

# Banking Groups Petition for Cert Over Reporting for Nonresidents

By

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The Florida Bankers Association and Texas Bankers Association have asked the Supreme Court to review the D.C. Circuit's decision that the Anti-Injunction Act (AIA) bars them from bringing a pre-enforcement challenge to final regulations requiring U.S. banks to report annually the amount of interest paid to some nonresident aliens.

The petition  asks the Court to decide on whether a suit under the Administrative Procedure Act (APA) may be brought to enjoin the imposition of the reporting requirement under [reg. sections 1.6049-4](#) and [1.6049-8](#) (T.D. 9584 ) "when the underlying information is not subject to domestic taxation and the noncompliance penalty does not constitute a restraint on the 'assessment or collection' of a tax for purposes of the AIA." It also asked the Court to weigh in on the scope of the term "assessment or collection." The petitioners argue that the majority opinion in *Florida Bankers Association v. Treasury*, 799 F.3d 1065 (D.C. Cir. 2015 ) , relies too heavily on dicta from *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2466 (2012) , and that the opinion misapplied the statutory assessment or collection requirement.

"It is a noteworthy case raising a serious issue regarding the justiciability of tax cases," said Kristin E. Hickman of the University of Minnesota Law School.

There is no circuit split on this issue, but that may not be an insurmountable obstacle for the petitioners. "Not only is it an important issue where the law is unclear, but the issue is clearly one that would impact a lot of tax cases," Hickman said. She said that if the D.C. Circuit's interpretation of the AIA is allowed to stand and is adopted by other circuits, many tax cases that raise serious questions about the IRS's compliance with the APA may never see the inside of a courtroom. "This is not a one-off case," she said.

Another factor that may weigh in favor of the petition is the D.C. Circuit's influence in the administrative law area, said Patrick J. Smith of Ivins, Phillips & Barker Chtd. "Clearly the D.C. Circuit is where most pre-enforcement challenges to tax regulations would be brought," he said. As a result, the circuit's opinion would have disproportionate impact, he said, adding that the lengthy and strong dissent from Judge Karen LeCraft Henderson is also likely to draw the Supreme Court's attention.

The Court's decision in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015) , may also factor into its willingness to take on the case. Both Henderson's dissenting opinion and the petitioner's brief point out that the Supreme Court addressed an issue similar to *Florida Bankers* when it considered an analogous statute in *Direct Marketing*. "It is difficult to reconcile the interpretation of the AIA advanced by the majority in *Florida Bankers* with the Supreme Court's

decision last term in *Direct Marketing*," Hickman said. "My hope is that the Supreme Court will take the case and resolve it."

The solicitor general's response is due on February 29, but the government might ask for an extension of time to respond. Practitioners anticipate that amicus briefs will be filed in support of the petition.