

## NEWS ANALYSIS

### Will the Supreme Court Narrow The Anti-Injunction Act?

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The D.C. Circuit recently decided it would not revisit the scope of the Anti-Injunction Act (AIA), leaving open the possibility of Supreme Court review and future challenges to the validity of Treasury regulations.

In *Florida Bankers Association v. Treasury*, No. 14-05036, the D.C. Circuit on November 5 issued an order denying the petition for rehearing *en banc* by the Florida Bankers Association and the Texas Bankers Association. The bankers associations plan to petition the Supreme Court for certiorari.

The debate over the meaning of the AIA has grown increasingly important because it has become a presumptive bar to pre-enforcement challenges regarding the validity of nearly all types of Treasury regulations. The AIA is essentially an antique as far as tax statutes go — which makes its recent resurgence all the more notable — but the practical concerns regarding efficient tax administration that it was designed to protect are just as relevant today as they were in the 1860s when it first appeared. The language of the statute indicates that its purpose is to limit the judicial review of pre-enforcement tax cases so as not to imperil the collection of revenue.

Following the Supreme Court's decision in *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011), which explained that tax is not exempt from general administrative law principles, the AIA has become more important in challenges to regulations because it represents a departure from the administrative law norm of permitting pre-enforcement judicial review, said Kristin E. Hickman of the University of Minnesota Law School. "The question then becomes how broadly or narrowly you interpret the AIA as an exception from the Administrative Procedure Act (APA), she said. The decision in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015), applied a narrow interpretation of a parallel statute to allow a suit to enjoin state reporting requirements. The D.C. Circuit's majority opinion in *Florida Bankers* distinguished *Direct Marketing* on the ground that the penalty at issue in *Direct Marketing* was not a tax.

"If the Supreme Court were to decide not to agree to hear the *Florida Bankers* case, the D.C. Circuit opinion would be the end for this case, but it is certainly not going to be the last word on what impact the *Direct Marketing* decision has on the

Anti-Injunction Act,” said Patrick J. Smith of Ivins, Phillips & Barker Chtd. “In light of the very idiosyncratic D.C. Circuit decision, people who want to test the waters might be filing challenges in circuits other than the D.C. Circuit.”

### Florida Bankers

At issue in *Florida Bankers* were final regulations under section 6049 requiring U.S. financial institutions to report annually the amount of interest paid to specific nonresident aliens. Under section 6721(a), failure to file the information returns is subject to a penalty of \$250 per information return. The bankers associations filed suit, challenging the regulations under the APA and the Regulatory Flexibility Act. The government countered that the suit was barred by the AIA in section 7421(a), which prohibits suits “restraining the assessment or collection of any tax” from being maintained “by any person, whether or not such person is the person against whom such tax was assessed.”

**The associations were not without remedy because ‘a bank may decline to submit a required report, pay the penalty, and then sue for a refund. At that time, a court may consider the legality of the regulation,’ wrote Kavanaugh.**

The majority opinion of the D.C. Circuit, written by Judge Brett M. Kavanaugh, held that the suit was barred by the AIA because if it were successful, it would invalidate the reporting requirement and thereby eliminate the assessment and collection of tax. Kavanaugh wrote that the associations were not without remedy because “a bank may decline to submit a required report, pay the penalty, and then sue for a refund. At that time, a court may consider the legality of the regulation.”

Kavanaugh pointed to the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012), in explaining that because the penalty is located in chapter 68, subchapter B of the code, it is treated as a tax for purposes of the AIA. The bankers associations responded in their petition for rehearing that the treatment of penalties under chapter 68B was not before the Supreme Court in *National Federation of Independent Business* and argued that the D.C. Circuit placed too much weight on the Court’s dicta. They argued that the situation in *Direct Marketing* is “factually identical to the situation here in *Florida Bankers*.”

The D.C. Circuit majority was not moved by the possibility that a taxpayer would have to risk criminal prosecution for a misdemeanor in order to

challenge the regulations. However, Judge Karen LeCraft Henderson, in dissent, took exception to the “government-empowering consequences” of the decision to deny pre-enforcement review of a regulation enforced by a tax penalty. She said that in her view, the AIA does not bar a pre-enforcement challenge to either a tax reporting requirement or a regulation enforced by a tax penalty.

The associations argued that even if the penalty were deemed a tax, the AIA would still not apply because they are not seeking to restrain the tax’s assessment or collection. The majority dismissed that argument by explaining that “a taxpayer could almost always characterize a challenge to a regulatory tax as a challenge to the regulatory component of the tax. That would reduce the Anti-Injunction Act to dust in the context of challenges to regulatory taxes.” Henderson cited the D.C. Circuit’s opinion in *Cohen v. United States*, 650 F.3d 717 (2011), for the proposition that “the AIA has almost literal effect: It prohibits only those suits seeking to restrain the assessment or collection of taxes.” She said the Supreme Court has given the words “assessment” and “collection” technical definitions, and she concluded that “the AIA does not apply unless a plaintiff seeks to stop the technical processes of assessment or collection.” Henderson further noted that information reporting by banks is at least one step removed from the assessment or collection of taxes and that the information required to be reported is not even taxable, removing the case even further from assessment or collection than *Direct Marketing*.

The bankers associations may try to focus the Court on the practicalities of the case in their petition for certiorari, said James J. Butera of Jones Walker LLP, who represents the bankers associations. “It’s not a coincidence that the associations brought this case rather than individual banks, or as a combination of individual banks and associations,” he said. Banks operating under federal charters and insured by the FDIC do not want to be in the position of having to either sue the federal government or violate federal law and then incur tax penalties before bringing an APA challenge. Butera acknowledged that the Supreme Court may say the associations’ relief must come from the legislature rather than through a judicial interpretation of the AIA, though he said their response would be that *Direct Marketing* is already established doctrine. Butera said there could be amicus briefs if the bankers associations decided to petition for certiorari because of how important the issue is for other business interests and academics.

### Narrowing the AIA

Because the Supreme Court seemed to be moving toward a narrow interpretation of the AIA in *Direct*

*Marketing*, the D.C. Circuit's move in the opposite direction in *Florida Bankers* adds to the uncertainty regarding the scope of the AIA. "It seems to me that one consequence of [the *Direct Marketing*] decision is that the Anti-Injunction Act should be interpreted more narrowly than it has been, and certainly more narrowly than it was by Judge Kavanaugh in this case," said Smith. Hickman said she was disappointed and a little surprised that the D.C. Circuit did not grant the petition for rehearing *en banc*. "While I find Judge Kavanaugh's opinion to be clever, I find it difficult to reconcile with the spirit driving *Cohen*, and I find it difficult to reconcile with *Hibbs v. Winn* [542 U.S. 88, 90 (2004)] and *Direct Marketing*," she said.

Even proponents of a narrow interpretation admit the potential difficulty of drawing lines regarding which cases to allow in the area between individual taxpayer attempts to thwart the collection of tax and objections to regulations as applied to everyone. A challenge to the validity of regulations for lacking an adequate contemporaneous explanation of the agency's policy choices is fundamentally different from the paradigmatic AIA case of an individual taxpayer who wants to enjoin the IRS from levying against his property, said Hickman. "*Florida Bankers* strikes me as pretty far in the direction of being a garden-variety APA challenge to the validity of the regulation as opposed to the application of a regulation to an individual taxpayer," she said.

**Some regulations susceptible to an APA challenge might not find their way to a deficiency or refund action simply because of what they are designed to accomplish and who is required to comply with them, said Hickman.**

There are a host of possible regulations and other forms of guidance waiting in the wings if *Florida Bankers* or another case succeeds in narrowing the AIA and increasing the probability of success in validity challenges. While other information reporting regulations may raise the same issue as that in *Florida Bankers*, the universe of possible challenges is not limited to information reporting rules, Hickman said. "Congress is using the Internal Revenue Code and the IRS for all kinds of governmental functions that have only a tenuous or tangential relationship to the traditional revenue-raising function of the IRS," she said. Consequently, some regulations susceptible to an APA challenge might not find their way to a deficiency or refund action simply because of what they are designed to accom-

plish and who is required to comply with them, she said. For example, ERISA regulations written by the IRS might be susceptible to pre-enforcement review because there is no easy way to get to a deficiency or refund suit. Also, if a narrower interpretation of the AIA eventually prevails, the anti-inversion rules in Notice 2014-52 could become the target of a challenge.

Until there is a more definitive resolution of the proper interpretation of the AIA, likely from the Supreme Court, it will remain a significant deterrent to pre-enforcement challenges to the validity of tax regulations in general, particularly in the D.C. Circuit. ■