances. Similarly, under the pre-2005 version of 11 U.S.C. § 1325(b)(2)(A), upon objection to confirmation, a Chapter 13 repayment plan had to commit all of a debtor's "projected disposable income" to plan payments, where "projected disposable income" was defined as income "not reasonably necessary" for maintaining or supporting the debtor or dependents. This provision gave bankruptcy judges considerable discretion in determining what, if anything, an individual debtor could afford to devote to paying off debts.

BAPCPA was intended, among other things, to make Chapter 7 and Chapter 13 bankruptcy proceedings more rule-based. Most importantly for present purposes, the revised version of 11 U.S.C. § 707(b) instructs bankruptcy judges to presume abuse of Chapter 7 if the debtor's monthly income, after netting out certain permissible expenses, exceeds a specified monetary threshold. Furthermore, the revised version of 11 U.S.C. § 1325(b) mandates that projected disposable income for debtors with current monthly income (CMI) greater than applicable median family income is to be calculated after netting out allowable expenses, which in turn are to be determined in accordance with § 707(b). Thus, expense allowance calculations under § 707(b) are crucial for determining an individual debtor's access to Chapter 7 and a debtor's continuing repayment obligations following a Chapter 13 petition.

For most types of expense, however, the revised § 707(b) neither specifies precise allowances nor provides a method for litigants or parties to calculate these allowances. Rather, BAPCPA incorporates by reference so-called "National Standards," "Local Standards," and categories of "Other Necessary Expenses" (hereinafter collectively "IRS Standards" or "Standards") issued by the IRS. Specifically, 11 U.S.C. § 707(b)(2)(A)(ii)(I) instructs: "The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides."[1]

The first remarkable thing about this scheme is that the IRS Standards had not, prior to BAPCPA, had any particular relevance to bankruptcy proceedings.[2] The IRS publishes the Standards for use in collection disputes with delinquent taxpayers. Simplifying somewhat, when a taxpayer owes

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substantial back taxes to the federal government and there is some question of a taxpayer's ability to pay those taxes, the taxpayer may propose an "offer-in-compromise" to pay some amount less than the liability the IRS seeks to collect.[3] Alternatively, a taxpayer who owes substantial back taxes to the federal government may propose an installment agreement to pay the taxes owed over time.[4] If the IRS accepts either proposal, then the taxpayer's debt to the government is considered settled. Because of the volume of such proposals, and to provide consistency,[5] the IRS has laid out in publicly-available documents the method that it will presumptively apply in evaluating offers-in-compromise and installment agreement proposals.[6] Because this method takes into account what the taxpayer can afford to pay, it includes estimated living expenses in different categories. Basically, the Standards consist of a database with different categories of expense (broken down by region in the case of the Local Standards), and a dollar amount connected to each one.[7] The "IRS Standards" referenced in BAPCPA are these expense estimates.

Arguably, BAPCPA uses the IRS Standards for a purpose similar to that for which the IRS developed the Standards in the first place. In both cases, a government entity must determine how much an individual can afford to devote to paying off debt. This similarity may explain why BAPCPA's drafters decided to use the IRS's numbers. Nevertheless, the IRS originally published the Standards solely for use in evaluating offers-in-compromise and installment agreement proposals from delinquent taxpayers, without any particular attention to how the Standards would or should be used in bankruptcy proceedings. Furthermore, in the tax context the Standards serve as only a starting point for financial analysis. Although the IRS generally follows the Standards, it is legally obligated only to consider the Standards in each case, not to adhere to them as absolutes. Because of BAPCA, however, the IRS Standards now have an important, direct, and arguably nondiscretionary effect on Chapter 7 and Chapter 13 bankruptcy cases.

This unusual arrangement—in which a statute regulating one substantive area cross-references documents promulgated by an unrelated administrative agency to deal with a different substantive area—presents bankruptcy judges with a set of unfamiliar and difficult administrative law questions. Three such questions are especially salient. The first is whether, or to what extent, bankruptcy courts ought to defer to IRS statements, contained in documents other than the Standards themselves, about how the Standards should be applied. The second question is whether the IRS may alter the Standards for taxpayer settlement purposes but not bankruptcy purposes, or vice versa. The third question concerns the procedures that the IRS must use when it changes the Standards, especially in light of the fact that these Standards now have an apparently binding effect in Chapter 7 and Chapter 13 bankruptcy cases.

This short essay will explain, from the standpoint of administrative law, the difficulties that these issues present, and suggest a few possible (and in some cases competing) administrative law theories for thinking about them. Part II considers the preliminary question of what sort of legal instrument the IRS Standards actually are from the administrative law perspective—a question that itself turns out to be difficult to answer, but that directly affects how these Standards should be treated by bankruptcy courts—as well as some of the implications of that determination. Part III then considers different approaches to each of the three substantive questions raised above: the appropriate degree of deference by bankruptcy courts to how the IRS interprets and applies the Standards in tax cases, the permissible degree of divergence between the Standards applied in tax and bankruptcy cases, and the procedures that the IRS must use when altering the Standards. Part IV offers concluding thoughts.

II. What Are the IRS Standards?

A. The Basic Statutory and Doctrinal Administrative Law Framework

The Administrative Procedure Act (APA) provides both default procedural requirements for federal agency actions and standards for judicial review thereof. Congress may impose or agencies may adopt additional procedural requirements beyond the APA-mandated "floor," but courts gen-

erally cannot.[8] Congress can also relax or modify APA procedural requirements, but according to APA § 559, such congressional modification or relaxation of APA procedures must be express.[9]

B. Agency Rulemaking Under the APA

Section 553 of the APA lays out the default procedural requirements for agencies to use in promulgating rules.[10] This § 553 process, known as "notice-and-comment rulemaking," requires public notice of a proposed rulemaking through publication in the Federal Register, followed by an opportunity for interested persons to submit written comments, and also requires that final regulations be accompanied by a "concise general statement of their basis and purpose"—a statement that, in practice, is more typically lengthy and detailed than concise and general.[11] A rule adopted through this process will not be effective until at least 30 days after it is published in the Code of Federal Regulations (CFR).[12]

APA § 553(b) in turn provides several exceptions from § 553's notice-and-comment requirements, two of which are relevant here: § 553 procedures do not apply to interpretative rules or to "general statements of policy."[13] Because notice-and-comment rulemaking is, in practice, quite burdensome for agencies,[14] understanding the scope of these exceptions is critical.

1. Legislative Rules

Agency regulations subject to the default procedural requirements of APA § 553 generally are referred to as "legislative rules."[15] Most federal agencies are authorized by statute to promulgate regulations to implement some general statutory directive or purpose. If procedurally valid, such regulations or rules carry the force and effect of law unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[16]

Following the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[17] reviewing courts are obligated to grant strong deference to statutory interpretations contained in legislative rules. *Chevron* counsels that, where a statute gives an agency the power to promulgate legally binding rules, Congress has implicitly expressed a preference for the agency, rather than the courts, to possess primary responsibility for resolving statutory gaps and ambiguities.[18] Although much scholarly ink has been spilled over the nature and scope of *Chevron* deference, this much is clear: Where *Chevron* applies, a reviewing court must defer to a reasonable interpretation of an ambiguous statute by the administering agency, and legislative rules promulgated through notice-and-comment rulemaking are the prototypical example of agency action to which *Chevron* applies.[19]

2. "Interpretative" Rules

Loosely, an interpretative rule announces the agency's interpretation of a statute or regulation but is not legally binding on regulated parties.[20] In practice, it is not always easy to figure out how to categorize a given rule, and the APA offers no guidance for determining when a rule qualifies as interpretative rather than legislative. Sometimes an agency will label a rule "interpretative" or "legislative," but because agencies have an incentive to avoid the burden of notice-and-comment rulemaking procedures, the agency's label is not dispositive.[21] Courts therefore have had to develop standards for distinguishing legislative and interpretative rules—that is, for identifying when a rule in fact carries the force and effect of law, notwithstanding agency suggestions to the contrary.[22]

Although the doctrine is somewhat muddled, the dominant standard looks for the presence of several factors demonstrating that a rule is legally binding.[23] The relevant factors have evolved over time and vary somewhat among circuits,[24] but the principal considerations include: whether the rule is necessary to support an enforcement action, confer benefits, or impose obligations;[25] whether the statute is too open-ended to effectuate only with interpretative rules;[26] and whether the rule in question repudiates or amends another legislative rule.[27] Other factors, used by some circuits, seek to discern the agency's contemporaneous intent with the rule.[28]

The distinction between legislative and interpretative rules is even more complicated in the tax context. Outside the tax area, courts and scholars have accepted the notion that legislative rules may

arise both from delegations of specific authority to accomplish a congressionally identified goal and from delegations of general authority to promulgate rules and regulations as necessary to administer the statute.[29] This was not always the conventional view, however. In the early 20th century, the prevailing consensus was that regulations issued pursuant to a delegation of general rulemaking authority could only be interpretative rules, because treating such regulations as legislative rules would offend the nondelegation doctrine.[30] This view has been discarded, along with the strong version of the nondelegation doctrine on which it was based, in other areas of administrative law.[31] Yet many in the tax community persist in the belief that regulations promulgated under the Internal Revenue Code's general authority rulemaking grant are interpretative, not legislative.[32]

Categorizing a rule as legislative or interpretative not only determines whether the agency must satisfy the public notice and comment requirements of APA § 553—a burdensome process that agencies may seek to avoid. This distinction is also relevant for the scope of judicial deference to a legal interpretation announced in a rule. Recently, the Supreme Court held in *United States v. Mead Corp.*[33] that agency interpretations of statutes are entitled to strong *Chevron* deference only if they carry the force and effect of law. Consequently, when an agency announces its interpretation of a statute in an interpretative rule, courts will typically evaluate this interpretation under the less deferential standard of review announced in *Skidmore v. Swift & Co.*,[34] which calls upon a reviewing court to evaluate the extent to which an agency's legal interpretation is entitled to deference through a series of factors: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[35]

By contrast, where interpretative rules reflect an agency's interpretation of its *own regulations*, rather than of a congressional statute, the prevailing view is that the highly deferential standard of *Auer v. Robbins*[36] or *Bowles v. Seminole Rock & Sand Co.* applies.[37] According to this standard, which is roughly equivalent to *Chevron* in terms of the level of judicial deference, an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[38] The *Auer*/*Seminole Rock* standard is controversial for several reasons, not least because it appears to give the agency an incentive to promulgate vague legislative rules that it can later interpret informally without the burden of public notice and comment.[39] Hence, courts have occasionally declined to apply *Auer*/*Seminole Rock* deference to interpretations of agency regulations that merely reiterate statutory language or are themselves overly vague and ambiguous.[40] Other courts and scholars advocate *Skidmore* deference for these interpretative rules.[41]

3. Policy Statements

As noted above, § 553(b) exempts general statements of policy from § 553's notice and comment requirements.[42] The APA offers no definition for the policy statement category. As with interpretative rules, the doctrinal distinction between legislative rules and policy statements is confusing, but the principal distinction is that policy statements, like interpretative rules, lack the force and effect of law. Given this similarity, the line between the interpretative rule and policy statement categories is often blurred.[43] In theory, the difference is that an interpretative rule articulates the agency's interpretation of particular statutory or regulatory language, while a policy statement announces how the agency intends to exercise its discretion, especially with respect to enforcement actions.[44] Internal agency manuals that do not directly interpret statutory language but nevertheless guide government officials in administering government programs often fall within this category.[45] Nevertheless, because neither interpretative rules nor policy statements must satisfy the procedural requirements for notice-and-comment rulemaking, the practical implications of the distinction are limited.

C. What Are the IRS Standards?

The IRS developed its Local and National Standards in 1997 to encourage uniformity in evaluating offers in compromise and installment agreement proposals.[46] The IRS originally issued the standards informally as a matter of policy. That

is, at the time the standards were initially promulgated, the IRS had broad discretion regarding how it would settle disputes with delinquent taxpayers, and the Standards were an announcement to the public of how the IRS intended to exercise its discretion. At least at the moment the Standards were first issued, then, it would seem that they would best be categorized as general statements of policy not subject to § 553's notice and comment requirements.

In 1998, however, Congress enacted legislation revising I.R.C. § 7122 to require the Treasury Department to maintain and use the Standards in evaluating offers-in-compromise. I.R.C. § 7122(d) currently provides the following:

> (1) In general.—The Secretary shall prescribe guidelines for officers and employees of the Internal Revenue Service to determine whether an offer-in-compromise is adequate and should be accepted to resolve a dispute.
>
> (2) Allowances for basic living expenses.—
>
> (A) In general.—In prescribing guidelines under paragraph (1), the Secretary shall develop and publish schedules of national and local allowances designed to provide that taxpayers entering into a compromise have an adequate means to provide for basic living expenses.
>
> (B) Use of schedules.—The guidelines shall provide that officers and employees of the Internal Revenue Service shall determine, on the basis of the facts and circumstances of each taxpayer, whether the use of the schedules published under subparagraph (A) is appropriate and shall not use the schedules to the extent such use would result in the taxpayer not having adequate means to provide for basic living expenses.[47]

Subsequently, the Treasury Department adopted Treasury Regulation § 301.7122-1(c), a legally-binding regulation, interpreting I.R.C. § 7122(d).[48] Treasury Regulation § 301.7122-1(c) says that "guidelines published by the Secretary on national and local expense standards will be taken into account" in evaluating the facts and circumstances of taxpayers' basic living expenses and taxpayers' ability to pay their taxes.[49]

The language of both the statute and the regulation is an interesting combination of mandatory requirement and case-by-case discretion. The IRS is obligated by Congress's use of "shall" to develop and publish the Standards, and IRS agents are required by Treasury's use of "will" to consider the Standards in evaluating offers in compromise.[50] Yet, the statutory and regulatory language, as well as informal IRS interpretations, all clearly consider the Standards as merely the starting point for IRS analysis, rather than as dispositive.[51] Deviations from the Standards must be documented and justified by a case-by-case evaluation of each taxpayer's facts and circumstances.[52] In one internal memorandum, the IRS rejected a proposal for standardizing deviations for state income tax liabilities as inconsistent with the case-by-case evaluative model.[53] Perhaps because of the high threshold for deviating from the Standards, practitioners have accused the IRS of applying the Standards inflexibly in practice.[54]

One could argue that, whatever the Standards were in 1997 when they were first issued, they are now legislative rules for APA purposes. The congressional and regulatory mandate that the IRS must maintain and take into account the Standards in evaluating officers-in-compromise lend the Standards a degree of legal force. The fact that the Code and related regulations also leave the IRS with considerable discretion does not negate the Standards' mandatory role in the process. In short, one could argue that allowing exceptions from the otherwise mandated and broadly-applicable Standards does not render those Standards legally nonbinding. The claim that the IRS rarely deviates from the Standards in practice further buttresses the argument that they carry the force of law in the tax context. On that interpretation, despite their origin and their characterization by the IRS, the Standards are now legislative rules. If so, then the Standards would be subject to the procedural requirements of APA § 553, and the IRS could alter them only by employing the notice-and-comment process—something the IRS has historically not done.

On the other hand, one might continue to characterize the IRS Standards as policy statements (or perhaps interpretative rules interpreting I.R.C. § 7122(d)(2)(A)), even after the 1998 amendment to the Internal Revenue Code. First, even though the agency's own characterization of its actions is not dispositive, it does carry some weight; and the IRS has continued to characterize the Standards as general policy statements and to treat them as such for more than 10 years without any congressional objection. Furthermore, the authority of the IRS to deviate from the Standards appears at least facially to be quite broad, adding credence to the argument that the Standards are merely nonbinding guidance. On this view, I.R.C. § 7122 merely requires the IRS to provide general guidance—that is, it removes the agency's discretion to abstain from publishing any information about the presumptions it will use when evaluating offers-in-compromise; but the 1998 amendment to I.R.C. § 7122 did not thereby convert that guidance into legislative rules.

In addition to the question of how to categorize the IRS Standards themselves, there is the related question of how to categorize informal statements by the IRS, in the Internal Revenue Manual (IRM) and elsewhere, that elaborate how the numbers contained in the Standards are to be applied in different circumstances. One could conceivably view these additional statements as part of the Standards themselves—that is, one might assert that the "Standards" include both the expense allowances in the database and whatever subsequent additional guidance the IRS provides as to how it intends to apply those allowance amounts in taxpayer settlement negotiations. This view seems unlikely, however, given that common practice appears to be to use "Standards" to refer only to the numbers themselves. Alternatively, one could consider the additional statements either as interpretative rules (on the view that these other statements "interpret" the meaning of the numbers contained in the Standards) or as general policy statements (on the view that these statements constitute additional guidance from the IRS as to how it will exercise its statutory discretion). In other words, IRS statements in other documents that elaborate on how the Standards are to be applied in taxpayer disputes might be categorized as an agency's interpretation of its own regulations, or as additional (noninterpretative) policy statements covering the same general set of cases.

While this brief survey of general administrative law doctrine and its application to tax law may not seem to have immediate relevance for bankruptcy, BAPCPA has made these issues salient for bankruptcy practitioners struggling with the proper application of § 707(b) in Chapter 7 and Chapter 13 cases. The next section elaborates some of the main problems that either have arisen, or are likely to arise, in this context.

III. Administrative Law Problems and Questions

A. To What Extent Should Bankruptcy Courts Defer to IRS Interpretations of the Standards?

As noted above, while the IRS Standards themselves are just dollar figures attached to different expense categories, the IRS has provided a fuller explanation of how it uses these numbers in other documents, including the IRM. This gives rise to the following problem: In performing calculations pursuant to § 707(b), should a bankruptcy court look only to the IRS Standards themselves, or should the court look to other IRS statements regarding how the Standards are to be applied in the taxpayer context? Some courts and commentators have framed this issue in terms of whether a bankruptcy court should "defer" to the IRS's "interpretation" of the Standards.[55]

This issue has already arisen repeatedly with respect to debtors who own a vehicle or a residence outright, without any lien. The IRS Local Standards include an allowance for "vehicle ownership cost" (and a separate allowance for "vehicle operating cost"); the Local Standards similarly include a "mortgage/rental expense" allowance for the debtor's household. The IRS has, however, explained—in the IRM and elsewhere—that the expense allowances listed under the Local Standards apply only if the taxpayer actually has the expense.[56] Thus, the IRS treats the numbers listed in the Local Standards as caps. For example, if a delinquent taxpayer owns and is making installment payments on a vehicle, the IRS will deduct an amount up to the amount listed in the Local Standards when determining what the tax-

payer can presumptively afford to repay under the Local Standards. However, if the taxpayer owns the vehicle outright, or if vehicle debt payments are below the applicable allowance listed in the Local Standards, then the IRS will only deduct the taxpayer's actual vehicle ownership expense, rather than the full amount listed in the Local Standards.

The question that has divided the bankruptcy courts concerns the appropriate approach to follow when calculating expense allowances pursuant to § 707(b). Recall that this section says that allowable expense deductions in Chapter 7 and Chapter 13 cases shall be the "applicable monthly expense amounts specified under the National Standards and Local Standards." Does this mean that bankruptcy courts are to apply the dollar amounts listed in the Standards, without regard to whether the IRS would grant the full deductions when evaluating an offer-in-compromise, or does it mean that bankruptcy courts are to apply the IRS Standards in the same way that the IRS would apply them—granting full deductions for the categories listed under the Local Standards only if the debtor's actual expenses in that category equaled or exceeded the figure listed in the Standards, and otherwise allowing a deduction only for the debtor's actual expense in that category?[57]

This question might be framed strictly as a question of statutory interpretation, without any need to refer to administrative law deference principles. On this view, the question is whether the statutory language—particularly the word "applicable"—means that the bankruptcy courts are supposed to use the numbers in the IRS Standards without reference to how they would be applied in the taxpayer context (on the logic that "applicable monthly expense amounts" mean the expense amounts listed in the Standards for the applicable category, e.g., vehicle ownership), or that the bankruptcy courts are supposed to use the numbers listed in the Standards only when the IRS would also use those numbers (on the logic that "applicable monthly expense amounts" mean the expense amounts that the IRS would deem applicable when it employed the standards in a taxpayer case). Indeed, several of the bankruptcy courts to have considered the question have framed it primarily as an issue of statutory interpretation, turning on the best reading of the text and, in some cases, the purposes of BAPCPA and its legislative history. When the issue is framed this way, it does not appear that the issue is properly thought of as whether bankruptcy courts should "defer" to the IRS; rather, the issue is whether the "applicable" amount is the amount listed in the Standards or the amount the IRS would use when employing the Standards.

To put the same point in a slightly different way, the deference issue only comes up if the statements in the IRM and other documents regarding the proper application of the Standards are viewed as "interpretations" of the Standards. But the language in these sources need not be so viewed. One could, for example, take the position that the IRS elaborations on the appropriate application of the Standards are, at least for § 707(b) purposes, part of the Standards themselves, in which case the statutory command that bankruptcy courts apply the IRS Standards would by definition require them to apply IRS interpretations and instructions contained elsewhere. For reasons stated earlier, however, this theory is not particularly plausible, given that in virtually all other contexts the terms "Local Standards" and "National Standards" are used to refer only to the data tables provide by the IRS, rather than to the larger set of guidance materials that explain how the IRS will evaluate offers-in-compromise. An alternative theory, which leads to an opposite result, is that the IRM and other statements are merely separate policy statements in which the IRS explains how it will apply the Standards in taxpayer settlement cases. That theory would tend to support the view that bankruptcy courts should give little or no weight to IRS statements regarding the application of these standards, because BAPCPA instructs the bankruptcy courts only to refer to the Standards themselves, not to other IRS guidance documents.

Language in some bankruptcy court opinions, however, has framed this issue at least partly in terms of the degree to which bankruptcy courts should "defer" to the IRS's "interpretation" of the Standards. Some courts have argued that it would

be absurd to ignore existing administrative interpretations of the document that Congress has mandated the bankruptcy courts to employ.[58] Other courts have rejected this argument on the ground that the IRS has no special expertise in bankruptcy and does not administer the Bankruptcy Code, and so while bankruptcy courts are obligated by statute to apply the IRS Standards, they are not in any way obligated to defer to how the IRS would interpret or apply those Standards in a tax dispute.[59]

Let us proceed, then, on the provisional assumption that the legal question in these cases may be appropriately framed as whether bankruptcy courts should defer to the IRS's interpretation of the Standards when applying those Standards in bankruptcy cases. To make this a bit more precise, one can put the issue this way: The IRS Standards list "Allowable Living Expenses" for different expense categories. These numbers could be interpreted either as fixed deductions or as caps; their actual meaning is ambiguous. If a bankruptcy court had nothing else to go on, let us suppose that this court would conclude, in light of conventional interpretive techniques, that these numbers should be treated as fixed amounts, not caps. However, the IRM makes clear that the IRS thinks that at least some of these numbers should be interpreted as caps, not fixed amounts. The question that the court must then resolve is the degree to which it should defer to the IRS's interpretation of what these numbers signify.

On this characterization of the legal issue, it would seem that the IRM statements should be viewed as "interpretative rules," on par with an agency's interpretation of its own regulations. Even accepting this categorization, however, it not clear what conclusion ought to follow. One might contend that if the IRM directives are equivalent to an agency's interpretation of its own regulations, then bankruptcy courts ought to follow the traditional deference principles announced in the *Auer*/*Seminole Rock* line and give substantial weight to the IRS's interpretation of its own regulations, rejecting that interpretation only if it is plainly contrary to the text of the regulation or the statute. On the other hand, one might reasonably argue that the traditional basis for *Auer*/*Seminole Rock* deference is lacking in this context, because the IRS lacks expertise in bankruptcy and announced its interpretation of the Standards in a very different context—both because of the difference in substantive area and because in the tax context the Standards are a presumptive starting point rather than a legally binding mandate—which makes it implausible to suppose that Congress implicitly granted the IRS the authority to elaborate rules for bankruptcy cases by elaborating its interpretation of the Standards.

The choice between these approaches turns on three basic tensions. First, the question of the appropriate degree of deference by bankruptcy courts to IRS interpretations announced in the tax context pits the interest in consistency across areas against the interest in appropriate tailoring to context. A second, related point concerns the interest in agency expertise, which is often invoked to justify deference to agency interpretations. In this case, the IRS arguably has less bankruptcy-specific expertise than the bankruptcy courts, which would imply less deference than would ordinarily be due under *Auer*/*Seminole Rock*. On the other hand, the IRS has considerably greater access to economic data, and more systematic experience dealing with this general class of problems, than do the bankruptcy courts. Third, the different possible justifications for *Auer*/*Seminole Rock* deference pull in opposite directions. Sometimes *Auer*/*Seminole Rock* deference is justified with the claim that the agency that drafted the regulation has a special insight into what they really mean.[60] That view, which is sometimes advanced but sometimes disclaimed in the relevant case law,[61] would suggest deferring to the IRS in this case. At other points, however, *Auer*/*Seminole Rock* is defended on the grounds that agencies have special, policy-based insight into how a particular regulation should apply in a particular regulatory context.[62] That justification for *Seminole Rock* deference is much less compelling in a case like this one, where the interpretation was developed for a context that is arguably quite different.

B. May the IRS Standards for Tax and Bankruptcy Purposes Diverge?

A second issue which has not yet been litigated, but which is likely to arise in the near future, concerns the ability of the IRS to alter the Standards for purposes of taxpayer settlements but not for bankruptcy, or vice versa. Can the IRS announce that it is changing the numbers in various expense allowance categories for tax administration purposes, but keeping the old numbers for use in bankruptcy? Can it alter the numbers used in bankruptcy but announce that it will continue using the old numbers when evaluating offers-in-compromise? Or, to return to the question discussed in the preceding subsection, could the IRS announce that although the certain expense allowances would be treated as caps when calculating offers-in-compromise, they should be used as fixed deductions in bankruptcy cases? Or the reverse?

The question of whether the IRS has the authority to create a divergence between the Standards used in the tax context and those used in the bankruptcy context is not merely a fanciful law professor's hypothetical. Strikingly, the IRS has *already* announced that it will (at least temporarily) use different sets of numbers in these different contexts. The IRS's website includes a prominent disclaimer that the numbers provided there are to be used only for tax administration purposes; the site refers visitors to the U.S. Trustee Program's website for expense information for use in bankruptcy.[63] Likewise, the U.S. Trustee website warns that the numbers found there are to be used only in completing bankruptcy forms, not for any tax administration purpose.[64] There are differences, some of which are quite substantial, in the expense allowances for various categories between the two sites. Does the IRS have the authority to do this?

The answer to this question depends largely on how one interprets § 707(b), and more particularly the degree to which § 707(b) delegated authority to the IRS to develop rules for bankruptcy cases. On one reading of the statutory language—perhaps the most straightforward reading—Congress did not delegate to the IRS any additional authority to regulate bankruptcy. Rather, Congress simply commanded that bankruptcy courts use the same figures in administering Chapter 7 and Chapter 13 cases that the IRS uses in assessing offers-in-compromise. On this view, the IRS has no authority whatsoever to promulgate one set of numbers for use in bankruptcy and a different set of numbers for use in taxpayer settlements, because Congress in BAPCPA mandated that the numbers applied in each context are supposed to be the same. If that is correct, then the IRS's statement that the figures it currently uses for tax administration are not to be used for bankruptcy calculations is beyond the IRS's jurisdiction and is patently unlawful. Presumably, no matter what the IRS or the U.S. Trustee say on their websites, a debtor would be entitled (and required) to use the figures that the IRS has announced will apply in taxpayer cases.

The only way around this conclusion, it seems, would be to interpret BAPCPA as implicitly delegating to the IRS the authority to develop and announce Standards for use in bankruptcy. On this view, although the *initial* Standards would be the Standards that were in place at the moment BAPCPA came into force, the IRS would have the authority going forward to promulgate two separate sets of Standards: one for tax, and one for bankruptcy. On this view, the statement in § 707(b)(2)(A)(ii)(I) that the debtor's monthly expenses shall be the applicable amounts "specified under the National Standards and Local Standards" vested the IRS with authority it previously did not have to develop and promulgate standards for bankruptcy cases.

While this theory would clearly allow for the divergence of the Standards applied in each of these two contexts, that reading of § 707(b) seems like an extraordinary stretch of the statutory language that is hard to square with most conventional interpretive principles. First, the statute refers only to the existing Standards; it says nothing about granting the IRS new authority to issue standards for bankruptcy. If Congress had intended such a result, the language in BAPCPA seems an oblique and obscure way to accomplish that goal. Additionally, the statute refers to the National and Local Standards, implying that there

is only one such set of standards. Furthermore, the IRS has never heretofore had any jurisdiction over bankruptcy, it lacks any specialized expertise in bankruptcy matters that would enable it to discern when the tax and bankruptcy expense allowances should diverge, and nothing else in BAPCPA expressly confers rulemaking authority on the IRS or otherwise expands its jurisdiction into bankruptcy proceedings. These considerations further militate against construing BAPCPA as granting the IRS authority to develop two separate sets of standards for tax and bankruptcy. It seems much more plausible to read the statute as a directive that bankruptcy courts are to use whatever Standards the IRS uses for taxpayer settlement purposes, not as endowing the IRS with new authority to develop a separate set of Standards for application in bankruptcy cases.

C. What Procedures Must the IRS Use If It Modifies the Standards?

A third issue, which has not yet been confronted directly but which is likely to arise in the future—especially if courts conclude that the IRS cannot alter the Standards for tax purposes without simultaneously altering them for bankruptcy purposes—concerns the procedure that the IRS must employ if and when it changes the Standards.

Prior to BAPCPA, courts and commentators typically assumed that the IRS Standards were interpretative rules or policy statements, and consequently that the APA imposed minimal procedural requirements on IRS modifications of the Standards. For reasons given in Part II of this essay, there is at least a colorable argument that the 1998 amendments to the Internal Revenue Code in fact transformed the Standards into legislative rules. If that is the case, then even putting BAPCPA to one side, it would seem that the IRS cannot modify the Standards unless it employs the § 553 notice-and-comment procedure—unless the IRS can successfully invoke one of the other exceptions to § 553 (which is unlikely given how narrowly those exceptions are typically construed), or can establish that in amending the Internal Revenue Code Congress also relaxed the procedural requirements that would otherwise apply under the APA (which is difficult to square with § 559's requirement that modifications of APA procedures be express). So, if the 1998 amendments transformed the Standards into legislative rules, then any attempt by the IRS to modify the standards without using § 553 procedures is vulnerable to invalidation on procedural grounds.

However, as noted in Part II, it is possible that the IRS Standards are not legislative rules (at least not for tax purposes)—and, indeed, this seems to be what most people involved in the tax area have implicitly assumed for the last decade. Even if we proceed on the assumption that the Standards are policy statements that lack the force and effect of law in the tax context, the enactment of BAPCPA makes the issue of procedural requirements considerably harder, because the IRS Standards do have the force and effect of law in bankruptcy proceedings. So, the question arises: If the IRS Standards have the force of law under BAPCPA, can they still be treated as "interpretative rules" or "policy statements" for APA procedural purposes, or must they now be considered full-blown legislative rules, subject to the full panoply of APA § 553 procedural requirements? Both a "yes" answer and a "no" answer to that question are problematic.

If BAPCPA is read as converting the IRS Standards from guidance documents (exempt from § 553) to legislative rules (covered by § 553), then any purported change to the Standards that did not comply with § 553 would be legally invalid. This conclusion has the desirable feature that critical, legally binding policy decisions are not made by an agency without any serious procedural safeguards. Recall, after all, that although the IRS has a great deal of discretion to depart from the Standards in individual cases, most courts and commentators have read BAPCPA as not giving bankruptcy courts equivalent discretion to depart from the Standards when, in their view, the situation so warrants. The lack of a back-end escape hatch makes front-end scrutiny of otherwise binding rules all the more important. Imposing notice-and-comment procedures on revisions to the IRS Standards would also guarantee that the IRS, which may not think carefully about the bankruptcy implications of its Standards, will consider and respond to comments by interested parties that fo-

cus on the bankruptcy implications of changes to the Standards. On the other hand, though, a judicial determination that BAPCPA brought the IRS Standards within the ambit of § 553 would work a drastic and almost certainly unanticipated change in IRS practice. Subjecting the Standards to the § 553 notice-and-comment procedure would substantially reduce IRS flexibility, might prompt the IRS to deviate from the Standards in a larger number of cases, and might thereby undermine the usefulness of the Standards for taxpayers. A court might reasonably be reluctant to construe the statute this way, especially when the statutory text does not clearly demand that result and it does not appear that Congress foresaw it.

Alternatively, BAPCPA might be read as having no effect on the procedures used by the IRS in formulating or modifying the Standards. On this reading, when the IRS publishes or revises the Standards, it is not making rules for bankruptcy, except incidentally. To put this argument another way, the fact that BAPCPA incorporates the IRS Standards by reference does not convert the IRS Standards into legislative rules, and so the IRS may alter the Standards without any need to comply with § 553. This interpretation avoids the imposition of burdensome additional requirements on the IRS when it formulates its taxpayer settlement policy. On the other hand, this interpretation also means that the IRS, a federal agency, will have the power to announce significant, binding regulations with minimal procedural checks and no institutionalized mechanism for ensuring that the IRS considers the effect its decisions will have in bankruptcy proceedings.

In addition to the policy concerns that such an interpretation would raise, it is also problematic in light of § 559 of the APA. While Congress could in theory authorize the IRS to make rules that are legally binding in bankruptcy cases without complying with § 553, § 559 indicates that such an authorization should not be inferred when the statute does not address the issue directly. A possible response, however, is that § 559 is simply inapplicable, since the issue is not whether BAPCPA relaxes otherwise applicable § 553 requirements, but rather whether BAPCPA converts the IRS Standards into legislative rules. On this view, BAPCPA merely incorporates the output of another federal agency as an input into the decisions of the bankruptcy courts, just as other statutory schemes may incorporate the output of state or local governments, or private entities, as inputs into a statutory scheme without converting those other entities into de facto federal agencies subject to the APA.

Hence, BAPCPA's incorporation by reference of the IRS Standards creates an interpretive problem with no particularly good answer. If we stipulate that § 553 procedures are generally appropriate for legally binding rules but excessive for informal guidance, then we will either impose procedural safeguards that are fine for the tax context but too weak for the bankruptcy context, or we will impose procedural safeguards that are appropriate for the bankruptcy context but too onerous for the tax context. One possible way around this problem, discussed in the preceding section, might be to interpret BAPCPA as authorizing the IRS to develop and publish two separate sets of Standards, one for bankruptcy and one for tax. If one reads BAPCPA in that way, then one could further assert that when the IRS modifies the Standards applied in tax cases, it need not comply with § 553, because those Standards are merely nonbinding guidance, but if the IRS were to modify the Standards used for bankruptcy cases, the IRS would have to comply with § 553, as these Standards have the force and effect of law. Although this interpretive approach provides a neat solution that is attractive on policy grounds, the problem, as discussed above, is that it is very hard to square with the statutory language and background principles of statutory construction.

IV. Conclusion

Most federal regulatory programs, especially those that deal with complex and technical questions, vest administrative agencies with the power to issue rules and regulations to implement statutory mandates. Bankruptcy is one of the few major federal regulatory programs that lacks a centralized rulemaking agency. When bankruptcy courts exercised broad discretion over decisions regarding what individual debtors could afford to pay, the absence of a centralized rulemaking author-

ity was perhaps more tolerable. Once Congress decided to transform the system into one based much more on the application of specific numerical regulations and allowances, however, the need for agency administration became more acute. However, instead of creating a new executive agency to perform this rulemaking function, Congress opted to borrow provisions that a different agency (the IRS) uses for a somewhat similar purpose (evaluating settlement offers in taxpayer disputes).

That unusual arrangement creates a number of thorny administrative law problems—some of which bankruptcy practitioners have already discovered, others of which are looming on the horizon—that the bankruptcy courts will now have to address. Among the most important of these questions are: (1) should the bankruptcy courts defer to IRS documents explaining how the IRS will apply its Standards in taxpayer disputes when deciding how to apply these standards in bankruptcy cases?; (2) may the IRS maintain separate Standards for tax and bankruptcy purposes, or must the Standards applied in bankruptcy always match exactly the Standards that the IRS currently applies in tax cases?; and (3) what administrative procedures, if any, must the IRS follow when it modifies the Standards?

Many of these problems could, of course, have been avoided if BAPCPA had created a separate, bankruptcy-specific administrative agency with the authority to make rules analogous to the IRS Standards. Interestingly, the 1973 report of the Bankruptcy Act Commission recommended precisely this: the creation of a "U.S. Bankruptcy Administration," located in the executive branch, that would issue regulations to be implemented in proceedings before the bankruptcy courts.[65] This proposal, however, was not adopted. The U.S. Trustee Program that eventually evolved does not have rulemaking responsibility of the sort envisioned by the 1973 Commission. Perhaps, in light of BAPCPA, such a proposal ought to be considered again. If BAPCPA has created a regime in which implementation regulations issued by an administrative entity are a practical necessity—as it apparently has—it would make much more sense to have these rules made by an agency specifically focused on developing rules for bankruptcy, rather than borrowing somewhat similar rules from another agency. Absent that solution, however, bankruptcy courts will have to do the best they can to square the BAPCPA regime with existing doctrines of administrative law.

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Notes

1. The statute then proceeds to enumerate certain narrow circumstances in which Chapter 7 petitioners may include monthly expenses that go beyond what would be permitted under the IRS Standards.
2. In a handful of pre-BAPCA cases, courts had looked to the IRS Standards when evaluating whether a Chapter 7 petition was abusive, though in many of these cases the court concluded that the IRS Standards were not an appropriate guide to abuse questions in the Chapter 7 context. *See Voelkel v. Naylor (In re Voelkel)*, 322 B.R. 138, 147-48 (B.A.P. 9th Cir. 2005), *Harris v. United States Trustee (In re Harris)*, 279 B.R. 254, 260 (B.A.P. 9th Cir. 2002).
3. *See* I.R.C. § 7122.
4. *See* I.R.C. § 6159.
5. *See* IRS Chief Counsel Advice 199948028 (Dec. 3, 1999) (describing IRS intent with the Standards as "to ensure uniform treatment of similarly situated taxpayers").
6. *See generally* IRS, Internal Revenue Manual § 5.15.1, available at http://www.irs.gov/irm (hereinafter I.R.M.) (providing detailed Financial Analysis Handbook for analyzing taxpayer financial condition, including but not limited to the Standards).
7. *See* http://www.irs.gov/individuals/article/0,,id=96543,00.html (last visited Nov. 15, 2007).
8. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc.*, 435 U.S. 519, 524, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").
9. 5 U.S.C. § 559 (2000); *see also Dickinson v. Zurko*, 527 U.S. 150, 155, 119 S. Ct. 1816, 144 L. Ed. 2d 143 (1999) (recognizing procedural uniformity as APA goal and requiring clear congressional intent to deviate from that norm); *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955) ("Exceptions from the terms of the Administrative Procedure Act are not lightly to be presumed" in light of APA § 559).
10. 5 U.S.C. § 553 (2000). The APA actually provides for another type of rulemaking procedures. Formal rulemaking, governed by APA §§ 556-557, involves an elaborate

trial-type procedure and is required whenever rules are required "by statute to be made on the record after opportunity for an agency hearing," 5 U.S.C. §§ 553(c), 556, 557. However, courts have interpreted this triggering condition so narrowly that in practice only a handful of agency rules are governed by the APA's formal rulemaking process. *See United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 234-38, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973). The majority of rulemakings are governed by § 553.

11. 5 U.S.C. § 553(b) and (c) (2000).
12. *See* 5 U.S.C. § 553(d) (2000).
13. 5 U.S.C. § 553 (b)(A) (2000). Though the APA uses the term "interpretative," courts and commentators often use the more common and easier-to-pronounce "interpretive" label for the same sort of rule. Such rules may implicate APA § 555, which covers ancillary matters such as agency subpoena powers and the right to counsel of persons compelled to appear before an agency. *See* 5 U.S.C. § 555 (2000). The other principal exceptions to § 553 are for rules of agency organization and procedure and for situations when the agency has "good cause" to find that notice-and-comment would be impracticable, unnecessary, or contrary to the public interest.
14. *See, e.g.,* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules,* 52 Admin. L. Rev. 547, 551 (2000) ("Given the high costs of the rulemaking process, it should come as no surprise that agencies that agencies often attempt to avoid it by issuing interpretative rules.").
15. The APA does not actually use the legislative term to describe rules subject to the public notice and comment requirements of § 553(b) and (c). Explanations of APA provisions and both pre- and post-APA literature and jurisprudence use the term to distinguish such rules from interpretative rules. *See* 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.1, at 305 (4th ed. 2002); Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive,* 57 Yale L.J. 919, 919-31 (1948); Frederic P. Lee, *Legislative and Interpretive Regulations,* 29 Geo. L.J. 1, 2 (1940).
16. 5 U.S.C. § 706(2)(A).
17. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).
18. *See Chevron*, 467 U.S. at 843-44; *see also United States v. Mead Corp.*, 533 U.S. 218, 229-30 n.11, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards,* 54 Admin. L. Rev. 807, 813 (2002) (describing *Mead*'s interpretation of *Chevron*).
19. *See Mead*, 533 U.S. at 229-30.
20. *See, e.g., Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995) (noting that interpretative rules do not have the force and effect of law); *see also* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog,* 8 Admin. L.J. Am. U. 1, 10 (1994) (observing that interpretative rules are not legally binding); William Funk, *A Primer on Nonlegislative Rules,* 53 Admin. L. Rev. 1321, 1324-25 (2001) (recognizing legislative rules as legally binding and interpretative rules as not).
21. *See, e.g., Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003); *Mejia-Ruiz v. I.N.S.*, 51 F.3d 358, 363-65 (2d Cir. 1995).
22. *See, e.g., Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) (discussing the problem).
23. This dominant standard is derived from the D.C. Circuit's opinion in *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993), and its progeny. *See Hemp Indus.*, 333 F.3d at 1087 (applying the standard); *New York City Employees' Retirement Sys. v. S.E.C.*, 45 F.3d 7, 13 (2d Cir. 1995) (same) At least one circuit, the Fifth, uses an older standard known as the "substantial impact test." As applied by the Fifth circuit, this standard considers whether the rule imposes "rights and obligations" on regulated parties and also whether the rule "leaves the agency and its decisionmakers free to exercise discretion" or, conversely, binds the agency as well as regulated parties. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995); *see also Texas Sav. & Community Bankers Ass'n v. Federal Housing Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000) (applying the substantial impact test).
24. *See, e.g.,* 1 Pierce, Administrative Law Treatise § 6.4, at 340-45 (discussing the evolution of the *American Mining Cong.* factors); Funk, 53 Admin. L. Rev. at 1326-32 (describing the different factors that the courts have considered in connection with the *American Mining Cong.* test).
25. *American Mining Cong*, 995 F.2d at 1109; *see also* 1 Pierce, Administrative Law Treatise § 6.4 , at 340-45 (discussing the evolution of this factor); Funk, 53 Admin. L. Rev. at 1327 (discussing variations of this factor).
26. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584-85 (D.C. Cir. 1997); *Hoctor v. United States Dep't of Agriculture*, 82 F.3d 165, 169-71 (7th Cir. 1996); *see also* Funk, 53 Admin. L. Rev. at 1327 (describing this factor slightly differently).
27. Only a legislative rule can amend a legislative rule. *See American Mining Cong.*, 995 F.2d at 1109-10; *see also Hemp Indus.*, 333 F.3d at 1087 (applying this rule); *New York City Employees' Retirement Sys.,* 45 F.3d at 13 (same). Indeed, in *Paralyzed Veterans*, the D.C. Circuit required a legislative rule to amend an interpretative rule. *See Paralyzed Veterans*, 117 F.3d at 586-88. Scholars have criticized this holding as excessive. *See, e.g.,* 1 Pierce, Administrative Law Treatise § 6.4, at 346-48.
28. These considerations include whether the agency explicitly invoked legislative authority in adopting the rule, and whether the agency published the rule in the CFR, which may be indicative but not dispositive of legislative intent. The *American Mining Congress* court included publication in the CFR in its initial list of relevant considerations, but D.C. Circuit panels have since backed away from that factor after acknowledging that even nonbinding interpretative rules and policy statements can have "general applicability and legal effect" consistent with the statute governing publication in the CFR. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). Nevertheless, the D.C. Circuit and other courts still consider publication in the C.F.R. nondispositive evidence of agency intent. *See id.*; *Erringer v. Thompson*, 371 F.3d 625, 632 n.13 (9th Cir. 2004) (citing *American Mining Cong.*, 995 F.2d at 1110); *Sweet v. Sheahan*, 235 F.3d 80, 91 & n.8 (2d Cir. 2000).

29. *See Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (deeming FDA publication both an exercise of general rulemaking authority and a legislative rule subject to notice-and-comment rulemaking requirements); *Natural Res. Def. Council, Inc. v. E.P.A.*, 22 F.3d 1125, 1146-47 (D.C. Cir. 1994) (describing Clean Air Act general authority provision as authorizing legislative rules subject to notice-and-comment rulemaking requirements); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention,* 116 Harv. L. Rev. 467, 549-70 (2002) (tracing the origin of this modern understanding to efforts by agencies in the late 1960s and early 1970s to claim power to promulgate legally binding regulations based on general authority rulemaking grants).
30. The nondelegation doctrine considers the extent to which the Constitution permits Congress to delegate the authority to adopt binding, substantive regulations. *See* 3 Charles H. Koch, Jr., Admin. L. & Prac. § 12.13 (2d ed. 1997). The judicial and scholarly consensus in the early 20th century was that Congress could constitutionally delegate such authority only if the statutory grant was narrow and specific. *See, e.g.,* 1 F. Trowbridge Vom Baur, Federal Admini. Law § 489 (1942); John A. Fairlie, *Administrative Legislation,* 18 Mich. L. Rev. 181, 189-97 (1920); Frederic P. Lee, *Legislative and Interpretive Regulations,* 29 Geo. L.J. 1, 2-3, 21-25 (1940). Agencies could not employ more general rulemaking authority, for example permitting "all necessary rules and regulations," to promulgate legally binding rules without running afoul of the Constitution. *See, e.g.,* 1 Vom Baur, Federal Administrative Law, at § 489; Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive,* 57 Yale L.J. 919, 928-29 (1948).
31. The jurisprudential high point for the nondelegation doctrine was 1935, when the Supreme Court invalidated aspects of the National Industrial Recovery Act on that basis. *See A.L.A. Schechter Poultry Corp. v. United States.*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935). The doctrine's influence has declined ever since, so that the modern consensus holds the nondelegation doctrine to be dead in all but name. *See, e.g.,* 1 Pierce, Administrative Law Treatise § 2.6, at 91-93 (noting that *Schechter Poultry* and *Panama Refining* "do not reflect the law today"); 3 Koch, Admininistrative Law And Practice at § 12.13 (concluding "[t]he real law is pretty close to acceptance of any delegation of authority"); 1 Kenneth Culp Davis, Administrative Law Treatise § 3.2 (2d ed. 1978) (describing nondelegation as a failed legal doctrine).
32. *See, e.g.,* Ellen P. Aprill, *The Interpretive Voice,* 38 Loy. L.A. L. Rev. 2081, 2096-97 (2005); John F. Coverdale, *Court Review of Tax Regulations & Rulings in the Chevron Era,* 64 Geo. Wash. L. Rev. 35, 55-56 (1995); Irving Salem, et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference,* 57 Tax Law. 717, 728 (2004); *but see* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements,* 82 Notre Dame L. Rev. 1727, 1760-73 (2007) (challenging this conclusion as inconsistent with modern administrative law jurisprudence).
33. *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Specifically, *Mead* held that *Chevron* provides the appropriate standard for judicial review when Congress has given the agency in question the authority to bind regulated parties with "the force of law" and the agency has "exercised that authority." *Mead Corp.*, 533 U.S. at 226-27.
34. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Prior to *Mead*, the circuit courts were divided over whether interpretative rules were entitled to *Chevron* deference. *Compare National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (applying *Chevron* deference to interpretative rule), *and Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181-82 (3d Cir. 1995) (same), *with Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 832-33 (10th Cir. 1997), *rev'd,* 526 U.S. 865, 119 S. Ct. 1719, 144 L. Ed. 2d 22 (1999) (declining to apply *Chevron* deference to interpretative rule), *and Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994), *aff'd,* 516 U.S. 152, 116 S. Ct. 595, 133 L. Ed. 2d 535 (1996) (same). *Mead*'s emphasis on interpretations carrying the force of law matches neatly with the understanding that legislative rules are legally binding while interpretative rules are not and thus effectively resolves the circuit split.
35. *Skidmore*, 323 U.S. at 140.
36. *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).
37. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945). Recent Supreme Court cases have applied the *Auer*/*Seminole Rock* standard to such interpretations. *See, e.g., National Ass'n of Home Builders v. Defenders of Wildlife*, __ U.S. __, 127 S. Ct. 2518, 2537-38, 168 L. Ed. 2d 467 (2007); *Long Island Care at Home, Ltd. v. Coke*, __ U.S. __, 127 S. Ct. 2339, 2349, 168 L. Ed. 2d 54 (2007); *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 387-88, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003).
38. *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989) (quoting *Seminole Rock*, 325 U.S. at 414)).
39. *See* Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency,* 26 Admin & Reg. L. News 10, 10-11 (2000) (criticizing the *Seminole Rock* standard and advocating *Skidmore* deference in such cases).
40. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 255-58, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) (applying *Skidmore* and declining *Auer* deference because regulation merely parroted the statute). *Auer*/*Seminole Rock* deference is also inappropriate where the regulation is unambiguous on its face. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (declining *Auer* deference because regulation at issue was clear).
41. Specifically, courts and scholars have questioned whether the principles articulated by the Court in *Mead* undermine the rationale for *Auer*/*Seminole Rock* deference. *See, e.g., Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (suggesting that strong *Auer*/*Seminole Rock* deference may be inappropriate in such circumstances after *Mead*); Harold J. Krent, Judicial review of Nonstat-

utory Legal Issues, in A Guide to Judicial and Political Review of Federal Agencies 156-58 (John F. Duffy & Michael Herz eds. 2005) (discussing the merits of this argument). The Supreme Court prior to *Mead* suggested in dicta that *Skidmore* was the appropriate standard for reviewing an agency's interpretation of its own regulations. *See Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 157, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991).

42. 5 U.S.C. § 553(b) (2000). Because policy statements do not purport to interpret anything, the questions of judicial deference to policy statements rarely arise. Occasionally, however, a policy statement contains an implicit interpretative rule. Hence, in *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), the Supreme Court included policy statements in its list of *Skidmore*-appropriate interpretive formats.
43. *See* Robert A., *A Taxonomy of Federal Agency Rules,* 52 Admin. L. Rev. 1045, 1048 (2000) (discussing the difficulty).
44. *See* Anthony, 52 Admin. L. Rev. at 1046 (describing interpretative rules as "documents that interpret" and policy statements as "documents that do not interpret").
45. *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?,* 41 Duke L.J. 1311, 1333-55 (1992) (surveying critically various types of "nonlegislative policy documents" as practically if not legally binding).
46. *See* IRS Chief Counsel Advice 199948028 (Dec. 3, 1999) (describing IRS intent with the Standards as "to ensure uniform treatment of similarly situated taxpayers" in the collection context); *see also* Amy Hamilton, *Offers In Compromise,* 78 Tax Notes 250, 251 (1998) (outlining evolution in IRS approach to offers in compromise and identifying uniformity goal as motivating Standards).
47. 26 U.S.C. § 7122(d)(1) to (2).
48. *See* Treas. Reg. § 301.7122-1(c); *see also* Final Regulations and Removal of Temporary Regulations; Compromise of Tax Liabilities (T.D. 9007), 67 Fed. Reg. 48,025 (July 23, 2002) (hereinafter T.D. 9007).
49. Treas. Reg. § 301.7122-1(c).
50. *See also* T.D. 9007, 67 Fed. Reg. at 48,028 (observing that "publication of the national and local standards is required by [I.R.C. § 7122(d)(2)(A)]").
51. *See* T.D. 9007, 67 Fed. Reg. at 48,028 ("The amount to be paid, future compliance, or other conditions precedent to satisfaction of a liability for less than the full amount due are matters left to the discretion of the Secretary.... [T]he IRS has issued internal guidance requiring that the particular facts and circumstances of a taxpayer's case be considered whenever the expense standards are applied, and that expense allowances beyond the standards be used whenever use of the standards would result in a taxpayer not having adequate means to provide for basic living expenses."). The IRS explicitly calls the Standards "guidelines," rather than requirements. I.R.M. at §§ 5.8.5.5.1 & 5.15.1.7.
52. *See* I.R.M. at § 5.8.5.5.1. "If it is determined that a standard amount is inadequate to provide for a specific taxpayers [sic] basic living expenses, allow a deviation. Require the taxpayer to provide reasonable substantiation and document the case file.... A deviation from the local standard is not allowed merely because it is inconvenient for the taxpayer to dispose of excessively valued assets. In some situations, taxpayers may be expected to make life-style choices that will facilitate collection of the delinquent tax." I.R.M. at § 5.8.5.5.1. *See also* I.R.M. at § 5.15.1.7 (reiterating same).
53. *See* IRS Chief Counsel Advice 199948028 (Dec. 3, 1999) (concluding that agreements with states for acceptance of joint or simultaneous offers-in-compromise of federal and state tax liabilities would be inconsistent with rule that deviation from Standards be justified on a case-by-case basis).
54. *See, e.g.,* T.D. 9007, 67 Fed. Reg. at 48,028 (acknowledging commentary that IRS applies the Standards inflexibly); Hamilton, 78 Tax Notes at 251-53 (quoting practitioners criticizing some of the Standards as unrealistic, accusing IRS of inflexibility in applying the Standards, and blaming the Standards for driving taxpayers into filing for bankruptcy protections).
55. *See In re Slusher*, 359 B.R. 290, 309 (Bankr. D. Nev. 2007).
56. Interestingly, the IRS view is that the expense allowances contained in the *National* Standards apply whether or not the debtor actually has the expense.
57. Some bankruptcy courts have held that debtors can deduct the full allowance listed in the Standards, even when they have no actual ownership payments because they own the asset outright (or for some other reason). *See In re Smith*, No. 06-30261, 2007 WL 1836874 (Bankr. N.D. Ohio June 22, 2007); *In re Moorman*, 376 B.R. 694 (Bankr. C.D. Ill. 2007); *In re Briscoe*, 374 B.R. 1 (Bankr. D.D.C. 2007); *In re Morgan*, 374 B.R. 353 (Bankr. S.D. Fla. 2007); *In re Chamberlain*, 369 B.R. 519 (Bankr. D. Ariz. 2007); *In re Enright*, No. 06-10747, 2007 WL 748432 (Bankr. M.D.N.C. Mar. 6, 2007); *In re Sawdy*, 362 B.R. 898 (Bankr. E.D. Wis. 2007); *In re Zak*, 361 B.R. 481 (Bankr. N.D. Ohio 2007); *In re Billie*, 367 B.R. 586 (Bankr. N.D. Ohio 2007); *In re Zaporski*, 366 B.R. 758 (Bankr. E.D. Mich. 2007); *In re Watson*, 366 B.R. 523 (Bankr. D. Md. 2007); *In re Haley*, 354 B.R. 340 (Bankr. D.N.H. 2006) ; *In re Farrar-Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006); *In re Hartwick*, 352 B.R. 867 (Bankr. D. Minn. 2006), *aff'd in part, rev'd in part,* 373 B.R. 645 (D. Minn. 2007); *In re Fowler*, 349 B.R. 414 (Bankr. D. Del. 2006); *In re Demonica*, 345 B.R. 895 (Bankr. N.D. Ill. 2006); *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re Grunert*, 353 B.R. 591 (Bankr. E.D. Wis. 2006); *In re Wilson*, 356 B.R. 114 (Bankr. D. Del. 2006). Other bankruptcy courts, however, have held that debtors are only allowed to deduct expenses they actually have, so no deduction is permitted when the debtor owns the asset outright. *See In re Brown*, 376 B.R. 601 (Bankr. S.D. Tex. 2007); *In re Rezentes*, 368 B.R. 55 (Bankr. D. Haw. 2007); *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007); *In re Slusher*, 359 B.R. 290 (Bankr. D. Nev. 2007); *In re Devilliers*, 358 B.R. 849 (Bankr. E.D. La. 2007); *In re Carlin*, 348 B.R. 795 (Bankr. D. Or. 2006); *In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006); *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006); *In re Oliver*, 350 B.R. 294 (Bankr. W.D. Tex. 2006); *In re Lara*, 347 B.R. 198 (Bankr. N.D. Tex. 2006); *In re Barraza*, 346 B.R. 724 (Bankr. N.D. Tex. 2006); *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

58. *See, e.g., In re Slusher*, 359 B.R. at 309 ("[I]t makes no sense to turn a blind eye to existing administrative interpretations of the very text Congress has specified[….] [I]f guidance is sought on the meaning of the IRS standards Congress incorporated into the bankruptcy code, practical reason would suggest that courts should consider the full manner by which the IRS uses these standards.").
59. *See, e.g., In re Chamberlain*, 369 B.R. at 525 ("The IRS is not an administrative agency that administers the Bankruptcy Code, so there is no bassi for a court to defer to its administrative expertise."). Again, it is by no means obvious that this issue should even be framed in terms of "deference" to an IRS "interpretation" of the Standards. However, even if the issue is framed in terms of interpreting what Congress meant by "applicable" expense allowances under the standards, some of the background questions that would bear on the appropriate level of deference—such as the relevance of specialized expertise—remain relevant.
60. *See, e.g., Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 152, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) ("Because the Secretary promulgates these standards the Secretary is in a better position… to reconstruct the purpose of the regulations in question.").
61. *See, e.g., Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141 (7th Cir. 2001) ("[D]eference to regulatory interpretations does not depend on contemporaneity, since no demonstration that the agency officials had special insight into the intentions behind the passage of the regulation is required."); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584-85 (D.C. Cir. 1997) ("[T]he doctrine of deference is based primarily on the agency's statutory role as the sponsor of the regulation, not necessarily on its drafting expertise.").
62. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) ("This broad deference is all the more warranted when…the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.") (internal citation and quotation marks omitted); *Martin*, 499 U.S. at 152 ("[B]y virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems….Consequently, the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation.").
63. *See* http://www.irs.gov/individuals/article/0,,id=96543,00.html (last visited Nov. 15, 2007).
64. *See* http://www.usdoj.gov/ust/eo/bapcpa/20071015/meanstesting.htm (last visited Nov. 15, 2007).
65. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. 1, at 6, 103-55 (1973). *See also* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy,* 81 Am. Bankr. L.J. n. 103 (forthcoming 2007). Apparently, this proposal was rejected in part because of intense lobbying by bankruptcy judges, who thought that the creation of a commission would reduce their authority, or perhaps result in the elimination of their jobs. *See* Pardo, 81 Am. Bankr. L.J. at n.103; David A. Skeel, Jr., Debt's Dominion: A History Of Bankruptcy Law In America (2001).