No. 19-______

IN THE

Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF TREASURY; UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of *taxes* also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is CIC Services, LLC. It was the plaintiff in the district court and appellant in the court of appeals.

Respondents are the Internal Revenue Service, the Department of Treasury, and the United States of America. Respondents were defendants in the district court and appellees in the court of appeals.

The related proceedings below are:

1) CIC Services, LLC v. IRS, No. 3:17-cv-110 (E.D. Tenn.) – Judgment entered November 2, 2017; and

2) CIC Services, LLC v. IRS, No. 18-5019 (6th Cir.) – Judgment entered May 22, 2019.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29, Petitioner CIC Services, LLC states that it has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Cases:

Statutes and Other Authorities:

CIC Services, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is reported at 925 F.3d 247 and is reproduced in the Appendix ("App.") at 1a-37a. The opinion of the U.S. District Court for the Eastern District of Tennessee is unpublished but is available at 2017 WL 5015510 and is reproduced at App. 38a-47a. The order denying the petition for rehearing is reported at 936 F.3d 501 and is reproduced at App. 48a-66a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on May 22, 2019. The Sixth Circuit denied CIC's petition for rehearing en banc on August 28, 2019. This Court subsequently extended the time in which to file this petition until January 17, 2020. *See* 19A440. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved in this case are: 26 U.S.C. §§ 6707, 6707A, 6708, 6011(a), 6111, 6112, 7203, 7421(a); 26 C.F.R. §§ 1.6011-4(b), 301.6111-3(a)-(b)(1); Notice 2016-66. These provisions are reproduced at App. 67a-106a.

INTRODUCTION

Pre-enforcement review is the lifeblood of administrative law. Thanks to the Administrative Procedure Act, law-abiding citizens can challenge illegal regulations in court, without having to violate the regulation first and then raise its invalidity as a defense to an enforcement action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-41, 152-53 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Without pre-enforcement review, plaintiffs would have to "'bet the farm'" to "'test[] the validity'" of agency action—a risk most would understandably never take. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490-91 (2010).

The IRS is not exempt from the APA. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011). But once the IRS begins enforcement, the Anti-Injunction Act prohibits plaintiffs from suing to "restrain[] the assessment or collection of any tax." 26 U.S.C. §7421(a). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *NFIB v. Sebelius,* 567 U.S. 519, 543 (2012). This system draws upon the "old and familiar rule" of equity that barred injunctions against tax assessors and collectors. *Pullan v. Kinsinger*, 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870). But, tellingly, it was formally codified by Congress in the wake of the Civil War, when the federal government's need for quick revenue was especially pressing. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1720-25 (2017). The modern rationale for this "'pay first and litigate later'" rule is just as simple: the treasury wants its money upfront, and it does not want taxpayers using meritless lawsuits to delay their tax bills. *Flora v. United States*, 357 U.S. 63, 68, 75 (1958).

This case presents an exceptionally important question about the relationship between the APA and the Anti-Injunction Act: Does the Anti-Injunction Act override the APA and insulate agency action from pre-enforcement review whenever an agency enforces that action with a penalty that it labels as a tax? Here, Petitioner CIC Services challenges IRS guidance requiring it and its industry to comply with onerous reporting and information-gathering requirements. Violations of these requirements are punishable by, among other things, a tax penalty and imprisonment. This Court has squarely held that challenges to tax-reporting and information-gathering requirements do not implicate the Anti-Injunction Act. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1 (2015). But a divided Sixth Circuit panel concluded that the IRS's decision to attach a tax penalty to punish violators of a reporting requirement revives the Anti-Injunction Act's bar on suits that challenge the legality of the requirement.

The Sixth Circuit denied en banc review in a sharply divided vote. Seven judges agreed with the panel dissent that "people should not have to risk prison time in order to challenge the lawfulness of government action" when the challenge focuses on a reporting requirement, not the penalty associated with violating that requirement; "[s]imply put, this is not a case about taxes." App. 58a, 60a (Thapar, J., dissenting from denial of rehearing). Judge Sutton—whose vote would have been decisive—voted to deny rehearing not because he agreed with the panel's reading of the Anti-Injunction Act "as an original matter," but because he believed that the Supreme Court is "in a well-informed position to resolve the point." App. 55a, 57a.

Judge Sutton is correct on that point. The Sixth Circuit's decision denying CIC's pre-enforcement challenge easily satisfies all of this Court's criteria for granting further review.

First, the panel's decision is contrary to this Court's reading of nearly identical statutory language in *Direct Marketing*. As in that case, CIC's injuries here are the costs of complying with the information-gathering and reporting mandates, not its liability for tax penalties that the IRS has not (and may never) assess. The mandates impose duties independent of the tax penalties, appear in a separate statutory provision, and would injure the plaintiff even if the tax penalties were eliminated. Like *Direct Marketing*, this case lacks the direct connection to "assessment or collection" of taxes that the Anti-Injunction Act requires.

Second, the decision below deepens a split among the courts of appeal as to the effect of a tax penalty on an otherwise permissible challenge to a reporting requirement. *Compare* App. 7a-8a, *and Florida Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1069 (D.C. Cir. 2015) (applying the Anti-Injunction Act to bar pre-enforcement challenge), *with Korte v. Sebelius*, 735 F.3d 654, 669-70 (7th Cir. 2013) (allowing pre-enforcement suit), *and Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126-27 (10th Cir. 2013) (en banc) (same).

Finally, this case presents an indisputably important question about the meaning of the Anti-Injunction Act and this Court's precedents—one on which "thoughtful jurists" have divided. App. 65a n.2 (Thapar, J., dissenting from denial of rehearing en banc). Under the Sixth Circuit's decision, even patently unlawful IRS regulations can be insulated from review unless an individual is willing to risk the imposition of enormous fines and—in this case—prison time. As Judge Thapar emphasized, the erroneous decision in this case will likely lead to a "'world in which no challenge to [the IRS's] actions is ever outside the closed loop of its taxing authority.'" App. 66a (quoting *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc)).

STATEMENT OF THE CASE

A. Background

Congress authorized the IRS to define—"under regulations"—the "reportable transactions" that must be submitted with tax returns. 26 U.S.C. § 6707A(c)(1); *id.* § 6011(a); *id.* § 6111; *id.* § 6112. But instead of passing regulations, the IRS simply defined "reportable transactions" to include "transactions of interest" and then claimed the authority to identify those transaction in later "guidance" documents. 26 C.F.R. § 1.6011-4(b). The IRS used this workaround to publish Notice 2016-66, a guidance document that designates "section 831(b) micro-captive transactions" as transactions of interest, thereby imposing a reporting requirement on all such transactions and their advisors. App. 91a; *see* 26 C.F.R. § 301.6111-3.[1] The Notice never went through notice and comment or other necessary procedures for "regulations." *See* 5 U.S.C. § 553(b)&(c). Throughout this case, the IRS has never meaningfully disputed that Notice 2016-66 is a substantive, legislative-type rule subject to the APA's notice-and-comment requirements.

CIC Services is a business whose attorneys and accountants advise taxpayers engaging in micro-captive transactions and is thus subject to the reporting and recordkeeping requirements imposed by Notice 2016-66. Compliance with the Notice costs CIC Services hundreds of hours of labor and tens of thousands of dollars. And failure to report carries serious consequences: a potential for hundreds of thousands of dollars in civil tax penalties, 26 U.S.C. §§ 6707-6708, and, for willful violations, criminal penalties, including imprisonment, *id.* § 7203.

B. Proceedings Below

In March 2017, CIC filed a pre-enforcement challenge to Notice 2016-66 in the Eastern District of Tennessee. It asked the district court to enjoin the Notice as an illegal attempt to circumvent the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*,

[1] Micro-captives are small insurance companies that businesses use and own themselves, instead of hiring an insurer that offers coverage to the general public.

and other statutes. In its lone defense, the IRS moved to dismiss the complaint for lack of subject matter jurisdiction, asserting (as relevant here) that the complaint was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a). The district court granted the IRS's motion to dismiss on the ground that the Anti-Injunction Act bars suits for the purpose of restraining the assessment or collection of any tax. App. 46a.

A divided panel of the Sixth Circuit affirmed. App. 1a-37a. CIC had argued that it was challenging the agency's *mandate*—the reporting requirement itself and not hypothetical tax penalties. Thus, CIC argued that its suit lacked the direct connection to "assessment or collection" of taxes that the Anti-Injunction Act requires. The majority acknowledged that challenges to tax-reporting requirements do not ordinarily implicate the Anti-Injunction Act because "information reporting is a separate step in the taxation process that occurs before assessment or collection." App. 16a (citing *Direct Mktg*, 575 U.S. 1). But because the reporting requirements at issue here are enforced by a tax penalty, the panel threw out the ordinary principle espoused by this Court in *Direct Marketing*. The panel believed that CIC's challenge to the reporting requirements is necessarily "focused on *that* tax's [the tax-penalty's] assessment or collection." App. 16a. The panel concluded that CIC's "suit 'would have the effect of restraining—*fully stopping*' the IRS from collecting the penalties imposed for violating the Notice's requirements," so under the Anti-Injunction Act, the court lacked subject-matter jurisdiction. App. 17a, 21a.

In rejecting CIC's argument that it was challenging the Notice—not the hypothetical tax penalties associated with violation of the Notice—the panel acknowledged that its decision conflicted with its own circuit precedent in *Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), which had "seemed prepared to recognize the distinction urged by [CIC]." App. 19a. The panel felt unbound by *Autocam* because the Supreme Court "vacated" that decision (on other grounds) in light of *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Instead, it followed the reasoning laid out by a divided panel of the D.C. Circuit in *Florida Bankers Ass'n*, 799 F.3d at 1069.

Judge Nalbandian dissented. App. 25a-37a. In his view, because CIC's alleged injury was not tax liability but rather the significant amount of labor and money required to comply with the reporting requirements, the case did not fall within the reach of the Anti-Injunction Act. App. 26a-27a. According to *Direct Marketing*, he explained, a suit to enjoin the enforcement of a reporting requirement is not a suit for the purpose of restraining assessment or collection of taxes. App. 26a-27a. Because *Direct Marketing* interpreted the similarly worded Tax-Injunction Act, Judge Nalbandian would have applied its reasoning to this case. App. 27a-28a. He also rejected the D.C. Circuit's attempt to distinguish cases like this from *Direct Marketing* on the argument that the tax penalty is inextricably linked to the regulation. App. 28a-32a. Unlike the cases that *Florida Bankers* relied on—cases in which the alleged injury was the *tax liability*—"the regulation that CIC seeks to enjoin does not directly result in any tax lability." App. 32a.

Here, no tax liability is in jeopardy because CIC has never been found to have violated the reporting requirements. App. 32a.

Judge Nalbandian also emphasized the ramifications of the panel's opinion. First, it means that the only way for parties like CIC to challenge an illegal agency action "is to violate the law and risk financial ruin and criminal prosecution"—"precisely the bind that pre-enforcement judicial review was meant to avoid." App. 35a. Second, it has the effect of rendering *any* regulatory requirement unreviewable, so long as the agency slaps a tax penalty on it. App. 36a. In sum, Judge Nalbandian concluded that the panel majority's interpretation of the Anti-Injunction Act did not fit with the text, precedent, or purpose of the statute.

CIC filed a timely petition for rehearing en banc, which was denied on August 28, 2019. App. 49a. Multiple judges wrote separately to highlight the panel's errors and emphasize the importance of the issue. Judge Sutton explained that Judge Nalbandian's panel dissent "seems to be right as an original matter." App. 55a. Indeed, he "doubt[ed] that the words of the Anti-Injunction Act … ban all prospective relief whenever the IRS enforces a regulation with a penalty that it chooses to call a 'tax.'" App. 55a. And he "especially doubt[ed] that conclusion in this setting—where the taxpayer's only remedy is not to 'pay first challenge later' but to 'report to prison first challenge later.'" App. 55a. Nevertheless, Judge Sutton concurred in the denial of rehearing en banc because the case did not come to the

Sixth Circuit "on a fresh slate." App. 56a. He opined that this Court's older decisions construing the Anti-Injunction Act made following its precedent "tricky business." App. 56a. And because the several opinions in this case and others "say all there is to say about the issue from a lower court judge's perspective" Judge Sutton thought that only this Court could efficaciously "resolve the point." App. 57a.

Judge Thapar, writing for himself and six other judges, dissented from the denial of rehearing en banc. App. 58a-66a. Like Judge Nalbandian, he argued that *Direct Marketing* resolves the question presented here: whether the Anti-Injunction Act applies to a suit that challenges the lawfulness of regulatory reporting and recordkeeping requirements. App. 58a-59a. The dissent emphasized that CIC is not trying to evade tax enforcement but rather "seeks to enjoin the underlying reporting requirement." App. 60a. As the dissent explained, focusing on the alleged injury actually caused by the reporting requirement—not some hypothetical future injury from a tax penalty—is not only consistent with an earlier panel of the Sixth Circuit, but also with decisions from the Seventh and Tenth Circuits. App. 60a-61a (citing *Autocam*, 730 F.3d at 621-22, *vacated on other grounds sub nom. Autocam Corp. v. Burwell*, 573 U.S. 956 (2014); *Korte*, 735 F.3d at 669-70; *Hobby Lobby Stores, Inc.*, 723 F.3d at 1126-27.

Judge Thapar also emphasized the serious and far-reaching implications of the panel's decision. As an initial matter, the law does not ordinarily require parties to suffer harm before they challenge agency action; but this decision goes even farther than that. Parties wishing to challenge the IRS's guidance now must be willing to violate the law and risk a year in prison before they are even allowed to bring a challenge. App. 61a (citing 26 U.S.C. § 7203). Practically speaking, "these criminal sanctions make the reporting requirement in this case (and many others) unreviewable." App. 62a. Upholding the panel's decision, then, means that "the IRS will have the power to impose sweeping 'guidance' across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process." App. 62a-63a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit "decided an important federal question in a way that conflicts with [a] relevant decision[] of this Court." Sup. Ct. Rule 10(c). By holding that the Anti-Injunction Act barred CIC's challenge, the decision below contravenes a nearly identical application of a nearly identical provision in *Direct Marketing*.

The Sixth Circuit's decision also "conflict[s] with the decision[s] of []other United States court[s] of appeals on the same important matter." Sup. Ct. Rule 10(a). Specifically, the Seventh and Tenth Circuits have interpreted the Anti-Injunction Act not to bar a challenge to a regulatory mandate even when violation of that mandate resulted in a tax penalty.

In all events, the decision below involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule

10(c). Under the Sixth Circuit's decision, a party cannot bring any pre-enforcement challenge to any regulatory provision—no matter how divorced from tax liability—if it happens to be enforced by a penalty that is labeled as a tax. For all of these reasons, the Court should grant review and reverse the decision below to bring clarity to this critical area of administrative law.

I. The Sixth Circuit's decision conflicts with this Court's decision in *Direct Marketing.*

A. *Direct Marketing* makes clear that a challenge to a regulatory reporting requirement is not an attempt to restrain the assessment or collection of a tax.

CIC challenges the legality of the reporting requirements established by Notice 2016-66, separate and apart from the hypothetical tax penalty that might be imposed to punish violations of those requirements. The Anti-Injunction Act states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421(a). This Court's opinion in *Direct Marketing* makes clear that neither the text nor purpose of the Anti-Injunction Act bars pre-enforcement challenges of the type CIC has brought here.

To be sure, *Direct Marketing* interpreted the Tax Injunction Act, 28 U.S.C. § 1341, and not the Anti-Injunction Act. But both statutes prohibit federal courts from restraining the assessment or collection of a tax. *See* Tax Injunction Act, 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). And because the Tax Injunction Act was modeled on the Anti-Injunction Act, this Court "assume[s] that words used in both Acts are generally used in the same way." *Direct Mktg*, 575 U.S. at 8.

In *Direct Marketing*, this Court considered whether a suit to enjoin the tax-related notice and reporting requirements of a Colorado law governing internet retailers "would 'enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law.'" *Id.* at 4, 7. Because the case self-evidently involved a challenge to enjoin the reporting requirements, the only question was whether imposition of those requirements was itself "an act of assessment, levy or collection." *Id.* at 8, 12. The Court carefully analyzed the definitions of those terms and unanimously concluded that "enforcement of the notice and reporting requirements is none of these." *Id.* at 12.

As relevant here, the Court explained that "assessment" and "collection" are terms of art in federal tax law. *Id.* at 8. Assessment is "the official recording of a taxpayer's liability." *Id.* at 9. And collection is "the act of obtaining payment of taxes due." *Id.* at 10. The Court held that "[s]o defined, these terms do not encompass [the state's] enforcement of its notice and reporting requirements." *Id.* at 11. The notice and reporting requirements are instead geared toward "information gathering" meant to facilitate *later* tax "collection" and "assessment." *Id.* at 8-11. But a reporting requirement is not itself "an act of assessment … or collection," and thus a challenge to the requirement is not barred. *Id.* at 8, 11-12.

The Court then considered whether the term "restrain" broadened the application of the prohibition to suits that might tenuously "'limit, restrict, or hold back' the assessment … or collection" of taxes. *Id.* at 12. It determined that "restrain" should be understood in its strict, equitable sense. *Id.* at 13-14. In other words, a suit that "merely inhibits" the collection of tax revenue will not trigger the injunction; only lawsuits that actually "stop" the assessment or collection of a tax are barred. *Id.* at 12-14. And because the reporting requirements in that case "precede[d] the steps of 'assessment' and 'collection,'" a challenge to their enforcement did not *stop* assessment or collection. *Id.* at 11, 14.

Applying *Direct Marketing*'s interpretation of nearly identical text in this nearly identical context shows that the Anti-Injunction Act does not apply to CIC's suit. "[T]he notice and reporting requirements" that CIC challenges "*precede* the steps of 'assessment' and 'collection.'" *Id.* at 11 (emphasis added). CIC is not trying to stop the "assessment or collection" of any tax or tax penalty. Indeed, it has not engaged in any action that would trigger the tax penalty. Nor has the IRS threatened or assessed any tax penalty against CIC.[2] Notice 2016-66 and its nebulous information-

[2] In Notice 2016-66, the IRS even admits that the reason for the Notice is because the IRS "lack[s] sufficient information"

gathering purposes are far removed from the distinct steps of assessing or collecting a tax.

But the Anti-Injunction Act also clearly requires that the plaintiff's suit be "*for the purpose of* restraining" assessment or collection of a tax. 26 U.S.C. § 7421(a) (emphasis added). CIC's suit does not qualify. CIC is challenging an IRS Notice that subjects it to reporting requirements; it "does not allege tax liability as its injury." App. 26a (Nalbandian, J., dissenting). Moreover, the reporting requirements cannot themselves be plausibly construed as inextricable from the tax penalties. App. 19a. They appear in different statutory provisions from the tax penalties, impose freestanding legal obligations, and carry criminal consequences independent of the tax penalties. *See* 26 U.S.C. §§ 6011(a), 6111, 6112, 26 C.F.R. §§ 1.6011-4, 301.6111-3 (reporting and recordkeeping requirements); 26 U.S.C. §§ 6707, 6707A (tax penalties); *id.* § 7203 (criminal penalty). Indeed, if the tax penalties did not exist, CIC would have filed this exact same suit. "Put simply, this is not a dispute over taxes." App. 26a (Nalbandian, J., dissenting).

The Sixth Circuit's application of the Anti-Injunction Act to this kind of pre-enforcement challenge thus cannot be reconciled with the text of the Act and with this Court's decision in *Direct*

about micro-captive transactions, and it states that once it has gathered enough information, it may simply rescind its designation of micro-captives as a reportable transaction. App. 91a-92a. In short, the IRS concedes that—if taxpayers provide enough information—it may never collect a single dime more.

Marketing. The petition should be granted on this basis alone.

B. The Sixth Circuit's attempt to distinguish *Direct Marketing* is unavailing.

Following the lead of a divided panel of the D.C. Circuit, *see Florida Bankers*, 799 F.3d 1065, the Sixth Circuit relied on a perceived narrow distinction between the nature of the penalty in *Direct Marketing* and the one at issue here. That reasoning was flawed. Any purported differences between the penalties at issue in *Direct Marketing* and those at issue here would have no effect on *Direct Marketing*'s interpretation or application of statutory text, which applies with full force here.

In *Florida Bankers*, on nearly identical facts, the D.C. Circuit first determined that the Tax Code treats the civil penalty imposed for violating the reporting requirement as a "tax" because it is located in Chapter 68, Subchapter B of the Tax Code. 799 F.3d at 1068-69 (citing 26 U.S.C. § 6671(a)). Thus, in its view, the penalty itself was the relevant tax to be assessed or collected for Anti-Injunction Act purposes—not whatever downstream tax revenue the reporting requirements might generate. *Id.* at 1069. Relatedly, the D.C. Circuit found that the regulatory mandate and the tax penalty enforcing the mandate were so intertwined that a suit for the purpose of restraining one was also a suit for the purpose of restraining the other. *Id.* at 1070 ("[P]laintiffs cannot evade the Anti-Injunction Act by purporting to challenge only the regulatory aspect of a regulatory tax."). It claimed the support of several Supreme Court cases for this proposition—specifically, cases involving tax-exempt status and *NFIB v. Sebelius*. *Id.* at 1070-71. Because it framed the challenge to the reporting requirement as a *direct* challenge to the tax penalty—that is, a direct challenge to a "tax"—the D.C. Circuit held that the case was "at the heartland of the Anti-Injunction Act" and thus barred. *Id.* at 1069-72.

In short, the D.C. Circuit found that *Direct Marketing* was not controlling because the penalty in *Direct Marketing* "was not itself a tax, or at least it was never argued or suggested that the penalty in that case was itself a tax." *Id.* at 1069. The Sixth Circuit panel found this distinction "persuasive." App. 14a. At best, however, this is an immaterial distinction that should not affect *Direct Marketing*'s application to this case.

As an initial matter, the fact that *Direct Marketing* did not analyze the character of the regulatory penalty in that case is persuasive evidence that it did not matter to the outcome. *See* App. 34a (Nalbandian, J., dissenting) ("Nothing" in *Direct Marketing* indicates that the Court "would have held differently if someone had argued that the … penalties in that case were taxes."). But the *Florida Bankers* analysis is unpersuasive for other reasons as well.

First, while the penalty enforcing the reporting requirement there, and in this case, is—according to the Tax Code—to be treated as a tax, it is not an affirmative, stand-alone tax for the purpose of "'protection of the revenues.'" *See Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011) (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 (1974)), *abrogated on other grounds by NFIB*, 567 U.S. 519. A tax penalty "is meant to *deter* violations of the underlying regulatory requirement: if the penalty is avoided—and presumably this is the Government's intent—then individuals will have complied with the regulation and the IRS will collect zero revenue." *Florida Bankers*, 799 F.3d at 1078 (Henderson, J., dissenting). In other words, the very purpose of a tax penalty is to help ensure that it never needs to be collected. Even if the difference between a regulatory tax and a revenue-raising tax does not, standing alone, resolve this case, the regulatory nature of the tax penalty shows that the case falls well outside of the Anti-Injunction Act's "heartland" and is far removed from its historical purpose of ensuring a steady stream of federal revenue. 799 F.3d at 1072.

Second, *Direct Marketing* establishes that the analysis should focus on the plaintiff's challenge—the target of the plaintiff's suit as evidenced by the alleged injury—and not on independently identifying the closest possible tax for Anti-Injunction Act purposes. *See* 575 U.S. at 6-7, 11-12, 14. *Direct Marketing* did not hold that the plaintiff's suit was outside the scope of the Tax Injunction Act because the closest related tax was several steps down the road. It reached that conclusion because the notice and reporting requirements were not themselves taxes—they were distinguishable antecedents to the assessment or collection of a tax. *Id.* at 11; *see also Cohen*, 650 F.3d at 727 (determining the applicability of the Anti-Injunction Act requires "careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection").

Here, CIC challenges the reporting requirements—not some hypothetical tax penalty. Those existing reporting requirements cause CIC significant injury. Indeed, the tax penalty is largely irrelevant to CIC because CIC has never done anything to trigger it. "Per the Supreme Court's direction, [this] suit cannot be understood to 'restrain[] the assessment or collection' of a tax just because it might inhibit the agency's future collection efforts" following a hypothetical future enforcement action. *See* App. 59a-60a (Thapar, J., dissenting from denial of rehearing en banc).

Like the D.C. Circuit in *Florida Bankers*, the Sixth Circuit panel asserted that even if CIC's suit facially challenges only the regulatory mandate, and not the tax penalty, it is still barred because it has the "'effect of restraining—*fully stopping*' the IRS from collecting the penalties imposed for violating the Notice's requirements." App. 17a. But even assuming that is right in a technical sense, it puts the cart before the horse. The Anti-Injunction Act bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a); *see* App. 64a n.1 (Thapar, J., dissenting from denial of rehearing en banc) (cautioning against interpretations that would "rewrite[e] the Anti-Injunction Act to say 'effect' rather than 'purpose'"). CIC's sole purpose in bringing this action is to enjoin the reporting requirements.

Thus, the existence of the tax penalty matters only if the panel below and the D.C. Circuit were right that regulatory mandates and the penalties for violating regulatory mandates are somehow inextricably intertwined. They are not. Arguing to the contrary, the Sixth Circuit panel pointed to *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974) and *Bob Jones University v. Simon*, 416 U.S. 725 (1974). Both cases grounded challenges to the revocation of their tax-exempt status in an argument that they "sought only to maintain their flow of charitable donations, not to restrain a tax." App. 64a (Thapar, J., dissenting from denial of rehearing en banc). In those cases, this Court refused to accept the taxpayers' attempts to distinguish the purposes of their suits—not because the distinction was impossible—but because the evidence in those cases did not support the distinction.

In *Bob Jones* the Court looked to "Petitioner's complaint and supporting documents" and found that they "belie[d] any notion that this suit is not a suit to enjoin the assessment or collection of federal taxes from petitioner." 416 U.S. at 738. The sum of the petitioner's alleged injuries focused on its own "tax liability" that would flow from revocation of its tax-exempt status. *Id.* On that record there was "little doubt that a primary purpose of th[e] lawsuit [was] to prevent the [IRS] from assessing and collecting income taxes from petitioner." *Id.* So too in *"Americans United." See* 416 U.S. at 760-61

("[R]espondent would not be interested in obtaining the … relief requested if that relief did not effectively restrain the taxation of its contributors"); *see also* *Seven-Sky*, 661 F.3d at 10 (explaining that the petitioners' arguments in "*Americans United"* and *Bob Jones* were "defeated by [their] own pleadings, since the *only* injuries [they] identified involved tax liability").

These cases show that the purpose of a lawsuit must be analyzed in light of the injury sought to be remedied.[3] Here, CIC has demonstrated "a clear interest—separate from any potential 'tax' liability—in avoiding the substantial costs of the reporting requirement. The 'purpose' of its lawsuit is to obtain relief from costs the company must pay today, not restrain a penalty it might have to pay tomorrow." App. 64a (Thapar, J., dissenting from denial of rehearing en banc).

The Sixth Circuit panel also cited the D.C. Circuit's discussion of *NFIB*, 567 U.S. at 519, to support its case-determinative reliance on the

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[3] As Judge Thapar acknowledged in his dissent from the denial of rehearing en banc, App. 64a n.1, *Bob Jones* can be read to have suggested, in passing, that the Anti-Injunction Act would bar any suit that would "necessarily preclude" the collection of taxes. 416 U.S. at 732. But "that stray phrase has never since been invoked by the Court, even in a decision released on the same day by the same Justice about the same issue"—a decision that "would have been … much easier" if that language were applied. App. 64a n.1 (citing *"Americans United*," 416 U.S. 752). And for good reason. "The 'necessarily preclude' test would … have the inconvenient feature of rewriting the Anti-Injunction Act to say 'effect' rather than 'purpose.'" App. 64a n.1.

penalty's status as a tax. *See* App. 13a. In *NFIB*, it was argued that the Anti-Injunction Act did not apply to the case because plaintiffs were challenging the regulatory mandate to purchase health insurance, not the penalty for failing to purchase the insurance. *See Florida Bankers*, 799 F.3d at 1071 (discussing the arguments). While the Court agreed in *NFIB* that the Anti-Injunction Act did not apply, it never engaged the plaintiffs' argument. Instead, it held that the Anti-Injunction Act did not apply because the penalty at issue was not a tax at all. 567 U.S. at 544-45.

Florida Bankers took this to mean that "the Anti-Injunction Act would have applied if the penalty were a tax under the act." 799 F.3d at 1071. But several judges have pointed out the flaw in that logic. *See* App. 33a (Nalbandian, J., dissenting); App. 64a-65a (Thapar, J., dissenting from denial of rehearing en banc); *Florida Bankers*, 799 F.3d at 1080 (Henderson, J., dissenting). Indeed, it is "wrong to assume that a suit implicating a tax triggers the Anti-Injunction Act simply because a suit not implicating a tax does not trigger the Anti-Injunction Act." App. 33a (Nalbandian, J., dissenting); *see also Florida Bankers*, 799 F.3d at1080 (Henderson, J., dissenting) (citing the fallacy of "denying the antecedent"). At bottom, *NFIB* "never reached the question" whether—*were the penalty a tax*—the lawsuit would have had the purpose of restraining it. App. 64a-65a (Thapar, J., dissenting from denial of rehearing en banc); *see* App. 34a (Nalbandian, J., dissenting) ("[T]he *NFIB* Court never said that pre-enforcement review of a regulatory mandate is barred under the Anti-Injunction Act simply because it is enforced by a tax.

A search for that proposition in the opinion leaves one emptyhanded.”).

In short, this Court’s precedent does not suggest that regulatory mandates and the tax penalties that enforce them are so intertwined that a challenge to one is a challenge the other. The penalty’s status as a tax thus provides no basis to treat CIC’s challenge any differently from the one analyzed in *Direct Marketing*: (1) determine the direct target of the suit and (2) determine whether that target is a tax. The decision below is irreconcilable with *Direct Marketing*’s reasoning.

II. The Sixth Circuit’s opinion conflicts with decisions from the Seventh and Tenth Circuits.

The Sixth and D.C. Circuits’ opinions not only depart from *Direct Marketing*—and an earlier, directly-on-point decision of the Sixth Circuit, *see Autocam*, 730 F.3d at 621-22—but they stand in stark contrast to decisions of the Seventh and Tenth Circuits. In those cases, the courts rejected an interpretation of the Anti-Injunction Act that would bar pre-enforcement challenges to the Affordable Care Act’s contraceptive mandate because those suits challenged the mandate itself, not the “tax penalty” attached to it. *See Korte*, 735 F.3d at 669-70 (7th Cir. 2013); *Hobby Lobby Stores,* 723 F.3d at 1126-27 (10th Cir. 2013) (en banc).

As the Seventh Circuit explained, pre-enforcement challenges to the contraceptive mandate “[w]ere not suits ‘for the purpose of’ restraining the assessment or collection of a tax"; they "s[ought] relief from a regulatory mandate that exists separate and apart from the assessment or collection of taxes." *Korte*, 735 F.3d at 669. The mandate was "not structured as a predicate to the imposition of a tax but [wa]s instead an independent regulatory mandate"; indeed, the "stiff tax penalties" attached to it were not the only "consequences for noncompliance." *Id.* The Seventh Circuit acknowledged that invalidating the mandate would "incidentally affect … tax liability" by making it impossible for individuals to be "liable for the tax penalty." *Id.* at 669-70. But the court rejected this reasoning as too attenuated: "the Anti-Injunction Act does not reach 'all disputes tangentially related to taxes'"; "the assessment or collection of a tax must be the primary purpose of the lawsuit." *Id.* "These lawsuits," the court concluded, "target the mandate itself." *Id.*

The Tenth Circuit, sitting en banc, unanimously endorsed this same reading of the Anti-Injunction Act. *See Hobby Lobby*, 723 F.3d at 1126-28; *id.* at 1164 (Briscoe, J., concurring in part and dissenting in part); *id.* at 1191 (Matheson, J., concurring in part and dissenting in part). Pre-enforcement challenges to the contraceptive mandate, the majority opinion explained, were "not challenging the IRS's ability to collect taxes"; they were "seeking to enjoin the enforcement, by whatever method, of one HHS regulation." *Id.* at 1127.[4]

The decision below thus deepens the existing circuit split, leaving the four courts of appeal to have reached this question evenly divided. This division was acknowledged below. *See* App. 61a, 65a n.2 (Thapar, J., dissenting from denial of rehearing en banc) (noting that the decision below conflicted with "[t]wo other circuits," and that "thoughtful jurists"—including the majority—"have read [this Court's] cases as well as the Anti-Injunction Act differently"). Certiorari is warranted to resolve this ongoing division among the lower courts.

III. The decision below threatens to insulate agency actions from APA challenges and undermines the purpose of the APA.

The division among the lower courts arises in part from the high-stakes implications of the question presented for the whole of administrative law. As several judges have noted, the decision below threatens to snuff out any practical ability for affected individuals to challenge a wide swath of agency actions. Moreover, the decision undermines the core purposes of the Administrative Procedure Act, namely ensuring that regulated parties have an ability to obtain pre-enforcement review of administrative mandates.

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[4] The Tenth Circuit and Seventh Circuit reached their conclusions without the benefit of *Direct Marketing*—a decision that further supports their reasoning.

As it stands, the law in the Sixth and D.C. Circuits requires parties to first "pay" the penalty and "report to prison" before challenging unlawful agency action, App. 55a (Sutton, J., concurring in the denial of rehearing en banc)—at least as long as the agency slaps a tax penalty on its regulatory mandate, which could be done for *any* agency action. *See* App. 61a-62a (Thapar, J., dissenting from denial of rehearing en banc) (explaining that agencies now regulate in an "ever-expanding sphere of everyday life—from childcare and charity to healthcare and the environment"). In doing so, the Sixth Circuit has not only "ban[ned] all *prospective* relief whenever the IRS enforces a regulation with a penalty that it chooses to call a 'tax,'" App. 55a (Sutton, J., concurring in the denial of rehearing en banc) (emphasis added), but has also effectively rendered the agency action entirely "unreviewable," App. 62a (Thapar, J., dissenting from denial of rehearing en banc); App. 36a (Nalbandian dissenting) (citing Hickman & Kerska at 1685-86).

This means that, "[g]oing forward …, the IRS will have the power to impose sweeping 'guidance' across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process." App. 62a-63a (Thapar, J., dissenting from denial of rehearing en banc). As Judge Nalbandian explained, there are no limits to the panel's opinion: its logic would even "require [courts] to characterize an Equal Protection challenge to [a racially] discriminatory [regulation] as a 'suit for the purpose of restraining the assessment or collection of a tax' simply because it is enforced by a penalty in Chapter 68, Subchapter B of the Tax Code." App. 30a-31a. "Intuitively, we know that description cannot stand without warping the meaning of the statute beyond recognition." App. 31a (Nalbandian, J., dissenting).

CIC's situation well illustrates this far-reaching threat. According to the Sixth Circuit, CIC cannot obtain judicial review unless (1) it deliberately violates the reporting requirements imposed by Notice 2016-66, (2) the IRS chooses to assess a tax penalty, (3) CIC pays it, and (4) CIC sues for a refund. Each of these steps is "fraught" with difficulties, App. 37a (Nalbandian, J., dissenting), starting with the fact that deliberately violating a reporting requirement is a crime punishable by up to a year in prison and $100,000 in fines.[5] 26 U.S.C. § 7203. Of course, even if CIC were willing to "'bet the farm'" and assume such risk, *see Free Enter. Fund*, 561 U.S. at 490-91, the decision to assess a tax penalty is committed to the IRS's unreviewable discretion, 26 U.S.C. §§ 6707A(d), 6707(c)—making the IRS (the would-be defendant) the sole arbiter of whether CIC can sue. And even then, assuming the IRS would assess the tax penalty, CIC's ability to challenge the illegal agency action assumes that CIC could pay the penalties assessed—"to the tune of $50,000 … for *each* transaction [CIC] fails to report." App. 34a (Nalbandian, J., dissenting); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336 (1920) (noting that some penalties can be set so high

[5] This is to say nothing of the fact that, for CIC's attorney- and accountant-members, deliberately breaking the tax laws would violate the ethical strictures of their professions.

that they "might well deter even the boldest and most confident"). For all these reasons, there is a serious risk that the panel's decision deprives aggrieved taxpayers of "any opportunity to obtain review." *South Carolina v. Regan*, 465 U.S. 367, 380-81 (1984).[6]

The panel's decision also undercuts the core goals of the APA.[7] The APA was designed to foster expedient pre-enforcement review of questionable agency action and to require lawful agency rulemaking. *See Abbott Labs.*, 387 U.S. at 140-41. But the panel's decision allows illegal agency actions to survive indefinitely without judicial review. That is especially problematic in light of the IRS's blatant disregard both for APA rulemaking requirements and Congress's specific mandate to define reportable transactions "under regulations." 26 U.S.C. § 6707A(c)(1). Indeed, the panel emphasized that the IRS does "not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those

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[6] If the Anti-Injunction Act requires all of that before a plaintiff can obtain judicial review, then it is unconstitutional. *See Florida Bankers*, 799 F.3d at 1083-84 (Henderson, J., dissenting) (collecting authorities). Thankfully, the best reading of the text of the Anti-Injunction Act and this Court's caselaw does not support that result.

[7] The panel decision likewise fails to serve the core goals of the Anti-Injunction Act—protecting government coffers. And it contradicts the Anti-Injunction Act's presumptive preference for legal compliance. The Act tells taxpayers they must comply with the law: pay an assessed tax and then sue for a refund. The panel's opinion, on the other hand, *encourages* law breaking by forcing parties to violate a regulatory mandate in order to challenge it.

requirements." App. 24a (quoting Hickman & Kerska at 1712–13).

Notwithstanding these concerns, the lower courts have struggled without clear guidance from this Court. Because this Court has addressed closely related issues and invoked the more precise issue without deciding it, neither the Sixth nor the D.C. Circuit purported to answer the question presented as an original matter. In Judge Sutton's view, both courts were compelled into the "tricky business" of "reading between the lines of Supreme Court decisions." App. 56a (Sutton, J., concurring in the denial of rehearing en banc). And while the best reading of this Court's precedent supports CIC's interpretation of the Anti-Injunction Act, the task from a lower-court perspective was made even more complicated by stray language in past precedent of this Court that arguably "leans in different directions." App. 56a.

The lower courts' efforts to apply such scattered guidance have thus produced a diverging collection of opinions—primarily in the Sixth and D.C. Circuits, but also in the Seventh and Tenth Circuits—that, collectively, "say all there is to say about the issue from a lower court judge's perspective" and leave this Court "in a well-informed position to resolve the point." App. 57a (Sutton, J., concurring in the denial of rehearing en banc). Judge Sutton counseled against en banc review in the Sixth Circuit not because the panel was right or because the issue lacked importance but precisely because he believes further review by the lower courts will add no value, and will, in all likelihood only add to the confusion. App. 57a. This Court's review is needed to clarify the law, restore uniformity among the circuits, and prevent federal agencies from evading review of unlawful regulations.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-5019

CIC SERVICES, LLC,

Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF TREASURY; UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 3:17-cv-00110—Travis R. McDonough, District Judge.

October 19, 2018, Argued
May 22, 2019, Decided
May 22, 2019, Filed

Before: SUHRHEINRICH, CLAY, and NALBANDIAN, Circuit Judges.*

* The Honorable Damon J. Keith, who participated in oral argument as a member of the original panel, died on April 28, 2019. Judge Suhrheinrich replaced Judge Keith on this panel for the consideration and decision of this case.

OPINION

CLAY, Circuit Judge. Plaintiff CIC Services, LLC appeals the district court's November 2, 2017 order granting Defendants' motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff's complaint alleges that Defendants' Notice 2016-66, 2016-47 I.R.B. 745 was promulgated in violation of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* and the Congressional Review Act, 5 U.S.C. § 801 *et seq.*, and seeks to enjoin its enforcement. For the reasons that follow, we **AFFIRM** the district court's dismissal.

BACKGROUND

Factual Background

As a part of the American Jobs Creation Act of 2004, Congress delegated authority to the Internal Revenue Service ("IRS") to identify and gather information about potential tax shelters. *See* 26 U.S.C. § 6707A. In exercising that authority, the IRS requires taxpayers and certain third parties to maintain and submit records pertaining to any "reportable transaction[s]." *Id.* § 6707A(c). Reportable transactions are those transactions deemed as such by IRS regulations. *Id.*

Failure to adhere to these IRS requirements can result in significant penalties. For instance, a taxpayer who fails to submit to the IRS a return listing his or her reportable transactions faces a penalty of 75% of his or her tax savings resulting from those transactions, from a minimum of $5,000 to a maximum of $200,000. *Id.* §§ 6011, 6707A(b). A "material advisor" — one who provides material aid to a taxpayer in his or her carrying out reportable transactions and who derives a threshold amount of gross income from that aid, *see id.* § 6111(b) — faces similar penalties. For instance, a material advisor who fails to submit to the IRS a return listing the reportable transactions in which he or she aided faces a penalty of between $50,000 and $200,000. *Id.* §§ 6111(a), 6707(b). And a material advisor who fails to maintain a list of the taxpayers that he or she aided in carrying out reportable transactions faces a penalty of $10,000 per day if the list is not produced within 20 business days of a request from the IRS. *Id.* §§ 6112(a), 6708(a).

On November 21, 2016, Defendants published Notice 2016-66 (the "Notice").[1] *See* 2016-47 I.R.B. 745. The Notice identified certain "micro-captive transactions" as "transactions of interest," a subset of reportable transactions.[2] *Id.*; *see also* 26 C.F.R. § 1.6011-4(b). The

1. Notice 2016-66 was amended by Notice 2017-08, but only with regard to various deadlines. *See* 2017-3 I.R.B. 423. Accordingly, we refer only to Notice 2016-66.

2. Micro-captive transactions are "a type of transaction . . . in which a taxpayer attempts to reduce the aggregate taxable income of the taxpayer, related persons, or both, using contracts that the parties treat as insurance contracts and a related company that the parties treat as a captive insurance company." *Id.* The details of these transactions and their tax implications for those that engage in them are not relevant to this appeal. If desired, more information can be found at 26 U.S.C. § 831(b) and at IRS News Release IR-2018-62 (Mar. 19, 2018).

Notice explained that these transactions have "a potential for tax avoidance or evasion," but that the IRS "lack[s] sufficient information" to distinguish between those that are lawful and those that are unlawful. 2016-47 I.R.B. 745. By deeming these transactions to be reportable transactions, the Notice imposed the requirements and potential penalties noted above on taxpayers engaging in them, and on material advisors aiding in them. *Id.*

Procedural History

On March 27, 2017, Plaintiff, a material advisor to taxpayers engaging in micro-captive transactions, filed a complaint in the United States District Court for the Eastern District of Tennessee. Plaintiff's complaint alleges that Defendants promulgated Notice 2016-66 in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.* and the Congressional Review Act ("CRA"), 5 U.S.C. § 801 *et seq.*, and seeks to enjoin its enforcement. Specifically, Plaintiff alleges that the Notice (1) is a legislative rule that required notice-and-comment rulemaking, (2) is arbitrary and capricious, and therefore *ultra vires*, and (3) is a rule that required submission for congressional review before it could go into effect. Plaintiff also filed a motion for a preliminary injunction.

On April 21, 2017, the district court denied Plaintiff's motion for a preliminary injunction, reasoning that it would not be in the public interest and that Plaintiff was unlikely to succeed on the merits. Defendants then moved to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. Defendants asserted that Plaintiff's complaint was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a) and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 (collectively, the "AIA"),[3] which divest federal district courts of jurisdiction over suits "for the purpose of restraining the assessment or collection of any tax." On November 2, 2017, the district court granted Defendants' motion to dismiss for lack of subject matter jurisdiction.

This appeal followed.

DISCUSSION

I. Standard of Review

We review *de novo* questions of subject matter jurisdiction, including whether a complaint is barred by the AIA. *Lorillard Tobacco Co. v. Chester, Wilcox & Saxbe*, 589 F.3d 835, 843 (6th Cir. 2009). In reviewing a district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), we accept all material allegations in the complaint as true and construe the complaint in the light most favorable to the nonmoving party. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994).

3. The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act are "to be interpreted coterminously." *Ecclesiastical Order of the ISM of AM, Inc. v. Internal Revenue Serv.*, 725 F.2d 398, 404-05 (6th Cir. 1984). For simplicity, we refer to both as the "AIA."

II. Analysis

A. The AIA

The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). While there exist some statutory and judicial exceptions to this prohibition, they are few and circumscribed. *See RYO Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 470 (6th Cir. 2012) ("With few exceptions, no court has jurisdiction over a suit to preemptively challenge a tax."). Thus, "whether an injunction can legally issue under the AIA" requires only two inquiries. *Id.* at 471. "First, we must consider whether the . . . complaint[] [is] within the purview of the AIA as a 'suit for the purpose of restraining the assessment or collection of any tax.'" *Id.* (quoting 26 U.S.C. § 7421(a)). Second, "[i]f so, we must [consider] whether [the] case falls into an exception to the AIA that would [nevertheless] allow us to [reach] the merits."[4] *Id.*

The problem with these ostensibly straightforward inquiries is that "courts lack an overarching theory of the AIA's meaning and scope against which to evaluate

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4. In this way, the AIA "creates a narrow exception to the general administrative law principle that pre-enforcement review of agency regulations is available in federal court." *Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1066, 419 U.S. App. D.C. 31 (D.C. Cir. 2015); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 736, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974). *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).

individual [complaints].” Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1686 (2017). At times, the Supreme Court has given the AIA “literal force,” without regard to the character of the tax, the characterization of the preemptive challenge to it, or other non-textual factors. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974). At other times, it has given the AIA “almost literal” force, considering such factors with an eye towards furthering the AIA’s underlying purposes. *Id.* at 737, 742. The result, according to some commentators, has been “jurisprudential chaos.” Hickman & Kerska, *supra*, at 1686.

We attempt to find some order amidst the chaos, addressing each of the AIA inquiries in turn.

1. Whether Plaintiff’s complaint is within the purview of the AIA

Whether a complaint is within the purview of the AIA depends, commonsensically, on whether it is properly characterized as a “suit for the purpose of restraining the assessment or collection of any tax.” *RYO*, 696 F.3d at 471 (quoting 26 U.S.C. § 7421(a)). Plaintiff argues that its complaint is not a suit for the purpose of restraining the assessment or collection of taxes. Defendants argue that it is. Reducing the briefs to their cores, Plaintiff asserts that the Supreme Court’s recent decision in *Direct Marketing Ass’n v. Brohl*, 575 U.S. ___, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015) controls this issue, while Defendants assert that the D.C. Circuit’s subsequent decision in *Florida Bankers*

Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 419 U.S. App. D.C. 31 (D.C. Cir. 2015), distinguishing *Direct Marketing*, is more persuasive. We agree with Defendants and hold that Plaintiff's complaint is within the purview of the AIA.

In *Direct Marketing*, the Supreme Court analyzed the scope of the Tax Injunction Act ("TIA"), which provides that no federal district court shall "enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the court of such State." 28 U.S.C. § 1341. Although the TIA concerns state as opposed to federal taxes, it was "modeled on" the AIA and the Supreme Court has long looked to one in construing the other. *Direct Marketing*, 135 S. Ct. at 1129; *see also Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 6, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962) ("The enactment of the comparable [TIA] . . . throws light on the proper construction to be given [to the AIA]."). The Court began its opinion in *Direct Marketing* by reaffirming this close connection between the two Acts, and making clear that "[it] assume[s] that words used in both Acts are generally used in the same way." 135 S. Ct. at 1129.

At issue in *Direct Marketing* were the meanings of "restrain," "assessment," "levy," and "collection," all words, apart from "levy," used in both the TIA and the AIA. *See* 28 U.S.C. § 1341; 26 U.S.C. § 7421(a).

With regard to "restrain," the Court explained that "standing alone [it] can have several meanings."

Direct Marketing, 135 S. Ct. at 1132. One is a "broad meaning" that "captures orders that merely *inhibit* acts of assessment, levy and collection." *Id.* "Another, narrower meaning, however, is 'to prohibit from action; to put compulsion upon . . . [or] to enjoin,'" and this meaning "captures only those orders that stop (or perhaps compel) acts of assessment, levy and collection." *Id.* (quotation omitted). The Court held that the TIA uses "restrain" in the latter, narrower sense. *Id.* And in doing so, it relied on two contextual clues: the words preceding "restrain" in the TIA — "enjoin" and "suspend," both of which are "terms of art in equity" — and the "carefully selected list of technical terms" on which "restrain" acts — "assessment," "levy," and "collection." *Id.* The Court explained that to give "restrain" the broad meaning would "defeat the precision" of these contextual clues, and would render several of the terms superfluous. *Id.* Thus, the question that the TIA asks is "whether the relief [sought] to some degree *stops* 'assessment, levy or collection,' not whether it *merely inhibits* them." *Id.* at 1133 (emphasis added).

With regard to "assessment" and "collection," the Court noted that it need not "comprehensively define these terms" in order to hold that they did not encompass the reporting requirements at issue. *Id.* at 1129. Nevertheless, the Court explained that "assessment" refers to "the official recording of a taxpayer's liability." *Id.* at 1130. "Collection," in turn, "is the act of obtaining payment of taxes due." *Id.* While both "might also be understood more broadly," the Court held that under either the narrow or the broad definition, each is a "separate step in the taxation process" that occurs *after* the step of reporting to the taxing authority information used to determine tax liability. *Id.* at 1129-31. ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection.").

Based on these definitions, the Supreme Court in *Direct Marketing* ultimately held that the TIA did not bar the plaintiff's suit. The plaintiff had sought to enjoin the enforcement of a Colorado law that required certain retailers to maintain and submit records pertaining to sales on which the retailers did not collect state sales and use taxes. *Id.* at 1128, 1134. The Court reasoned that while enforcement of the law might "improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers," the law was focused on information gathering as opposed to the discrete, subsequent acts of assessment, levy, and collection. *Id.* at 1131. Accordingly, a suit seeking to enjoin its enforcement would, if successful, "merely inhibit[]" those acts as opposed to "restrain[ing]" them. *Id.* at 1133. And thus the merits of the plaintiff's suit could be reached.

Shortly after *Direct Marketing*, the D.C. Circuit distinguished it in *Florida Bankers* with then-Judge Kavanaugh writing for the majority. 799 F.3d at 1069. At issue in *Florida Bankers* were the meanings of "tax" and "for the purpose of" as used in the AIA. *See* 26 U.S.C. § 7421(a).

With regard to "tax," the court asked whether that term covers a "penalty" imposed to enforce a "tax-related statutory or regulatory requirement." *Fla. Bankers*, 799 F.3d at 1067. The court explained that while "[t]he answer to that question is often no . . . the Tax Code defines some penalties as taxes for purposes of the [AIA]." *Id.* "In those cases, the [AIA] ordinarily applies because the suit, if successful, would invalidate the regulation and thereby directly prevent [the] collection of [that] tax." *Id.* The court held that this is exactly what occurs when the penalty at issue is located in Chapter 68, Subchapter B of the Tax Code. *Id.* In 26 U.S.C. § 6671(a), the Tax Code explicitly defines such penalties as taxes for the purposes of the AIA, and that practice has been "clear[ly] and unequivocal[ly]" acknowledged by the Supreme Court. *Id.* at 1068. Specifically, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, the Court explained:

> Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the [AIA]. For example, 26 U.S.C. § 6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" Subchapter 68B of the [Tax] Code. Penalties in Subchapter 68B are thus treated as taxes under Title 26, which includes the [AIA].

567 U.S. 519, 544, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012). Thus, the court in *Florida Bankers* reasoned that the relevant "tax" in its AIA analysis was the penalty — located in Chapter 68, Subchapter B — that would be imposed upon violation of the challenged regulation. 799 F.3d at 1068.

It is on this basis that the court distinguished *Direct Marketing*. The penalty in that case "was not itself a tax, or at least it was never argued or suggested that the penalty in that case was itself a tax." *Id.* at 1069. The court explained that "[i]f the penalty here were not itself a tax, the [AIA] would not bar this suit. But because this penalty is deemed a tax by Section 6671(a), the [AIA] bars this suit as premature." *Id.* In other words, unlike in *Direct Marketing*, the tax in *Florida Bankers* was not "two or three steps removed from the regulation in question." *Id.* Rather, "because the Code define[d] the penalty as a tax, a tax [was] imposed as a direct consequence of violating the regulation." *Id.* And "[i]nvalidating the regulation would directly bar collection of *that* tax." *Id.* (emphasis added). This distinction put the complaint in *Florida Bankers* "at the heartland of the [AIA]." *Id.* at 1070.

With regard to "for the purpose of," the court rejected the argument that even if the penalty were a tax, the case was still not within the purview of the AIA because the plaintiffs sought relief not from the penalty but from the underlying regulatory mandate. *Id.* ("[Plaintiffs] contend instead that they are seeking relief from a regulatory mandate that exists separate and apart from the assessment or collection of taxes."). The court held that "plaintiffs cannot evade the [AIA] by purporting to challenge only the regulatory aspect of a regulatory tax;" the AIA "cannot be sidestepped by such nifty wordplay." *Id.* And in doing so, the court relied on (1) a line of Supreme Court cases describing the "circular" nature of that argument and looking only to whether the relief sought "would necessarily preclude" the collection of taxes within the meaning of the AIA, *Bob Jones Univ.*, 416 U.S. 725, 732, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974); *see also Alexander v. "Americans United", Inc.*, 416 U.S. 752, 760, 94 S. Ct. 2053, 40 L. Ed. 2d 518 (1974); *Bailey v. George*, 259 U.S. 16, 42 S. Ct. 419, 66 L. Ed. 816, 1922-2 C.B. 342, T.D. 3347 (1922), (2) the Supreme Court's "recent[] indicat[ion]" in *NFIB* that that argument is meritless, *see* 567 U.S. at 546, and (3) the policy implications of accepting that argument, *see Fla. Bankers*, 799 F.3d at 1071 ("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 [AIA] to dust in the context of challenges to regulatory taxes."). *Id.* at 1070-71. Thus, the court refused to give any significance to the part of the regulation the plaintiffs purportedly sought to challenge.

Based on these definitions, the court in *Florida Bankers* held that the AIA barred the plaintiffs' suit. The plaintiffs had sought to enjoin the enforcement of an IRS regulation requiring banks to report certain interest payments made to account holders. *Id.* at 1067. The court began with its holding that the relevant tax for its AIA analysis was the penalty that the banks would have to pay if they violated the reporting requirements, *not* the account-holder taxes the collection of which those requirements were designed to facilitate. *Id.* at 1068. The court then reasoned that the plaintiffs' suit would, if successful, "invalidate the reporting requirement and restrain (indeed eliminate) the assessment and collection of the tax paid for not complying with [it]." *See id.* at 1067, 1072. Accordingly, the suit was "for the purpose of restraining the assessment or collection of a tax," and the merits could not be reached. *Id.*

Against this backdrop, Plaintiff asserts that *Direct Marketing* controls, analogizing the TIA to the AIA and the Colorado law to the Notice. Defendants assert that *Florida Bankers*, distinguishing *Direct Marketing*, is more persuasive. We agree with Defendants, as *Florida Bankers* is directly on point, consistent with *Direct Marketing*, and in accordance with a broader survey of Supreme Court and circuit court precedent. Plaintiff's reply brief provides a useful structure for illustrating this conclusion.

First, Plaintiff contends that "[t]he purpose of this suit is not to restrain the assessment or collection of *taxes*." (Reply Brief for Appellant at 6.) Plaintiff argues that the penalties imposed for violation of the Notice's requirements are not taxes for purposes of the AIA, and that the only remaining taxes that the Notice implicates are the "nebulous down-stream" taxes of third parties. (*Id.*) This argument is unpersuasive.

The third-party taxes the collection of which the Notice is designed to facilitate are not the relevant taxes for this AIA analysis. The relevant taxes are instead the penalties imposed for violation of the Notice's requirements. Like the penalty in *Florida Bankers*, the penalties here are all located in Chapter 68, Subchapter B of the Tax Code, and as a result are treated as taxes themselves for purposes of the AIA. The Supreme Court has explained as much. *See NFIB*, 567 U.S. at 544. We have held as much. *See*

Thomas More Law Ctr. v. Obama, 651 F.3d 529, 540 (6th Cr. 2011), *abrogated on other grounds by NFIB*, 567 U.S. at 519.[5] And other circuits have consistently held as much. *See, e.g., Nuttelman v. Vossberg*, 753 F.2d 712, 714 (8th Cir. 1985); *Herring v. Moore*, 735 F.2d 797, 798 (5th Cir. 1984); *Souther v. Mihlbachler*, 701 F.2d 131, 132 (10th Cir. 1983); *Prof'l Eng'rs, Inc. v. United States*, 527 F.2d 597, 599 (4th Cir. 1975).

Second, Plaintiff contends that "[t]he purpose of this suit is not to restrain the *assessment or collection* of taxes." (Rely Brief for Appellant at 11.) Plaintiff

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5. In *Thomas More Law Ctr.*, we explained at length that:

> In many contexts, the law treats "taxes" and "penalties" as mutually exclusive. . . . [but] [o]ther provisions of the Internal Revenue Code, to be sure, show that *some* "penalties" amount to "taxes" for purposes of the [AIA]. Not surprisingly, for example, Chapter 68 of the Revenue Code imposes "penalties" on individuals who fail to pay their "taxes." Less obviously, but to similar effect, subchapter B of chapter 68 of the Revenue Code imposes other "penalties" related to the enforcement of traditional taxes. Under section 6671, "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by [subchapter B of chapter 68]." All of these "penalties" thus count as "taxes," including for purposes of the [AIA]. Otherwise, the recalcitrant tax protester could sue to preempt collection of a substantial monetary charge (accumulated penalties and interest) but not what will often be a smaller charge (the tax owed).

651 F.3d at 539 (internal citations omitted).

argues that the "information gathering" and "records maintenance" requirements of the Notice are focused on the act of reporting to the taxing authority information used to determine tax liability, not the discrete, subsequent acts of assessment or collection of that liability. (*Id.*) This argument misses the mark.

While it is true that information reporting is a separate step in the taxation process that occurs before assessment or collection, *see Direct Marketing*, 135 S. Ct. at 1130, Plaintiff's argument presupposes that the relevant taxes in this AIA analysis are the third-party taxes the collection of which the Notice is designed to facilitate. As previously discussed, that is incorrect. Like the challenged regulation in *Florida Bankers*, the Notice is indeed "two or three steps removed" from any third-party taxes. 799 F.3d at 1069. But once it is established that the relevant tax is the penalty imposed for violation of the Notice's requirements, it becomes clear that Plaintiff's suit *is* focused on *that* tax's assessment or collection. Plaintiff's suit seeks to invalidate the Notice, which is the entire basis for that tax. If successful, Plaintiff's suit would "restrain (indeed eliminate)" it. *Id.* at 1067.

Third, Plaintiff contends that "[t]he purpose of this suit is not to *restrain* the assessment or collection of taxes. (Reply Brief for Appellant at 15.) Plaintiff argues that under the narrower definition of "restrain" articulated in *Direct Marketing*, its suit would not restrain any tax's assessment or collection. This argument also misses the mark, for the same reason as Plaintiff's prior argument.

If the relevant taxes in this AIA analysis were the third-party taxes, and *if* we decided that the *Direct Marketing* definition of "restrain" should be extended from the TIA to the AIA, then Plaintiff's argument would likely have merit. Yet, as previously discussed, the former proposition is incorrect. And as a result, we need not engage with the latter. Even assuming *arguendo* that the *Direct Marketing* definition should be extended to the AIA,[6] Plaintiff's suit "would have the effect of restraining — *fully stopping*" the IRS from collecting the penalties imposed for violating the Notice's requirements. *See Maze v. Internal Revenue Serv.*, 862 F.3d 1087, 1092, 430 U.S. App. D.C. 250 (D.C. Cir. 2017) (emphasis added) (also assuming extension of the *Direct Marketing* definition *arguendo*). Plaintiff admits as much. (*See* Rely Brief for Appellant at 7) ("[I]t is true that the IRS certainly could never collect any penalties . . . for noncompliance if Notice 2016-66 is struck down.").

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6. Whether the *Direct Marketing* definition should be extended from the TIA to the AIA is unclear. The Tenth Circuit chose not to do so in *Green Solution Retail, Inc. v. United States*, 855 F.3d 1111, 1118 (10th Cir. 2017). In that case, the court explained that one of the two reasons behind the Supreme Court's choice of the narrower definition in *Direct Marketing* was the fact that it was surrounded by "enjoin" and "suspend," both of which are terms of art in equity, and both of which are absent from the AIA. *Id.* at 1119. In light of that difference, the court in *Green Solution* held that *Direct Marketing* did not implicitly overrule its prior cases applying the broad definition of "restrain." *Id.* at 1116. This circuit has similar precedent. *See, e.g., Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982) ("The [AIA] is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes.") (internal quotations omitted).

Fourth, Plaintiff contends that "[t]he *purpose* of this suit is not to restrain the assessment or collection of taxes." (Reply Brief for Appellant at 18.) Plaintiff argues that its suit is challenging the Notice's regulatory requirement and not the penalty. This argument, though intuitive at first glance, is unpersuasive.

Any distinction that once existed in the Supreme Court's AIA jurisprudence between "regulatory" taxes and "revenue-raising" taxes appears to have been "abandoned." *Fla. Bankers*, 799 F.3d at 1070; *see also Bob Jones*, 416 U.S. at 741 n.12. In *Bob Jones*, the Court instead emphasized the effect of the plaintiff's suit. It held that where the relief sought would "necessarily preclude" the assessment or collection of the relevant tax, the suit "falls squarely within the literal scope" of the AIA and federal courts lack jurisdiction over it. *Bob Jones*, 416 U.S. at 731. Yet, the Court has made clear that the purpose of the suit is still a factor in any AIA analysis. In *Bob Jones*, the Court noted that there was little doubt that a "primary purpose of [the suit]" was to prevent assessment or collection of the relevant tax, regardless of how the challenge was characterized. *Id.* at 738. And in *Alexander*, the Court similarly noted that the "obvious purpose of [the suit]" was to prevent assessment or collection of the relevant tax, regardless of how the challenge was characterized. 416 U.S. at 761.

The Court thus seems willing to infer a purpose to restrain the assessment or collection of taxes in instances where it appears that the plaintiff is — in the words of the D.C. Circuit — trying to "sidestep" the AIA with "nifty wordplay." *Fla. Bankers*, 799 F.3d at 1070; *see also Alexander*, 416 U.S. at 761 ("The [plaintiff's purported] goal is merely a restatement of the [the plaintiff's actual goal] and can be accomplished only by restraining the assessment and collection of a tax in contravention of [the AIA]."); *Z Street v. Koskinen*, 791 F.3d 24, 28-30, 416 U.S. App. D.C. 201 (D.C. Cir. 2015) ("In other words, unlike the plaintiffs in *Bob Jones* and [*Alexander*], Z Street does not have the 'obvious purpose' of [restraining the assessment of collection of taxes]."). Relying largely on these cases, the court in *Florida Bankers* paid even less mind to the subjective purpose of the suit, holding unequivocally that "[a] challenge to a regulatory tax comes within the scope of the [AIA], even if the plaintiff claims to be targeting the regulatory aspect of the regulatory tax." 799 F.3d at 1070-71. The court explained that a challenge to the regulatory aspect of a regulatory tax is "necessarily" also a challenge to the tax aspect of a regulatory tax because invalidating the former would "necessarily" invalidate latter. *Id.* at 1071.

Nevertheless, a panel of this Court recently seemed prepared to recognize the distinction urged by Plaintiff and subsequently rejected by the *Florida Bankers* court. *See Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), *vacated by Autocam Corp. v. Burwell*, 573 U.S. 956, 134 S. Ct. 2901, 189 L. Ed. 2d 852 (2014) ("The plaintiffs seek to enjoin a part of the coverage requirements imposed by the [ACA] mandate, not the IRS's mechanism for collecting 'tax' from noncompliant employers. Such suits are common in other regulatory contexts . . . ."). But *Autocam* was decided before *Florida*

Bankers, dedicated few words to its AIA analysis, and in any event, having been vacated by the Supreme Court, is no longer good law. *See Hill v. Marshall*, 962 F.2d 1209, 1213 (6th Cir. 1992). Additional cases cited by Plaintiff and by the dissent in *Florida Bankers* in support of this distinction are similarly unhelpful.[7]

Ultimately, especially in light of the Supreme Court's rule favoring "clear boundaries" in the interpretation of jurisdictional statutes, *see Direct Marketing*, 135 S. Ct. at 1131, we find the D.C. Circuit's recent, unequivocal pronouncement on this issue in *Florida Bankers* persuasive. As the Supreme Court has explained "time and again," the AIA is "more than a pleading exercise," and to allow Plaintiff's argument to succeed would "reduce the [AIA] to dust in the context of challenges to regulatory taxes." *Fla. Bankers*, 799 F.3d at 1071. A challenge to a regulatory tax comes within the scope of the AIA, even if the plaintiff claims to be targeting the regulatory aspect of

7. In *Seven-Sky v. Holder*, 661 F.3d 1, 8-9, 398 U.S. App. D.C. 134 (D.C. Cir. 2011), *abrogated on other grounds by NFIB*, 567 U.S. at 519, the D.C. Circuit noted that "[t]he harms appellants allege . . . exist as a result of the [ACA coverage] mandate, not the penalty. . . . The individual mandate and the shared responsibility payment create different legal obligations, for different categories of people, at different times." But the D.C. Circuit's more recent decision in *Florida Bankers* deemed that passage dicta. *See* 799 F.3d at 1072 n.3. Additionally, in *Korte v. Sebelius*, 735 F.3d 654, 669 (7th Cir. 2013) and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013), the courts emphasized that the regulation at issue was a separate provision of the U.S. Code structured not as a predicate to the imposition of a tax, but as a mandate enforceable by a variety of different mechanisms. That is not the case here.

the regulatory tax, because a challenge to the regulatory aspect of a regulatory tax is necessarily also a challenge to the tax aspect of a regulatory tax. *Id.* Invalidating the former would "necessarily" invalidate the latter. *Id.*

In sum, we hold that Plaintiff's complaint seeking to enjoin the enforcement of the Notice is properly characterized as a "suit for the purpose of restraining the assessment or collection of any tax." *RYO*, 696 F.3d at 471 (quoting 26 U.S.C. § 7421(a)). Thus, Plaintiff's complaint is within the purview of the AIA and the district court does not have subject matter jurisdiction over it unless an exception applies.[8]

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8. The dissent poses a hypothetical that it finds problematic in light of our holding: a reporting requirement discriminatorily imposed upon a protected class and enforced by a penalty located in Chapter 68, Subchapter B of the Tax Code. *See* Dis. Op. at 19. According to the dissent, the AIA could not bar a preemptive challenge to this requirement, "without warping the meaning of the statute beyond recognition," at least in part because the purpose of the suit plainly would be "to end discriminatory action by the Government," not to enjoin the assessment or collection of a tax. *Id.*

What troubles the dissent about its hypothetical result is not entirely clear. To the extent that it is the clarity of the purpose of such a suit that troubles the dissent, the same purpose would clearly underlie, for instance, a preemptive challenge to tax investigations discriminatorily targeted at a protected class; yet that challenge would likely be barred by the AIA. *See, e.g., Clavizzao v. United States*, 706 F. Supp. 2d 342, 346 (S.D.N.Y. 2009) ("[U]nder the [AIA], a plaintiff cannot even seek an injunction preventing the IRS from investigating tax liabilities in an allegedly discriminatory or harassing fashion."). To the extent that it is the constitutional nature of such a suit that troubles the dissent, "decisions of [the Supreme] Court make it unmistakably clear that the constitutional

2. Whether this case falls into an exception to the AIA

As noted above, the statutory and judicial exceptions to the AIA are few and circumscribed. *See RYO*, 696 F.3d at 471. Plaintiff asserts that this case falls into the judicial exception created by the Supreme Court in *South Carolina v. Regan*, 465 U.S. 367, 104 S. Ct. 1107, 79 L. Ed. 2d 372 (1984). In that case, South Carolina sought to enjoin a federal law that made interest on state-issued bearer bonds taxable. *Id.* at 370. The Court allowed the merits of this challenge to be reached, even though it was within the purview of the AIA, because there was no "alternative legal avenue" by which South Carolina could challenge the legality of the tax. *Id.* at 373. South Carolina did not bear the tax itself — the bondholders did — and as a result South Carolina lacked the legal avenues available to the bondholders. *Id.* at 378. Without a newly crafted exception to the AIA, it had no way to challenge the law's constitutionality. *Id.*

nature of a taxpayer's claim . . . is of no consequence" under the AIA; "the taxpayer must succumb to an unconstitutional tax, and seek recourse only after it has been unlawfully exacted." *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 10, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008) (quotation omitted) (alteration in original). And to the extent that it is the treatment of certain penalties as taxes for purposes of the AIA that troubles the dissent, we are bound by the Supreme Court's allowance of that practice, whatever its merits or shortcomings. *See NFIB*, 567 U.S. at 544 ("Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the [AIA].").

However, as these facts suggest, and as we have explained, "this exception is very narrow." *RYO*, 696 F.3d at 472. "Because of the strong policy animating the [AIA], and the sympathetic, almost unique facts in *South Carolina*, courts have construed the *South Carolina* exception very narrowly, undermining [the] plaintiff's efforts to fit its own claims within the confines of this exception." *Id.* (quotation omitted). As in *RYO*, this case "is distinguishable from *South Carolina* in various ways." *Id.*

Most significantly, the Supreme Court contrasted the facts of *South Carolina* with cases in which plaintiffs have "the alternative remedy of a suit for a refund." 465 U.S. at 374-75; *accord RYO*, 696 F.3d at 472. Plaintiff does not contest that it has this alterative remedy. Rather, Plaintiff challenges whether that remedy is sufficiently meaningful. Plaintiff contends that having to "break the law" by violating the Notice, and then sue for a refund, is "no remedy at all." (Brief for Appellant at 38-40.) Contrary to Plaintiff's contention however, that is exactly what the AIA is designed to require. The AIA "serves two related purposes," *Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982), "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to disputed sums be determined in a suit for refund." *Williams Packing*, 370 U.S. 1 at 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292. Thus, we hold that Plaintiff's complaint does not fall into the *South Carolina* exception to the AIA.

CONCLUSION

The broader legal context in which this case has been brought is not lost on this Court. Defendants "do not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those requirements." Hickman & Gerska, *supra*, at 1712-13. And despite the jurisdictional nature of this appeal, Plaintiff has made its thoughts on the merits abundantly clear, emphasizing that "Notice 2016-66's Issuance and Enforcement is an Obvious Violation of the APA." (Reply Brief for Appellant at 4.) But that does not in and of itself give federal district courts subject matter jurisdiction over suits seeking to enjoin the assessment or collection of taxes. Absent further instruction from Congress or the Supreme Court, such suits are barred by the AIA.

For the reasons set forth above, we **AFFIRM** the district court's dismissal.

DISSENT

NALBANDIAN, Circuit Judge, dissenting. Ordinarily, administrative law does not intend to leave regulated parties caught between a hammer and an anvil. That is why the Supreme Court has recognized a norm in favor of pre-enforcement judicial review of final agency action. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Judicial review obviates the dilemma of either complying with potentially unlawful (and onerous) regulations or "risk[ing] prosecution." *Id.* at 152. But that is the choice CIC Services is left with today. The majority holds that the Anti-Injunction Act bars us from reviewing CIC's pre-enforcement challenge of an Internal Revenue Service reporting requirement.[1] I disagree.

The Anti-Injunction Act bars all "suit[s] for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). This provision ensures the "prompt collection" of the Government's "lawful revenue." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962). It allows the Government "to assess and collect taxes alleged to be due without judicial intervention" by requiring taxpayers to seek relief in a refund suit, *after* the disputed tax is paid. *Id.* The question here is whether CIC's challenge falls within

1. Here, references to the Anti-Injunction Act also refer to the tax exception to the Declaratory Judgment Act, both of which are "to be interpreted coterminously." *Ecclesiastical Order of the ISM of AM, Inc. v. Internal Revenue Serv.*, 725 F.2d 398, 404-05 (6th Cir. 1984).

this statute: Is it a "suit for the purpose of restraining the assessment or collection of any tax?" 26 U.S.C. § 7421(a).

Perhaps at some level of abstraction, it could be. CIC seeks to enjoin an IRS notice that requires it to report certain transactions and to maintain a (reportable) list of clients who engage in those transactions. *See* Notice 2016-66, 2016-47 I.R.B. 745. CIC contends that the IRS promulgated the notice in violation of the Administrative Procedure Act and the Congressional Review Act.

Of course, the reports themselves are not taxes. Nor do they necessarily contain information showing that CIC or its clients owe taxes. And CIC does not allege tax liability as its injury. Rather, it takes issue with the hundreds of hours of labor and tens of thousands of dollars the requirement will cost to comply with. And all so that, CIC argues, the IRS can unfairly and publicly portray its "industry as one filled with crooked operatives and tax scammers." Put simply, this is not a dispute over taxes.

That said, the IRS promulgated the notice because the agency "lack[s] sufficient information to identify which" transactions have a potential for tax avoidance and which do not. 2016-47 I.R.B. 745. Presumably, once the IRS uses the reported information to identify which ones do, there will be tax consequences for some taxpayers. So it is plausible that CIC's challenge could eventually hinder the assessment and collection of taxes down the road.

But is that enough to trigger the Anti-Injunction Act? According to *Direct Marketing Ass'n v. Brohl*, 135 S. Ct.

1124, 191 L. Ed. 2d 97 (2015), the answer is a resounding "No." What *Direct Marketing* taught us in interpreting the similarly worded Tax-Injunction Act is that the text of the statute is paramount. And a suit to enjoin the enforcement of a *reporting requirement* is not a "suit for the purpose of restraining the *assessment* or *collection* of any tax." 26 U.S.C. § 7421(a) (emphases added).

As the Supreme Court explained there, "information gathering" (such as the reporting requirement here) is "a phase of tax administration procedure that occurs *before* assessment . . . or collection." *Direct Marketing*, 135 S. Ct. at 1129 (emphasis added). "'Assessment' is the next step in the process, and it refers to the official recording of a taxpayer's liability." *Id.* at 1130. But that does not occur until "*after* information relevant to the calculation of that liability is reported to the taxing authority." *Id.* (emphasis added). And "collection" comes even later. *See id.* It is the "act of obtaining payment of taxes due." *Id.* To be sure, the Court acknowledged that "assessment" and "collection" could be understood more broadly. *See id.* at 1130-31. But no matter how broadly those terms might stretch, they refer to phases in the process distinct from "information gathering." *See id.*

And so, the Court reasoned, the Tax-Injunction Act "is not keyed to all activities that may improve [the Government's] ability to assess and collect taxes." *Id.* at 1131. "Such a rule would be inconsistent not only with the text of the statute, but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Id.* District courts may not "restrain"—i.e., "enjoin," "stop," or "prohibit"[2] —the "assessment" or "collection" of taxes. *Id.* at 1132. "[A]nd enforcement of . . . reporting requirements is none of these." *Id.* at 1131.

Although *Direct Marketing* appears to settle the matter, the Government notes a distinction between that case and this one. In *Direct Marketing*, the penalty that enforced the reporting requirement "was not itself a tax"—or at least no one argued that it was. *Florida Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1069, 419 U.S. App. D.C. 31 (D.C. Cir. 2015). Here,

2. In *Direct Marketing*, the Court opted to give "restrain" this narrower meaning as opposed to its broader meaning, which would apply to suits that "merely *inhibit*" assessment or collection. 135 S. Ct. at 1132. The majority nevertheless cautions that it is "unclear" that "restrain" carries the same meaning in the Anti-Injunction Act that it does in the Tax-Injunction Act. But the Court explained that the words used in both statutes "are generally used in the same way." *Id.* at 1129. It also justified giving "restrain" its narrower meaning, in part, on the fact that, in the Tax-Injunction Act, "restrain" operates "on a carefully selected list of technical terms—'assessment, levy, collection'—not on an all-encompassing term, like 'taxation.'" *Id.* at 1132. To give restrain its broader meaning, the Court reasoned, "would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.'" *Id.* The only difference between the Anti-Injunction Act and the Tax-Injunction Act in that respect is that the former omits the word "levy" from its text. Finally, the Court explained that the "narrower definition is consistent with the rule that '[j]urisidictional rules should be clear.'" *Id.* at 1133 (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 321, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005) (Thomas, J., concurring) (alteration in original)). These reasons militate in favor of giving "restrain" its narrower meaning in the Anti-Injunction Act, too.

in contrast, the reporting requirement is enforced by penalties in Chapter 68, Subchapter B of the Tax Code. *See* 26 U.S.C. §§ 6707, 6707A, 6708. And the Tax Code deems those penalties "taxes." 26 U.S.C. § 6671(a).

So the specific issue here is whether a reporting requirement that is enforced by a "tax" is shielded from pre-enforcement judicial review under the Anti-Injunction Act. The majority adopts the reasoning of *Florida Bankers* to answer that question affirmatively.

In *Florida Bankers*, a divided panel of the D.C. Circuit held that the Anti-Injunction Act barred a similar suit challenging the legality of a reporting requirement that the IRS enforced with a tax. *See* 799 F.3d at 1072. That is because, the court reasoned, the tax is "imposed as a direct consequence of violating the regulation," and so "[i]nvalidating the regulation would directly bar collection of that tax." *Id.* at 1069. For the D.C. Circuit majority, this distinguished the case from *Direct Marketing* because "the tax . . . is not two or three steps removed from the regulation in question." *Id.* In other words, there was no attenuation between the assessment and collection of the tax, on the one hand, and invalidating the regulation on the other.

That misses the mark. Enjoining a reporting requirement enforced by a tax does *not* necessarily bar the assessment or collection of that tax. That is because the tax does not result from the requirement per se. The only way for the IRS to assess and collect the tax is for a party to *violate* the requirement. So enjoining the requirement only stops the assessment and collection of the tax in the sense that a party cannot first violate the requirement and then become liable for the tax. Surely, this is the kind of attenuated relationship between "restrain," "assessment," and "collection" that *Direct Marketing* rejected. At best, the difference is one of degree—there may not be three steps of attenuation here or in *Florida Bankers*, but there certainly is attenuation.[3]

The *Florida Bankers* court would reject this reasoning as "nifty wordplay." *Id.* at 1070. To show why it is not, consider this hypothetical: Imagine if the IRS notice here unlawfully discriminated against a group of Americans by subjecting only that group to its reporting requirement. The logic of *Florida Bankers* would require us to characterize an Equal Protection challenge to the discriminatory notice as a "suit for the purpose of restraining the assessment or collection of [a] tax"

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3. And, unsurprisingly, commentators have recognized the tension between *Florida Bankers* and *Direct Marketing*. *See, e.g.*, Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1685 (2017) ("*Florida Bankers* also arguably contradicts the Supreme Court's reading in *Direct Marketing Ass'n v. Brohl* of the similarly worded Tax Injunction Act . . . ."); Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 Wash. L. Rev. 1317, 1368 (2017) ("*Direct Marketing* is seemingly at odds with another case, discussed in the prior Part, *Florida Bankers Ass'n v. Department of Treasury*."); Patrick J. Smith, *D.C. Circuit in Florida Bankers Misapplies Anti-Injunction Act*, 149 Tax Notes 1493, 1493 (Dec. 21, 2015) ("This report explains how the majority opinion in *Florida Bankers* is inconsistent with *Direct Marketing*, as well as D.C. Circuit precedent on the AIA.").

simply because it is enforced by a penalty in Chapter 68, Subchapter B of the Tax Code.[4] Intuitively, we know that description cannot stand without warping the meaning of the statute beyond recognition. No one thinks that the plaintiffs in that hypothetical case would care about enjoining the collection of a tax. The *purpose* of the suit would be to end discriminatory action by the Government. And yet the tax in that hypothetical is no further removed from the notice there than the tax in this case is removed from the notice here.

The *Florida Bankers* court dismissed an argument based on similar reasoning, stating, "plaintiffs cannot evade the Anti-Injunction Act by purporting to challenge only the regulatory aspect of a regulatory tax." *Id.* In doing so, the court mainly relied on *Bob Jones University v. Simon*, 416 U.S. 725, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974) and *Alexander v. "Americans United", Inc.*, 416 U.S. 752, 94 S. Ct. 2053, 40 L. Ed. 2d 518 (1974). Both cases involved non-profit organizations that brought constitutional challenges to IRS letter-rulings revoking their tax-exempt status. *See Bob Jones*, 416 U.S. at 735-36; *Alexander*, 416 U.S. at 755-56. And the plaintiffs in both cases argued that the purpose of their suits was "to ensure that donors seeking tax deductions would continue to contribute to their organizations," not to restrain the assessment or collection of taxes. *Seven-Sky v. Holder*, 661 F.3d 1, 10, 398 U.S. App. D.C. 134 (D.C. Cir. 2011),

4. To be sure, the court in *Florida Bankers* suggested that the regulation would have to be "tax-related." 799 F.3d at 1067. But, as the hypothetical demonstrates, one can imagine any number of pernicious regulations that could be made to fit that description.

abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

But the critical distinction between those cases and this one is that "challenges to IRS letter-rulings revoking tax-exempt status are *inextricably linked* to the assessment and collection of taxes." *Id.* The direct consequence of the IRS letter-rulings for both cases was that the organization became liable for federal unemployment taxes. *Bob Jones*, 416 U.S. at 730; *Alexander*, 416 U.S. at 755. In fact, "the *only* injuries plaintiffs identified involved tax liability." *Seven-Sky*, 661 F.3d at 10. So the Supreme Court unsurprisingly saw through the plaintiffs' arguments and held that each suit was barred by the Anti-Injunction Act because, if successful, each would "necessarily preclude" the collection of taxes. *Bob Jones*, 416 U.S. at 732; *see also Alexander*, 416 U.S. at 761.

That is not the case here. The regulation that CIC seeks to enjoin does not directly result in any tax liability. Indeed, the IRS cannot even assess the tax unless Plaintiff first violates the regulation. This attenuation means that, unlike in *Bob Jones* or *Alexander*, an injunction does not "necessarily preclude" an assessment or collection of taxes. This also alleviates any worry that plaintiffs could avoid the Anti-Injunction Act by always recharacterizing their suits as challenges to a regulation instead of a tax. Plaintiffs may make those arguments, but as in *Bob Jones* and *Alexander*, they will often fail.

The other case that the *Florida Bankers* court substantially relied on, *NFIB v. Sebelius*, is not to the contrary. There, the plaintiffs argued that the Anti-Injunction Act should not apply since they were challenging a regulatory mandate to purchase health insurance, not the penalty for failing to purchase the insurance. *Florida Bankers*, 799 F.3d at 1071. Though the Supreme Court agreed that the Anti-Injunction Act did not apply, it did so because it held that the penalty at issue was not a tax under the statute. *Id.* The *Florida Bankers* court read the decision to mean that "the Anti-Injunction Act would have applied if the penalty were a tax under the Act." *Id.* It gave two reasons for reaching that conclusion. First, it relied on the Supreme Court's statement that because the penalty was not a tax under the Anti-Injunction Act, the statute did not apply, and so the Court could go on to reach the merits. *Id.* Second, the court noted that the Supreme Court failed to expressly address plaintiffs' argument despite "the extensive briefing and [oral] argument focused on [it]." *Id.*

But as Judge Henderson explained in her dissent, the first reason falls victim to the fallacy of "denying the antecedent." *Id.* at 1080 (Henderson, J., dissenting). Stated abstractly, it means one is wrong to assume that because a conditional premise is true, so is its inverse. *See id.* (citing *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370, 404 U.S. App. D.C. 66 & n.3 (D.C. Cir. 2013)). Stated in terms of this case, it means one is wrong to assume that a suit implicating a tax triggers the Anti-Injunction Act simply because a suit not implicating a tax does not trigger the Anti-Injunction Act.

On top of that, and again as Judge Henderson noted, the first reason is not textually sound. *Id.* Even if a suit implicates a tax, that does not mean it is necessarily barred by the Anti-Injunction Act: "the suit may nonetheless not seek to 'restrain[] the assessment or collection' of said tax." *Id.* (alteration in original) (quoting 26 U.S.C. § 7421(a)).

The second reason is inherently speculative and, regardless, cuts in both directions. For it is just as likely that the Supreme Court intentionally avoided the issue since it was unnecessary to reach in that case. At bottom, the *NFIB* Court never said that pre-enforcement review of a regulatory mandate is barred under the Anti-Injunction Act simply because it is enforced by a tax. A search for that proposition in the opinion leaves one emptyhanded.

More importantly, the *NFIB* Court did not have the benefit of its later decision in *Direct Marketing*. We do. And there the Court did not mince its words: "[E]nforcement of . . . reporting requirements is" neither "assessment" nor "collection." 135 S. Ct. at 1131. Nothing in the Court's decision causes me to think it would have held differently if someone had argued that the $5 or $10 penalties in that case were taxes.

Under the majority's decision, CIC now only has two options: (1) acquiesce to a potentially unlawful reporting requirement that will cost it significant money and reputational harm or (2) flout the requirement, i.e., "break the law," to the tune of $50,000 in penalties for *each* transaction it fails to report. *See* 26. U.S.C. § 6707(a)-(b). Only if it (or someone else) follows the latter path—and only when (or if) the Government comes to collect the penalty—will any court be able to pass judgment on the legality of the regulatory action.

Moreover, plaintiffs who do follow that path are not only subject to financial penalties but also criminal penalties.[5] The Tax Code makes it a misdemeanor for any person who "willfully fails" to "make any return, keep any records, or supply any information" required under its title and its regulations. 26 U.S.C. § 7203. And it fines that person $25,000 ($100,000 if it's a corporation). *See id.*

In other words, the only lawful means a person has of challenging the reporting requirement here is to violate the law and risk financial ruin and criminal prosecution. That is probably enough to test the intestinal fortitude of anyone. And it leaves CIC in precisely the bind that pre-enforcement judicial review was meant to avoid. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'") (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)); *MedImmune, Inc.*, 549 U.S. at 128-29 ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172, 87 S. Ct. 1526, 18 L. Ed. 2d 704 (1967) (concluding that a "proposed avenue of review [] beset with penalties and other impediments [is] inadequate as a satisfactory alternative to [pre-enforcement review]").

5. If that seems like it must be wrong, think again. The Government's only response to whether it could criminally prosecute a person seeking judicial review for failing to supply the required information was that it was "not clear." [Government's Br. at 58.]

That might not be so alarming if this predicament was confined to this notice. But at least two commentators predict that the reasoning of *Florida Bankers* would apply to "most if not all Treasury regulations and IRS guidance documents." Kristin E. Hickman & Gerald Kersa, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1685 (2017). The inevitable consequence of our decision today is that "many" of those regulations and guidance documents will be rendered "effectively unreviewable." *Id.* at 1686. In the process, something more may be lost than the private stakes in each meritorious case that would have otherwise been brought. And that is, "public confidence in the quality and legitimacy of agency action" for which judicial review was meant to serve as a protective bulwark. *Id.*

And to what end? The chief "evil[]" the Anti-Injunction Act sought to ward off was undue judicial "interfere[nce] with the process of collecting the taxes on which the government depends for its continued existence." *State R. Tax Cases*, 92 U.S. 575, 613, 23 L. Ed. 663 (1875). But the reporting requirement here generates no revenue for the Government. And the point of the penalty is to incentivize compliance with the requirement—not to incentivize its own assessment and collection. So it is not at all clear to me that barring CIC's suit serves the purpose of the Anti-Injunction Act. Indeed, the opposite appears true.

If all this seems rather anomalous, that is because it is. In the typical Anti-Injunction Act case, a plaintiff seeks to prevent some imminent process of assessment or collection relating to the taxes that he owes for a given year. *See, e.g., Tatar v. United States*, No. 17-2088, 2018 U.S. App. LEXIS 10406, 2018 WL 2247497 at *1 (6th Cir.

Apr. 24, 2018) (unpublished); *Dunlap v. Lew*, No. 16-3658, 2017 U.S. App. LEXIS 27874, 2017 WL 9496075 at *1 (6th Cir. June 2, 2017) (unpublished). To seek judicial review, all the plaintiff must do is (leaving aside some procedural hoops) pay the tax and sue for a refund. *See Dunlap*, 2017 U.S. App. LEXIS 27874, 2017 WL 9496075 at *2. In that way, the Anti-Injunction Act's goal of ensuring the Nation's efficient collection of tax revenues is fulfilled, and the plaintiff has every incentive to seek judicial review if he has a meritorious claim.

Contrast that with the situation here: the path to judicial review is fraught with threats of penalties, fines, and prosecution—all intended to encourage compliance with a reporting requirement that collects not a penny for the Government. The anomalous implications of today's decision should convince us that we have given an anomalous reading to the Anti-Injunction Act.

For these reasons, I would hold that the Anti-Injunction Act does not bar CIC's suit.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, FILED NOVEMBER 2, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

November 2, 2017, Filed

Case No. 3:17-cv-110

CIC SERVICES, LLC, and RYAN, LLC,

Plaintiffs,

v.

INTERNAL REVENUE SERVICE,
DEPARTMENT OF TREASURY, AND
THE UNITED STATES OF AMERICA,

Defendants.

Judge Travis R. McDonough

Magistrate Judge H. Bruce Guyton

MEMORANDUM OPINION

Before the Court is a motion to dismiss filed by Defendants, the Internal Revenue Service, the Department of Treasury, and the United States of

America. (Doc. 25.) Also before the Court is Plaintiffs CIC Services, LLC ("CIC"), and Ryan, LLC's ("Ryan") conditional motion for leave to amend. (Doc. 26.) For the reasons stated hereafter, Defendants' motion to dismiss (Doc. 25) will be **GRANTED**, and Plaintiffs' conditional motion for leave to amend (Doc. 26) will be **DENIED**.

I. BACKGROUND

On November 1, 2016, the Internal Revenue Service ("IRS") issued IRS Notice 2016-66 (the "Notice"). In the Notice, the IRS expressed concern that "micro-captive transactions"[1] had the potential for tax avoidance or evasion and classified these transactions as "transactions of interest" for the purposes of 26 C.F.R. § 1.6011-4 and 26 U.S.C. §§ 6011 and 6012. (Doc. 1-1, at 2-3.) Based on this classification, the Notice directs that: (1) "[p]ersons entering into these transactions on or after November 2, 2006, must disclose the transaction" to the IRS; and (2) "[m]aterial advisors who make a tax statement on or after November 2, 2006, with respect to transactions entered into on or after November 2, 2006, have disclosure and maintenance obligations under §§ 6111 and 6112" of the Internal Revenue Code.[2] (*Id.* at 12.) The Notice further provides that taxpayers and material advisors are

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1. For a definition of the transactions at issue, *see* Doc. 1-1, at 9-11.

2. A material advisor is any person "who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction," and who receives gross income for such activities in excess of certain thresholds. 26 U.S.C. § 6111(b)(1).

required to file a disclosure statement regarding these transactions prior to January 30, 2017, and that persons who fail to make required disclosures "may be subject to . . . penalty" under 26 U.S.C. §§ 6707(a), 6707A, and 6708(a). (*Id.* at 13, 15.) Finally, the Notice requests comment "on how the transaction might be addressed in published guidance." (*Id.* at 16.) On December 30, 2016, the IRS issued Notice 2017-08, which extended the deadline for required disclosure of the transactions at issue to May 1, 2017. (Doc. 1-2.)

On March 27, 2017, Plaintiffs initiated the present action.[3] (Doc. 1.) According to the allegations in their verified complaint, CIC is "a manager of captive insurance companies," and Ryan is a "broad-based accounting, consulting, and tax services corporation, which also manages captive insurance companies." (*Id.* at 3.) In these capacities, Plaintiffs assert that they are subject to the Notice's disclosure requirements for material advisors and that complying with the Notice's disclosure requirements will force them to incur significant costs. (*Id.* at 10.) Plaintiffs assert, however, that the Notice: (1) constitutes a "legislative-type rule" that fails to comply with mandatory notice-and-comment requirements

3. On December 28, 2016, CIC filed a similar complaint, which was assigned to District Court Judge J. Ronnie Greer. (*See* Case No. 3:16-cv-709.) On December 30, 2016, CIC voluntarily dismissed its previously filed complaint. CIC asserts that it voluntarily dismissed that case immediately following the IRS's issuance of Notice 2017-08, hoping that the IRS would ultimately eliminate or substantially modify the reporting requirements set forth in the Notice. (Doc. 9, at 11.)

under the Administrative Procedures Act ("APA"), 5 U.S.C. § 533, *et seq.*; (2) is "arbitrary and capricious and *ultra vires* in nature"; and (3) fails to comply with the requirements of the Congressional Review of Agency Rule-Making Act, 5 U.S.C. § 801, because the IRS failed to submit it to Congress and the Comptroller General. (*Id.* at 2.) Based on these allegations, Plaintiffs seek, among other things, a declaration under the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, that the Notice is invalid and an injunction prohibiting the IRS from enforcing the disclosure requirements set forth in the Notice based on the IRS's failure to comply with the APA's notice-and-comment requirements.

Shortly after filing their complaint, Plaintiffs moved the Court for a preliminary injunction prohibiting the IRS from enforcing the disclosure requirements set forth in the Notice. (*See* Doc. 8.) On April 21, 2017, the Court denied Plaintiffs' motion for preliminary injunction, reasoning, in part, that Plaintiffs were unlikely to succeed on the merits of their claims because such claims are likely barred by the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421. On May 30, 2017, Defendants moved to dismiss Plaintiffs' claims, arguing, among other things, that the Court lacks subject-matter jurisdiction. (Doc. 25.) Defendants' motion is now ripe for the Court's review.

II. STANDARD OF LAW

"A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) involves either a facial attack or a factual attack." *Glob.*

Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co., 807 F.3d 806, 810 (6th Cir. 2015). A facial attack "is a challenge to the sufficiency of the pleading," and, on such a motion, "the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). "A factual attack, on the other hand, is not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *Id.* "On such a motion, no presumptive truthfulness applies to the factual allegations, . . . and the court is free to weigh evidence and satisfy itself as to the existence of its power to hear the case." *Id.* (internal citations omitted).

In this case, because Defendants challenge the sufficiency of Plaintiffs' complaint, and because the Court will not be required to make any factual findings in deciding whether it has jurisdiction, the Court will consider Defendants' motion as a facial attack and take Plaintiffs' allegations as true for the purposes of ruling on the Rule 12(b)(1) motion.

III. ANALYSIS

Defendants primarily argue that the Court should dismiss Plaintiffs' claims because it lacks subject-matter jurisdiction due to the AIA and the tax exemption to the DJA. (Doc. 25-1, at 7.) In relevant part, the AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such *tax* was assessed." 26 U.S.C. § 7421 (emphasis added). Similarly, the DJA provides that a Court may "declare the rights and legal relations of any interested party seeking such declaration," except "with respect to Federal taxes . . . ." 28 U.S.C. § 2201(a). "The federal tax exemption to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." *Ecclesiastical Order of the ISM of AM, Inc. v. IRS*, 725 F.2d 398, 402 (6th Cir. 1984) (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 733, n.7, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974)). Defendants contend that Plaintiffs' claims and their requested injunction violate the AIA and the tax exemption to the DJA, because any ruling in Plaintiffs' favor will necessarily operate to restrain tax assessment and collection. (Doc. 25-1, at 13.)

Although the Notice provides that persons who fail to comply with it will be subject to "penalty" under 26 U.S.C. §§ 6707(a), 6707A, and 6708(a), the plain language of governing statutes establishes that such a "penalty" is a "tax" within the AIA's prohibition against injunctive relief. Specifically, 26 U.S.C. § 6671(a) provides:

> The penalties and liabilities provided by [Subchapter 68B] shall be paid upon notice and demand by the Secretary, and **shall be assessed and collected in the same manner as taxes**. Except as otherwise provided, **any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by [Subchapter 68B]**.

(emphasis added). Each of the penalty provisions referenced in the Notice is contained within Subchapter

68B of the Internal Revenue Code and must be considered a "tax" for the purposes of the AIA and the DJA.

The Supreme Court of the United States has agreed that penalties assessed under Subchapter 68B are properly considered taxes for the purpose of determining whether the AIA divests a court of jurisdiction. In *National Federation of Independent Business v. Sebelius*, the Supreme Court held that the AIA did not apply to a challenge of a "penalty" for noncompliance with the Affordable Care Act's individual mandate, because the "penalty" was not a "tax." 567 U.S. 519, 543-46, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012). The Supreme Court noted, however, that Congress can "describe something as a penalty but direct that it nonetheless be treated as a tax for the purposes of the [AIA]." *Id.* at 544. Describing such a legislative choice, the Supreme Court specifically pointed to 26 U.S.C. § 6671(a) and explained that "[p]enalties in Subchapter 68B are . . . treated as taxes under Title 26, which includes the [AIA]." *Id.*

Relying on this reasoning, the United States Court of Appeals for the D.C. Circuit recently held that the AIA barred a lawsuit challenging an IRS regulation that penalized U.S. banks that did not report certain interest payments. *Fla. Bankers Ass'n v. U.S. Dep't. of Treasury*, 799 F.3d 1065, 419 U.S. App. D.C. 31 (D.C. Cir. 2015). Because the penalty following a failure to report was prescribed in Subchapter 68B, it was to be considered a tax for the purposes of the AIA. *Id.* at 1068. Accordingly, the D.C. Circuit held the lawsuit effectively sought to restrain and to eliminate the assessment and collection of a tax and was barred by the AIA. *Id.* The D.C. Circuit noted specifically that its ruling did not prevent a bank from obtaining judicial review of the challenged regulation, but explained that the AIA contemplated judicial review only after a bank failed to report, paid the resultant penalty, and sued for a refund.[4] *Id.* at 1067.

Further, in *Florida Bankers Association*, the D.C. Circuit reaffirmed that plaintiffs cannot sidestep the AIA by ostensibly challenging only a reporting requirement and not the penalties imposed for violating that reporting requirement. *Id.* at 1072. The D.C. Circuit explained that a challenge to such a requirement is "necessarily also a challenge to the tax imposed for failure to comply with that reporting requirement" because "[i]f plaintiffs' challenge were successful, the IRS would be unable to assess or collect that tax for failure to comply with the reporting

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4. Relying on the Supreme Court's decision in *South Carolina v. Regan*, 465 U.S. 367, 104 S. Ct. 1107, 79 L. Ed. 2d 372 (1984), Plaintiffs also argue that the AIA does not bar a lawsuit when doing so would deprive a plaintiff of an adequate remedy at law. Plaintiffs assert that, in the absence of a preliminary injunction, they will never recover costs of compliance with the Notice or for harm to their businesses. *Regan*, however, does not support Plaintiffs' argument. As explained by the United States Court of Appeals for the Sixth Circuit, *Regan* creates an exception to the AIA only where "Congress has not provided an alternate avenue for an aggrieved party to litigate its claims." *RYO Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 472 (6th Cir. 2012). That is not the case here. As the D.C. Circuit recently held, the ability to initiate a refund suit after paying an assessed penalty provides an adequate alternate avenue to challenge IRS action. *See Maze v. IRS*, 862 F.3d 1087, 1093 (D.C. Cir. 2017).

requirement."[5] *Id.* at 1071-72; *see also RYO Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 471-73 (6th Cir. 2012).

In this case, Plaintiffs' claims and their requested injunction necessarily operate as a challenge to both the reporting requirement and the penalty or tax imposed for failure to comply with the reporting requirement. Because the Notice contemplates assessing penalties for non-compliance pursuant to 26 U.S.C. §§ 6707(a), 6707A, and 6708(a), all found within Subchapter 68B of the Internal Revenue Code, Plaintiffs seek, at least in part, to restrain the IRS's assessment or collection of a tax. Accordingly, the Court lacks subject-matter jurisdiction over Plaintiffs' claims because they are barred by the AIA and the tax exception to the DJA.

In their response brief, Plaintiffs request leave to amend "[i]n the event this Court concludes that the complaint should be dismissed based upon one or more curable pleading defects." (Doc. 26, at 29.) Specifically, Plaintiffs note that, at the time they initiated the present action, the deadline for complying with the Notice had not expired. (*Id.*) Plaintiffs assert that they can now amend their complaint to allege they have complied with the Notice's requirements such that they will not be subject

5. Plaintiffs' reliance on *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015), is also misplaced. In *Florida Bankers Association*, the D.C. Circuit considered the same argument Plaintiffs advance here and rejected it. 799 F.3d at 1068-70. The Court agrees with the analysis set forth in *Florida Bankers Association* and, for those same reasons, finds the Supreme Court's reasoning in *Direct Marketing* inapplicable here.

to penalty under the Notice. (*Id.*) Plaintiffs, however, ignore that, even if they have complied with the Notice, they seek: (1) a declaration that the Notice is invalid; and (2) an injunction prohibiting the IRS from enforcing the Notice. Such relief, therefore, still seeks to restrain the IRS's assessment or collection of taxes, even if not directly from Plaintiffs. Accordingly, because the Court finds that Plaintiffs cannot amend their complaint to cure the Court's lack of subject-matter jurisdiction, the Court will **DENY** Plaintiffs' request for leave to amend their complaint (Doc. 26).

IV. CONCLUSION

For the reasons stated herein, Defendants' motion to dismiss (Doc. 25) is **GRANTED**, and, because the Court lacks subject-matter jurisdiction, Plaintiffs' claims will be **DISMISSED WITHOUT PREJUDICE**. Plaintiffs' motion for leave to amend their complaint (Doc. 26) is **DENIED**.

AN APPROPRIATE ORDER WILL ENTER.

/s/ ***Travis R. McDonough***
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 28, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-5019

CIC SERVICES, LLC,

Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF TREASURY; UNITED STATES OF AMERICA,

Defendants-Appellees.

October 19, 2018, Argued;
August 28, 2019, Decided;
August 28, 2019, Filed

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:17-cv-00110—Travis R. McDonough,
District Judge

Before SUHRHEINRICH, CLAY, and
NALBANDIAN, Circuit Judges

Appendix C

ORDER

The court received a petition for rehearing en banc. The original panel reviewed the petition and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition was then circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

Appendix C

CONCURRENCE IN THE DENIAL OF REHEARING EN BANC

CLAY, Circuit Judge, concurring in the denial of rehearing en banc. In their latest attempt to inflict death by distorted originalism on the modern administrative state, some of my colleagues would have this Court directly contravene the Anti-Injunction Act (the "AIA"), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Specifically, my colleagues would allow plaintiffs seeking to preemptively challenge regulatory taxes to evade the AIA simply by purporting to challenge only the regulatory aspect of the regulatory tax. Yet "[t]he Supreme Court has consistently ruled" that the AIA "cannot be sidestepped by such nifty wordplay." *Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1070, 419 U.S. App. D.C. 31 (D.C. Cir. 2015); *see, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 761, 94 S. Ct. 2053, 40 L. Ed. 2d 518 (1974); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974); *Bailey v. George*, 259 U.S. 16, 19-20, 42 S. Ct. 419, 66 L. Ed. 816, 1922-2 C.B. 342, T.D. 3347 (1922). To hold otherwise "would reduce the [AIA] to dust in the context of challenges to regulatory taxes." *Fla. Bankers*, 799 F.3d at 1070.

Of course, that is precisely the result that my colleagues crave. They chide the IRS for its "regulat[ion] [of] an ever-expanding sphere of everyday life" and decry that it is exercising its powers "in ways the Founders never would have envisioned." But such complaints were not persuasive when the original panel considered this case, were not persuasive when the full court considered the petition for rehearing en banc, and are not persuasive now. "[I]t is no answer to the growth of agencies" for federal courts to renounce the rules by which they have long abided, particularly where those rules have been clearly articulated by both Congress and the Supreme Court. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423, 204 L. Ed. 2d 841 (2019).

A suit seeking to preemptively challenge the regulatory aspect of a regulatory tax "necessarily" also seeks to preemptively challenge the tax aspect of a regulatory tax because invalidating the former would necessarily also invalidate the latter. *Bob Jones Univ.*, 416 U.S. at 731; *see also NFIB*, 567 U.S. at 543 ("The present challenge to *the mandate* thus seeks to restrain *the penalty's* future collection." (emphasis added)). Otherwise, a taxpayer could simply "characterize" a challenge to a regulatory tax as a challenge to only the regulatory aspect of the tax and thereby evade the AIA. *Fla. Bankers*, 799 F.3d at 1071. And "as the Supreme Court has explained time and again . . . the [AIA] is more than a pleading exercise." *Id.; see also RYO Machine, LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 471 (6th Cir. 2012) ("Regardless of how the claim is labeled, the effect of an injunction here is to interfere with the assessment or collection of a tax. The plaintiff is not free to define the relief it seeks in terms permitted by the [AIA] while ignoring the ultimate deleterious effect such relief would have on the Government's taxing ability." (quotation omitted)).

Against this wealth of precedent, my colleagues raise no new arguments sounding in either statutory text or caselaw. As the majority opinion in this case makes clear, *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015), *Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), *vacated on other grounds by Autocam Corp. v. Burwell*, 573 U.S. 956, 134 S. Ct. 2901, 189 L. Ed. 2d 852 (2014), *Korte v. Sebelius*, 735 F.3d 654, 669-70 (7th Cir. 2013), and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126-27 (10th Cir. 2013), are all largely inapposite. None of those cases involved a regulation enforced by a tax-penalty located in Subchapter 68B of the Internal Revenue Code. Where, as here, the regulation at issue *is* enforced by a tax-penalty located in Subchapter 68B of the Internal Revenue Code, that tax-penalty becomes the relevant tax for the AIA analysis, as opposed to any third-party taxes the collection of which the regulation is designed to facilitate. *NFIB*, 567 U.S. at 544; *Fla. Bankers*, 799 F.3d at 1068. And Plaintiff's suit plainly seeks to "restrain[] (indeed eliminat[e]) the assessment and collection of that tax." *Fla. Bankers*, 799 F.3d at 1068; *see also NFIB*, 567 U.S. at 544. In contrast, *Autocam, Korte*, and *Hobby Lobby* all involved the Affordable Care Act's contraceptive mandate, which was a separate provision of the U.S. Code structured not as a predicate to the imposition of a tax, but as a mandate enforceable by a variety of different mechanisms.

Rather, in an instance of textbook judicial activism, my colleagues instead attempt to raise a plethora of policy concerns. Indeed, reading the dissent, one might be left with the mistaken impression that "policy concerns, rather than traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S 81, 109, 127 S. Ct. 1534, 167 L. Ed. 2d 449 (2007) (Scalia, J., dissenting). Not so. As my colleagues well know, having admonished the IRS on the same grounds, "courts are[] [not] free to rewrite clear statutes under the banner of our own policy concerns." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815, 204 L. Ed. 2d 139 (2019). Regardless, none of the policy concerns that the dissent raises are persuasive.

For instance, my colleagues evoke the prospect of righteous individuals forced to "bet the farm" or "risk prison time" in order to challenge regulatory taxes imposed by a purportedly illegitimate administrative state. Yet the Supreme Court has made clear that the AIA creates an exception to the general administrative law principle in favor of pre-enforcement judicial review, and that it applies even in the gravest of circumstances, such as the violation of individuals' constitutional rights. *See, e.g., United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 10, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008) ("[T]he taxpayer must succumb [even] to an unconstitutional tax, and seek recourse only after it has been unlawfully exacted."). If and when Congress has a change of heart, it remains free to amend the AIA as it sees fit.

My colleagues also opine about a supposed "elephant in the room"—the fact that "the IRS (an executive agency) exercises the power to tax and destroy, in ways the Founders never would have envisioned." Yet the Founders' expectations about how Congress would wield the power bestowed on it by the Constitution are entirely irrelevant to the case before this Court. This is a case about statutory interpretation, not about the constitutionality of the so-called administrative state, or even the constitutionality of the AIA. My colleagues thus misstep in letting their hostility toward the IRS, rather than traditional tools of statutory construction, guide their analysis. Apparently, it is no cause for doubt or self-reflection by my dissenting colleagues that no one else, including the parties litigating this case, can see the elephant.

At bottom, my colleagues raise no arguments that justify this Court's departure from settled Supreme Court precedent regarding the AIA. Accordingly, I respectfully concur in the denial of rehearing en banc.

Appendix C

CONCURRENCE IN THE DENIAL OF REHEARING EN BANC

SUTTON, Circuit Judge, concurring in the denial of rehearing en banc. Three cross-currents affect the resolution of this en banc petition.

One is that the dissenting opinion by Judge Nalbandian seems to be right as an original matter. I doubt that the words of the Anti-Injunction Act—that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"—ban all prospective relief whenever the IRS enforces a regulation with a penalty that it chooses to call a "tax." 26 U.S.C. § 7421. And I especially doubt that conclusion in this setting—where the taxpayer's only remedy is not to "pay first challenge later" but to "report to prison first challenge later." As today's case appears to confirm, the meaning of the Anti-Injunction Act has crossed the bar from its port of birth. *See Lipke v. Lederer*, 259 U.S. 557, 562, 42 S. Ct. 549, 66 L. Ed. 1061, T.D. 3354 (1922) (holding that the Anti-Injunction Act does not apply to a suit to enjoin enforcement of a penalty Congress called a "tax"). One explanation for this drift may be the historic linkage between the meaning of the Anti-Injunction Act and the Tax Injunction Act, 28 U.S.C. § 1341. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1129, 191 L. Ed. 2d 97 (2015). Keep in mind that, while the Anti-Injunction Act ensures that the IRS can perform its revenue-collecting tasks without undue interference by federal taxpayers, the Tax Injunction Act protects a different sovereign's interests—"to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes" by the States. *Rosewell v. Lasalle Nat'l Bank*, 450 U.S. 503, 522, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). To respect the federal taxpayer's procedural concerns today thus might slight the State's sovereign concerns tomorrow, creating the risk that too much haste in stopping one abuse of power might open the door to another.

A second reality is that this case does not come to us on a fresh slate. Whatever we might do with the issue as an original matter is not the key question. As second-tier judges in a three-tier court system, our task is to figure out what the Supreme Court's precedents mean in this setting. That is not easy because none of the Court's precedents is precisely on point and because language from these one-off decisions leans in different directions. A little caution thus is in order when it comes to judging the efforts of our colleagues on this court and on the D.C. Circuit to sort this out. *See Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1068-70, 419 U.S. App. D.C. 31 (D.C. Cir. 2015) (Kavanaugh, J.). Neither of the two court of appeals decisions—neither ours nor the D.C. Circuit's—purports to answer this question as an original matter. And reading between the lines of Supreme Court decisions is a tricky business—hard enough with a panel of three lower-court judges, utterly daunting with a slate of sixteen lower-court judges.

The last consideration is that we are not alone. The key complexity in this case—how to interpret Supreme Court decisions interpreting the statute—poses fewer difficulties for the Supreme Court than it does for us. In a dispute in which the Court's decisions plausibly point in opposite directions, it's worth asking what value we would add to the mix by en-bancing the case in order to create the very thing that generally prompts more review: a circuit split. As is, we have Judge Thapar's dissental and Judge Nalbandian's dissent at the panel stage on one side and Judge Clay's opinion for the court on the other. These three opinions together with then-Judge Kavanaugh's opinion say all there is to say about the issue from a lower court judge's perspective. All of this leaves the Supreme Court in a well-informed position to resolve the point by action or inaction—either by granting review and reversing or by leaving the circuit court decisions in place.

Appendix C

DISSENT FROM THE DENIAL OF REHEARING EN BANC

THAPAR, Circuit Judge, dissenting from the denial of rehearing en banc. In this country, people should not have to risk prison time in order to challenge the lawfulness of government action. In this circuit, they now do. Because the law does not condone—let alone require—that result, I respectfully dissent from the denial of rehearing en banc.

Although the details at first may seem technical, this is a straightforward case. In 2016, the IRS issued so-called guidance requiring taxpayers and their advisers to report certain information to the agency. Failure to do so can result in significant civil penalties. 26 U.S.C. §§ 6707-6708. And a willful violation can result in criminal penalties, including imprisonment. *Id.* § 7203. Less than a year later, CIC Services sued the IRS, alleging that the agency had issued its guidance unlawfully. The question here is whether the Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," applies to that suit. *Id.* § 7421(a).

The Supreme Court, this circuit, and other circuits have all told us that the answer to that question is no. Take the Supreme Court. Recently, it interpreted the Tax Injunction Act, which generally uses words "in the same way" as the Anti-Injunction Act. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1129, 191 L. Ed. 2d 97 (2015). That case had two holdings. First, the Court held that the terms "assessment" and "collection"—used in both Acts—

do not refer to reporting requirements. Rather, such "information gathering" is distinct from and occurs before these other stages of the taxation process. *Id.* at 1129-31. Second, the Court held that the term "restrain"—also used in both Acts—means to "prohibit" or "stop." *Id.* at 1132 (internal quotation marks omitted). It did so because the term "'restrain' acts on a carefully selected list of technical terms" (*e.g.*, "assessment" and "collection"), not "an all-encompassing term, like 'taxation.'" *Id.* To adopt a broader definition, the Court explained, would "defeat the precision of that list, as virtually any court action related to any phase of taxation" could "inhibit" tax collection. *Id.* And the narrower definition appropriately reflected the term's "meaning in equity." *Id.* From these twin holdings, the Court easily concluded that a suit to enjoin a state law that required retailers to report certain information to the state revenue service could not "be understood to 'restrain' the 'assessment' . . . or collection'" of a tax. *Id.* at 1133.

That conclusion nearly resolves this case. CIC filed its lawsuit to enjoin IRS "guidance" that required the company to report certain information to the agency. The company claimed that it would have to devote hundreds of hours of labor and tens of thousands of dollars to comply with that requirement. And for no good reason, the company said, because the IRS had issued its guidance in violation of the Administrative Procedure Act and the Congressional Review Act. *See* 5 U.S.C. §§ 553, 706, 801. Per the Supreme Court's direction, that suit cannot be understood to "restrain[] the assessment or collection" of a tax just because it might inhibit the agency's future collection efforts. 26 U.S.C. § 7421(a); *Direct Mktg.*, 135 S. Ct. at 1133.

This case, however, does pose one additional wrinkle. Congress has prescribed civil penalties for failing to comply with certain IRS regulations and has apparently decided that these penalties should count as "taxes" for purposes of the Anti-Injunction Act. *See* 26 U.S.C. § 6671(a); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544-45, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012). But that fact changes little. The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection" of a tax. 26 U.S.C. § 7421(a). And here the suit seeks to enjoin the underlying reporting requirement, not the penalties. Nor has the IRS otherwise shown that CIC has the "purpose" of restraining these penalties. The company complains about the costs of complying with the reporting requirement, not the potential penalties for failing to do so. Indeed, CIC currently has no "tax" liability under this regulatory regime and may never incur any such liability. Simply put, this is not a case about taxes. *CIC Servs., LLC v. IRS*, 925 F.3d 247, 259 (6th Cir. 2019) (Nalbandian, J., dissenting).

Our circuit has reached the same conclusion in a nearly identical case. Specifically, we held that the Anti-Injunction Act did not apply to a lawsuit challenging the Affordable Care Act's contraceptive mandate, even though employers would have to pay a "tax" if they violated the mandate. *See Autocam Corp. v. Sebelius*, 730 F.3d 618, 621-22 (6th Cir. 2013), *vacated on other grounds sub nom. Autocam Corp. v. Burwell*, 573 U.S. 956, 134 S. Ct. 2901, 189 L. Ed. 2d 852 (2014). Our decision reasoned that the suit was "not intended to 'restrain[]' the IRS's efforts to 'assess[] or collect[]' taxes"; rather, it sought only to enjoin the underlying mandate. *Id.* at 622 (alterations in original). Although the Supreme Court later vacated that decision, it did so on other grounds. So the decision continues to be entitled to (at the very least) persuasive weight. And there was no good reason to disturb it here. *Cf. United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006); *Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989).

Our circuit was not alone in its conclusion. Two other circuits have reached the same result using the same reasoning. *See Korte v. Sebelius*, 735 F.3d 654, 669-70 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126-27 (10th Cir. 2013) (en banc). And another applied the same reasoning to a similar case. *See Seven-Sky v. Holder*, 661 F.3d 1, 8-10, 398 U.S. App. D.C. 134 (D.C. Cir. 2011), *abrogated on other grounds by NFIB*, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450.

Finally, these decisions just make sense. After all, the Supreme Court has long presumed that parties may challenge agency action *before* they suffer any harm. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815-16, 195 L. Ed. 2d 77 (2016); *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-41, 152-53, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *United States v. Nourse*, 34 U.S. 8, 28-29, 9 L. Ed. 31 (1835) (Marshall, C.J.). True, the Anti-Injunction Act creates a narrow exception to that rule. Yet the IRS's interpretation would not just broaden that exception but blast it wide open. In recent years, the agency has begun to regulate an ever-expanding sphere of everyday life—from childcare and charity to healthcare and the environment. That might be okay if the IRS followed basic rules of administrative law. But it doesn't. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1685, 1712-20 (2017). So with great power comes little accountability.

Even so, one might think, the IRS's interpretation would still allow people to bring a challenge *after* they violate the reporting requirement and pay the penalty. True enough. But only if people are also willing to spend up to a year in prison. *See* 26 U.S.C. § 7203. In effect, these criminal sanctions make the reporting requirement in this case (and many others) unreviewable. The IRS responds that "[it] is not clear" whether the government would criminally prosecute someone "who demonstrates a good-faith intent to submit its challenge for judicial resolution." IRS En Banc Br. at 8. But that has never been a "sufficient answer." *Abbott Labs.*, 387 U.S. at 154 (rejecting the argument that "the threat of criminal sanctions" was "unrealistic"). Courts normally do not require people "to bet the farm" in order to bring an administrative challenge. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (internal quotation marks omitted). Yet the IRS seems to think people should bet their liberty.

Going forward in this circuit, the IRS will have the power to impose sweeping "guidance" across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process. Surely nobody in 1867 would have understood the Anti-Injunction Act to require such a result. *See Pullan v. Kinsinger*, 20 F. Cas. 44, 48, F. Cas. No. 11463 (C.C.S.D. Ohio 1870) (describing the Act as "wholly unnecessary, enacted only as a politic and kindly publication of an old and familiar [common law] rule"); Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81, 96-97 (2014). Nor should we have allowed it.

By this point, one might recognize the "elephant in the room." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). The Founders gave *Congress* the "Power To lay and collect Taxes." U.S. Const. art. I, § 8, cl. 1. They limited this power to Congress because they understood full well that "the power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 431, 4 L. Ed. 579 (1819) (Marshall, C.J.). But today, the IRS (an executive agency) exercises the power to tax and to destroy, in ways that the Founders never would have envisioned. *E.g., In re United States* (*NorCal Tea Party Patriots*), 817 F.3d 953 (6th Cir. 2016). Courts accepted this departure from constitutional principle on the promise that Congress would still constrain agency power through statutes like the Administrative Procedure Act. 5 U.S.C. § 500 *et seq.* We now see what many feared: that promise is often illusory.

The IRS offers some arguments in response. It first contends that several Supreme Court decisions support its interpretation. Specifically, the agency points to

Alexander v. "Americans United" Inc., 416 U.S. 752, 94 S. Ct. 2053, 40 L. Ed. 2d 518 (1974) and *Bob Jones Univ. v. Simon*, 416 U.S. 725, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974). In those cases, the Court held that the Anti-Injunction Act barred challenges to the IRS's decision to revoke the tax-exempt status of two nonprofits. The nonprofits each argued that their lawsuits sought only to maintain their flow of charitable donations, not to restrain a tax. But the Court recognized that the "primary" or "obvious purpose" of both lawsuits was to restrain the collection of taxes. *"Americans United,"* 416 U.S. at 760-61; *Bob Jones*, 416 U.S. at 738.[1] Indeed, the plaintiffs in those cases were "defeated by [their] own pleadings, since the *only* injuries [they] identified involved tax liability." *Seven-Sky*, 661 F.3d at 10 (citing *"Americans United,"* 416 U.S. at 761; *Bob Jones*, 416 U.S. at 738-39). Yet here CIC has a clear interest—separate from any potential "tax" liability—in avoiding the substantial costs of the reporting requirement. The "purpose" of its lawsuit is to obtain relief from costs the company must pay today, not to restrain a penalty it might have to pay tomorrow. The

1. To be sure, the Supreme Court suggested at one point that the Anti-Injunction Act would bar any lawsuit that would "necessarily preclude" the collection of taxes. *Bob Jones*, 416 U.S. at 732. But that stray phrase has never since been invoked by the Court, even in a decision released on the same day by the same Justice about the same issue. *See "Americans United,"* 416 U.S. 752, 94 S. Ct. 2053, 40 L. Ed. 2d 518. If the test truly were whether a lawsuit would "necessarily preclude" the collection of taxes, then *"Americans United"* would have been a much easier case. Instead, the Court spent ten pages analyzing the facts of the case and the purpose of the lawsuit. *See id.* The "necessarily preclude" test would also have the inconvenient feature of rewriting the Anti-Injunction Act to say "effect" rather than "purpose."

agency also cites *NFIB*, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450. But that decision never reached the question whether the lawsuit had the "purpose of restraining" a tax because the penalty in that case was not a "tax." *See id.* at 546.[2]

Lastly, the IRS invokes a policy concern, asserting that any other interpretation would allow parties to circumvent the Anti-Injunction Act through "ingenious" pleading. IRS Br. at 43. But the agency has offered little basis for that concern. And the Supreme Court's decisions in *"Americans United"* and *Bob Jones* suggest that courts can determine a lawsuit's purpose without barring every pre-enforcement challenge involving the IRS (or requiring would-be plaintiffs to file their lawsuits from prison). More to the point, the Court has repeatedly told us that we may not rewrite a statute based on policy concerns. *See, e.g.,*

2. Of course, thoughtful jurists have read these cases as well as the Anti-Injunction Act differently. *See CIC Servs.*, 925 F.3d 247; *Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 419 U.S. App. D.C. 31 (D.C. Cir. 2015). But the Supreme Court long ago rejected the suggestion that circuit courts should automatically follow each other's decisions. Instead, "the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, 1900 Dec. Comm'r Pat. 285 (1900). And in rehearing this case, we could have considered other related questions that may bear on its outcome. *See Hobby Lobby*, 723 F.3d at 1157-59 (Gorsuch, J., concurring) (reasoning that the Anti-Injunction Act is not jurisdictional); Hawley, *supra*, at 90-110, 125-32 (arguing the same and noting that, if the Act is not jurisdictional, it may permit courts to grant equitable relief in a broader array of cases than currently recognized).

Azar v. Allina Health Servs., 139 S. Ct. 1804, 1815, 204 L. Ed. 2d 139 (2019). In sum, the Anti-Injunction Act should not apply to this suit.

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The IRS has long "envision[ed] a world in which no challenge to its actions is ever outside the closed loop of its taxing authority." *Cohen v. United States*, 650 F.3d 717, 726, 397 U.S. App. D.C. 33 (D.C. Cir. 2011) (en banc). With today's decision, I fear we have made some large strides towards such a world. For these reasons, I respectfully dissent from the denial of rehearing en banc.

ENTERED BY ORDER OF THE COURT

/s/____________________________
Deborah S. Hunt, Clerk

APPENDIX D — RELEVANT STATUTORY AND REGULATORY PROVISIONS

26 U.S.C. § 6707

(a) In general. If a person who is required to file a return under section 6111(a) [26 U.S.C. § 6111(a)] with respect to any reportable transaction—

(1) fails to file such return on or before the date prescribed therefor, or

(2) files false or incomplete information with the Secretary with respect to such transaction,

such person shall pay a penalty with respect to such return in the amount determined under subsection (b).

(b) Amount of penalty.

(1) In general. Except as provided in paragraph (2), the penalty imposed under subsection (a) with respect to any failure shall be $50,000.

(2) Listed transactions. The penalty imposed under subsection (a) with respect to any listed transaction shall be an amount equal to the greater of—

(A) $200,000, or

(B) 50 percent of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under section 6111 [26 U.S.C. § 6111].

Subparagraph (B) shall be applied by substituting "75 percent" for "50 percent" in the case of an intentional failure or act described in subsection (a).

(c) Rescission authority. The provisions of section 6707A(d) [26 U.S.C. § 6707A(d)] (relating to authority of Commissioner to rescind penalty) shall apply to any penalty imposed under this section.

(d) Reportable and listed transactions. For purposes of this section, the terms "reportable transaction" and "listed transaction" have the respective meanings given to such terms by section 6707A(c) [26 U.S.C. § 6707A(c)].

Appendix D

26 U.S.C. § 6707A

(a) Imposition of penalty. Any person who fails to include on any return or statement any information with respect to a reportable transaction which is required under section 6011 [26 U.S.C. § 6011] to be included with such return or statement shall pay a penalty in the amount determined under subsection (b).

(b) Amount of penalty.

(1) In general. Except as otherwise provided in this subsection, the amount of the penalty under subsection (a) with respect to any reportable transaction shall be 75 percent of the decrease in tax shown on the return as a result of such transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes).

(2) Maximum penalty. The amount of the penalty under subsection (a) with respect to any reportable transaction shall not exceed—

(A) in the case of a listed transaction, $200,000 ($100,000 in the case of a natural person), or

(B) in the case of any other reportable transaction, $50,000 ($10,000 in the case of a natural person).

(3) Minimum penalty. The amount of the penalty under subsection (a) with respect to any transaction shall not be less than $10,000 ($5,000 in the case of a natural person).

(c) Definitions. For purposes of this section:

(1) Reportable transaction. The term "reportable transaction" means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011 [26 U.S.C. § 6011], such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

(2) Listed transaction. The term "listed transaction" means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011 [26 U.S.C. § 6011].

(d) Authority to rescind penalty.

(1) In general. The Commissioner of Internal Revenue may rescind all or any portion of any penalty imposed by this section with respect to any violation if—

(A) the violation is with respect to a reportable transaction other than a listed transaction, and

(B) rescinding the penalty would promote compliance with the requirements of this title and effective tax administration.

(2) No judicial appeal. Notwithstanding any other provision of law, any determination under this subsection may not be reviewed in any judicial proceeding.

(3) Records. If a penalty is rescinded under paragraph (1), the Commissioner shall place in the file in the Office of the Commissioner the opinion of the Commissioner with respect to the determination, including—

(A) a statement of the facts and circumstances relating to the violation,

(B) the reasons for the rescission, and

(C) the amount of the penalty rescinded.

(e) Penalty reported to SEC. In the case of a person—

(1) which is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. § 78m or 78o(d)] or is required to be consolidated with another person for purposes of such reports, and

(2) which—

(A) is required to pay a penalty under this section with respect to a listed transaction,

(B) is required to pay a penalty under section 6662A [26 U.S.C. § 6662A] with respect to any reportable transaction at a rate prescribed under section 6662A(c) [26 U.S.C. § 6662A(c)], or

(C) is required to pay a penalty under section 6662(h) [26 U.S.C. § 6662(h)] with respect to any reportable transaction and would (but for section 6662A(e)(2)(B) [26 U.S.C. § 6662A(e)(2)(B)]) have been subject to penalty under section 6662A [26 U.S.C. § 6662A] at a rate prescribed under section 6662A(c) [26 U.S.C. § 6662A(c)],

the requirement to pay such penalty shall be disclosed in such reports filed by such person for such periods as the Secretary shall specify. Failure to make a disclosure in accordance with the preceding sentence shall be treated as a failure to which the penalty under subsection (b)(2) applies.

(f) Coordination with other penalties. The penalty imposed by this section shall be in addition to any other penalty imposed by this title.

Appendix D

26 U.S.C. § 6708

(a) Imposition of penalty.

(1) In general. If any person who is required to maintain a list under section 6112(a) [26 U.S.C. § 6112(a)] fails to make such list available upon written request to the Secretary in accordance with section 6112(b) [26 U.S.C. § 6112(b)] within 20 business days after the date of such request, such person shall pay a penalty of $10,000 for each day of such failure after such 20th day.

(2) Reasonable cause exception. No penalty shall be imposed by paragraph (1) with respect to the failure on any day if such failure is due to reasonable cause.

(b) Penalty in addition to other penalties. The penalty imposed by this section shall be in addition to any other penalty provided by law.

Appendix D

26 U.S.C. § 6011(a)

(a) General rule. When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Appendix D

26 U.S.C. § 6111

(a) In general. Each material advisor with respect to any reportable transaction shall make a return (in such form as the Secretary may prescribe) setting forth—

(1) information identifying and describing the transaction,

(2) information describing any potential tax benefits expected to result from the transaction, and

(3) such other information as the Secretary may prescribe.

Such return shall be filed not later than the date specified by the Secretary.

(b) Definitions. For purposes of this section:

(1) Material advisor.

(A) In general. The term "material advisor" means any person—

(i) who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and

(ii) who directly or indirectly derives gross income in excess of the threshold amount (or such other amount as may be prescribed by the Secretary) for such aid, assistance, or advice.

(B) Threshold amount. For purposes of subparagraph (A), the threshold amount is—

(i) $50,000 in the case of a reportable transaction substantially all of the tax benefits from which are provided to natural persons, and

(ii) $250,000 in any other case.

(2) Reportable transaction. The term "reportable transaction" has the meaning given to such term by section 6707A(c) [26 U.S.C. § 6707A(c)].

(c) Regulations. The Secretary may prescribe regulations which provide—

(1) that only 1 person shall be required to meet the requirements of subsection (a) in cases in which 2 or more persons would otherwise be required to meet such requirements,

(2) exemptions from the requirements of this section, and

(3) such rules as may be necessary or appropriate to carry out the purposes of this section.

Appendix D

26 U.S.C. § 6112

(a) In general. Each material advisor (as defined in section 6111 [26 U.S.C. § 6111]) with respect to any reportable transaction (as defined in section 6707A(c) [26 U.S.C. § 6707A(c)]) shall (whether or not required to file a return under section 6111 [26 U.S.C. § 6111] with respect to such transaction) maintain (in such manner as the Secretary may by regulations prescribe) a list—

(1) identifying each person with respect to whom such advisor acted as a material advisor with respect to such transaction, and

(2) containing such other information as the Secretary may by regulations require.

(b) Special rules.—

(1) Availability for inspection; retention of information on list. Any person who is required to maintain a list under subsection (a) (or was required to maintain a list under subsection (a) as in effect before the enactment of the American Jobs Creation Act of 2004 [enacted Oct. 22, 2004])—

(A) shall make such list available to the Secretary for inspection upon written request by the Secretary, and

(B) except as otherwise provided under regulations prescribed by the Secretary, shall retain any information which is required to be included on such list for 7 years.

(2) Lists which would be required to be maintained by 2 or more persons. The Secretary may prescribe regulations which provide that, in cases in which 2 or more persons are required under subsection (a) to maintain the same list (or portion thereof), only 1 person shall be required to maintain such list (or portion).

Appendix D

26 U.S.C. § 7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 [26 U.S.C. § 6654 or 6655] with respect to such failure. In the case of a willful violation of any provision of section 6050I [26 U.S.C. § 6050I], the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

26 U.S.C. § 7421(a)

(a) Tax. Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436 [26 U.S.C. §§ 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Appendix D

26 C.F.R. 1.6011-4(b)

(b) Reportable transactions—

(1) In general. A reportable transaction is a transaction described in any of the paragraphs (b)(2) through (7) of this section. The term transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan.

(2) Listed transactions. A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

(3) Confidential transactions—

(i) In general. A confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee.

(ii) Conditions of confidentiality. A transaction is considered to be offered to a taxpayer under conditions of confidentiality if the advisor who is paid the minimum fee places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that advisor's tax strategies. A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure if the advisor confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

(iii) Minimum fee. For purposes of this paragraph (b)(3), the minimum fee is—

(A) $ 250,000 for a transaction if the taxpayer is a corporation;

(B) $ 50,000 for all other transactions unless the taxpayer is a partnership or trust, all of the owners or beneficiaries of which are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is $ 250,000.

(iv) Determination of minimum fee. For purposes of this paragraph (b)(3), in determining the minimum fee, all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction are taken into account. Fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable in light of the facts and circumstances. For purposes of this paragraph (b)(3), a taxpayer also is treated as paying fees to an advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property. The IRS will scrutinize carefully all of the facts and circumstances in determining whether consideration received in connection with a confidential transaction constitutes fees.

(v) **Related parties.** For purposes of this paragraph (b)(3), persons who bear a relationship to each other as described in section 267(b) or 707(b) [26 U.S.C. § 267(b) or 707(b)] will be treated as the same person.

(4) Transactions with contractual protection—

(i) In general. A transaction with contractual protection is a transaction for which the taxpayer or a related party (as described in section 267(b) or 707(b) [26 U.S.C. § 267(b) or 707(b)]) has the right to a full or partial refund of fees (as described in paragraph (b)(4)(ii) of this section) if all or part of the intended tax consequences from the transaction are not sustained. A transaction with contractual protection also is a transaction for which fees (as described in paragraph (b)(4)(ii) of this section) are contingent on the taxpayer's realization of tax benefits from the transaction. All the facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation.

(ii) Fees. Paragraph (b)(4)(i) of this section only applies with respect to fees paid by or on behalf of the taxpayer or a related party to any person who makes or provides a statement, oral or written, to the taxpayer or related party (or for whose benefit a statement is made or provided to the taxpayer or related party) as to the potential tax consequences that may result from the transaction.

(iii) Exceptions—

(A) Termination of transaction. A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

(B) Previously reported transaction. If a person makes or provides a statement to a taxpayer as to the potential tax consequences that may result from a transaction only after the taxpayer has entered into the transaction and reported the consequences of the transaction on a filed tax return, and the person has not previously received fees from the taxpayer relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection. This paragraph (b)(4) does not provide any substantive rules regarding when a person may charge refundable or contingent fees with respect to a transaction. See Circular 230, 31 C.F.R. part 10, for the regulations governing practice before the IRS.

(5) Loss transactions—

(i) In general. A loss transaction is any transaction resulting in the taxpayer claiming a loss under section 165 [26 U.S.C. § 165] of at least—

(A) $ 10 million in any single taxable year or $ 20 million in any combination of taxable years for corporations;

(B) $ 10 million in any single taxable year or $ 20 million in any combination of taxable years for partnerships that have only corporations as partners (looking through any partners that are themselves partnerships), whether or not any losses flow through to one or more partners; or

(C) $ 2 million in any single taxable year or $ 4 million in any combination of taxable years for all other partnerships, whether or not any losses flow through to one or more partners;

(D) $ 2 million in any single taxable year or $ 4 million in any combination of taxable years for individuals, S corporations, or trusts, whether or not any losses flow through to one or more shareholders or beneficiaries; or

(E) $ 50,000 in any single taxable year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership, if the loss arises with respect to a section 988 [26 U.S.C. § 988] transaction (as defined in section 988(c)(1) [26 U.S.C. § 988(c)(1)] relating to foreign currency transactions).

(ii) Cumulative losses. In determining whether a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of taxable years as described in paragraph (b)(5)(i) of this section, only losses claimed in the taxable year that the transaction is entered into and the five succeeding taxable years are combined.

(iii) Section 165 [26 U.S.C. § 165] loss—

(A) For purposes of this section, in determining the thresholds in paragraph (b)(5)(i) of this section, the amount of a section 165 [26 U.S.C. § 165] loss is adjusted for any salvage value and for any insurance or other compensation received. See § 1.165-1(c)(4). However, a section 165 [26 U.S.C. § 165] loss does not take into account offsetting gains, or other income or limitations. For example, a section 165 [26 U.S.C. § 165] loss does not take into account the limitation in section 165(d) [26 U.S.C. § 165(d)] (relating to wagering losses) or the limitations in sections 165(f), 1211, and 1212 [26 U.S.C.

§§ 165(f), 1211, and 1212] (relating to capital losses). The full amount of a section 165 [26 U.S.C. § 165] loss is taken into account for the year in which the loss is sustained, regardless of whether all or part of the loss enters into the computation of a net operating loss under section 172 [26 U.S.C. § 172] or a net capital loss under section 1212 [26 U.S.C. § 1212] that is a carryback or carryover to another year. A section 165 [26 U.S.C. § 165] loss does not include any portion of a loss, attributable to a capital loss carryback or carryover from another year, that is treated as a deemed capital loss under section 1212 [26 U.S.C. § 1212].

(B) For purposes of this section, a section 165 [26 U.S.C. § 165] loss includes an amount deductible pursuant to a provision that treats a transaction as a sale or other disposition, or otherwise results in a deduction under section 165 [26 U.S.C. § 165]. A section 165 [26 U.S.C. § 165] loss includes, for example, a loss resulting from a sale or exchange of a partnership interest under section 741 [26 U.S.C. § 741] and a loss resulting from a section 988 [26 U.S.C. § 988] transaction.

(6) Transactions of interest. A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest.

(7) [Reserved by 72 FR 43149]

(8) **Exceptions—**

(i) In general. A transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction under paragraphs (b)(3) through (7) of this section, if the Commissioner makes a determination by published guidance that the transaction is not subject to the reporting requirements of this section. The Commissioner may make a determination by individual letter ruling under paragraph (f) of this section that an individual letter ruling request on a specific transaction satisfies the reporting requirements of this section with regard to that transaction for the taxpayer who requests the individual letter ruling.

(ii) Special rule for RICs. For purposes of this section, a regulated investment company (RIC) as defined in section 851 [26 U.S.C. § 851] or an investment vehicle that is owned 95 percent or more by one or more RICs at all times during the course of the transaction is not required to disclose a transaction that is described in any of paragraphs (b)(3) through (5) and (b)(7) of this section unless the transaction is also a listed transaction or a transaction of interest.

Appendix D

26 C.F.R. 301.6111-3(a)-(b)(1)

(a)In general. Each material advisor, as defined in paragraph (b) of this section, with respect to any reportable transaction, as defined in § 1.6011-4(b) of this chapter, must file a return as described in paragraph (d) of this section by the date described in paragraph (e) of this section.

(b) Material advisor—

(1) In general. A person is a material advisor with respect to a transaction if the person provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross income in excess of the threshold amount as defined in paragraph (b)(3) of this section for the material aid, assistance, or advice. The term transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan or arrangement, and includes any series of steps carried out as part of a plan.

Appendix D

Transaction of Interest -- Section 831 (b) Micro-Captive Transactions

Notice 2016-66

The Department of the Treasury ("Treasury Department") and the Internal Revenue Service (the "IRS") are aware of a type of transaction, described below, in which a taxpayer attempts to reduce the aggregate taxable income of the taxpayer, related persons, or both, using contracts that the parties treat as insurance contracts and a related company that the parties treat as a captive insurance company. Each entity that the parties treat as an insured entity under the contracts claims deductions for premiums for insurance coverage. The related company that the parties treat as a captive insurance company elects under § 831 (b) of the Internal Revenue Code (the "Code") to be taxed only on investment income and therefore excludes the payments directly or indirectly received under the contracts from its taxable income. The manner in which the contracts are interpreted, administered, and applied is inconsistent with arm's length transactions and sound business practices.

The Treasury Department and the IRS believe this transaction ("micro-captive transaction") has a potential for tax avoidance or evasion. *See* IR-2016-25 (discussing characteristics of an abusive micro-captive insurance structure). However, the Treasury Department and the IRS lack sufficient information to identify which § 831 (b) arrangements should be identified specifically as a tax avoidance transaction and may lack sufficient information to define the characteristics that distinguish the tax avoidance transactions from other § 831 (b) related-party transactions. This notice identifies the transaction described in section 2.01 of this notice and substantially similar transactions as transactions of interest for purposes of § 1.6011-4 (b) (6) of the Income Tax Regulations and §§ 6111 and 6112 of the Code. This notice also alerts persons involved in such transactions to certain responsibilities and penalties that may arise from their involvement with these transactions.

SECTION 1. BACKGROUND

.01 *Overview of Transaction*

In the micro-captive transaction, A, a person, directly or indirectly owns an interest in an entity (or entities) ("Insured") conducting a trade or business. A, persons related to A, or both, also directly or indirectly own another entity (or entities) ("Captive").

In some cases, Captive enters into a contract (or contracts) (the "Contract") with Insured as discussed below in section 1.02 of this notice. In these cases, Captive may enter into a reinsurance or pooling agreement under which a portion of the risks covered under the Contract are treated as pooled with risks of other entities, and Captive assumes risks from other entities as also discussed below in section 1.02 of this notice.

In other cases, Captive indirectly enters into the Contract by reinsuring risks that Insured has initially insured with an intermediary, Company C, as discussed below in section 1.03 of this notice.

.02 *Cases in Which Captive Enters into the Contract with Insured*

(a) *In general.* In cases in which Captive enters into the Contract with Insured, Captive and Insured treat the Contract as an insurance contract for federal income tax purposes. Captive provides coverage for Insured.

Captive may offer coverage only to persons related to or affiliated with Insured. If Captive also offers coverage to persons that are not related to or affiliated with Insured, Captive typically offers coverage only to other entities represented by a person who promotes the micro-captive transaction. Captive may enter into a reinsurance or pooling agreement under which a portion of the risks covered under the Contract are treated as pooled with risks of other entities and Captive assumes risks from other entities. Typically, the other entities participating in the reinsurance or pooling agreement are also represented by a person who promotes the micro-captive transaction.

Insured makes payments to Captive under the Contract, treats the payments as insurance premiums that are within the scope of § 1.162-1(a), and deducts the payments as ordinary and necessary business expenses under § 162. Captive treats the payments received from Insured under the Contract as premiums for insurance coverage. If Captive is not a domestic corporation, Captive makes an election under § 953(d) to be treated as a domestic corporation. The micro-captive transaction is structured so that Captive has no more than $1,200,000 in net premiums written (or, if greater, direct premiums written) for each taxable year ($2,200,000 for taxable years beginning after December 31, 2016) in which the transaction is in effect. Captive makes an election under § 831 (b) to be taxed only on taxable investment income and excludes the premiums from taxable income.

(b) *Promoter.* A promoter ("Promoter") typically markets the micro-captive transaction structure to A. Promoter, persons related to Promoter, or both, typically provide continuing services to Captive, including:

(1) providing the forms used for the Contract;

(2) management of Captive; and

(3) administrative, accounting, or legal services, including the filing of tax forms.

(c) *Contract coverage.* The coverage provided by Captive under the Contract has one or more of the following characteristics:

(1) the coverage involves an implausible risk;

(2) the coverage does not match a business need or risk of Insured;

(3) the description of the scope of the coverage in the Contract is vague, ambiguous, or illusory; or

(4) the coverage duplicates coverage provided to Insured by an unrelated, commercial insurance company, and the policy with the commercial insurer often has a far smaller premium.

(d) *Amounts paid to Captive*. The payments made by Insured to Captive under the Contract have one or more of the following characteristics:

(1) the amounts of Insured's payments under the Contract are designed to provide Insured with a deduction under § 162 of a particular amount;

(2) the payments are determined without an underwriting or actuarial analysis that conforms to insurance industry standards;

(3) the payments are not made consistently with the schedule in the Contract;

(4) the payments are agreed to by Insured and Captive without comparing the amounts of the payments to payments that would be made under alternative insurance arrangements providing the same or similar coverage;

(5) the payments significantly exceed the premium prevailing for coverage offered by unrelated, commercial insurance companies for risks with similar loss profiles; or

(6) if Insured includes multiple entities, the allocation of amounts paid to Captive among the insured entities does not reflect the actuarial or economic measure of the risk of each entity.

(e) *Claims procedures and management of Captive.* Captive, Insured, or both does one or more of the following:

(1) Captive fails to comply with some or all of the laws or regulations applicable to insurance companies in the jurisdiction in which Captive is chartered, the jurisdiction (s) in which Captive is subject to regulation because of the nature of its business, or both;

(2) Captive does not issue policies or binders in a timely manner consistent with industry standards;

(3) Captive does not have defined claims administration procedures that are consistent with insurance industry standards; or

(4) Insured does not file claims for each loss event covered by the Contract.

(f) *Captive's capital.* Captive's capital has one or more of the following characteristics:

(1) Captive does not have capital adequate to assume the risks that the Contract transfers from Insured;

(2) Captive invests its capital in illiquid or speculative assets usually not held by insurance companies; or

(3) Captive loans or otherwise transfers its capital to Insured, entities affiliated with Insured, A, or persons related to A.

.03 *Cases in Which Insured and Captive Use an Intermediary Company*

In certain cases, Captive indirectly enters into the Contract by reinsuring risks that Insured has initially insured with an intermediary, Company C. In these cases, Insured enters into a contract with Company C that the parties treat as an insurance contract. Company C also enters into a reinsurance contract with Captive to reinsure risks under the contract between Insured and Company C. In cases in which Captive reinsures risks that Insured has initially insured with an intermediary, Company C, the reinsurance agreement between Company C and Captive is the Contract for purposes of this notice and the disclosures required in section 3.05 of this notice.

In these cases, the coverage provided by Captive under the Contract, the payments made to Captive by Company C, and Captive's capital each has one or more of the characteristics described in section 1.02 (c), (d) or (f) of this notice, as applicable; also, Captive, Insured or both do one or more of the items described in section 1.02 (e) of this notice. In addition, a Promoter typically markets the transaction to A.

Moreover, in these cases, Company C is unrelated to A or Insured but may be related to Promoter. Company C enters into similar arrangements with other entities, which usually are also represented by Promoter. Company C reinsures with Captive a portion of the risks, commonly in layers. For example, the first layer might cover losses from $1 up to $10,000; the second layer might cover losses greater than $10,000, but not more than $100,000; and the third layer might cover losses greater than $100,000. Captive might assume from Company C 100% of one layer of Insured's risks and in another layer a proportionate share of the aggregate risk of Insured and other entities. The allocation among the layers of amounts paid to Captive as premiums typically does not reflect the actuarial or economic measures of the risks associated with the particular layers. In addition, any claims filed generally fall within the layer or layers that only cover risks of Insured.

.04 *Claimed Tax Treatment and Benefits*

In the micro-captive transaction, Insured, Captive, and, if applicable, Company C, treat the Contract as an insurance contract for federal income tax purposes. Insured claims a deduction for the premiums paid under § 162. Captive excludes the premium income from its taxable income by electing under § 831(b) to be taxed only on its investment income. Captive uses the premium income for purposes other than administering and paying claims under the Contract, generally benefitting Insured or a party related to Insured. For instance, Captive may use premium income to provide a loan to Insured.

However, if the transaction does not constitute insurance, Insured is not entitled to deduct the amount of that payment under § 162 as an insurance premium. In addition, if Captive does not provide insurance, Captive does not qualify as an insurance company and Captive's elections to be taxed only on its investment income under § 831 (b) and to be treated as a domestic insurance company under § 953 (d) are invalid.

The Treasury Department and the IRS recognize that related parties may use captive insurance companies that make elections under § 831(b) for risk management purposes that do not involve tax avoidance, but believe that there are cases in which the use of such arrangements to claim the tax benefits of treating the Contract as an insurance contract is improper. Therefore, the Treasury Department and the IRS are identifying transactions described in section 2.01 of this notice (and transactions substantially similar to such transactions) as transactions of interest for purposes of § 1.6011-4(b)(6) and §§ 6111 and 6112 of the Code.

SECTION 2. TRANSACTIONS OF INTEREST

.01 *Transactions Identified as Transactions of Interest*

The following transaction is identified as a transaction of interest under this notice:

(a) A, a person, directly or indirectly owns an interest in an entity (or entities) ("Insured") conducting a trade or business;

(b) An entity (or entities) directly or indirectly owned by A, Insured, or persons related to A or Insured ("Captive") enters into a contract (or contracts) (the "Contracts") with Insured that Captive and Insured treat as insurance, or reinsures risks that Insured has initially insured with an intermediary, Company C;

(c) Captive makes an election under § 831(b) to be taxed only on taxable investment income;

(d) A, Insured, or one or more persons related (within the meaning of § 267(b) or 707(b)) to A or Insured directly or indirectly own at least 20 percent of the voting power or value of the outstanding stock of Captive; and

(e) One or both of the following apply:

(1) the amount of the liabilities incurred by Captive for insured losses and claim administration expenses during the Computation Period (defined in section 2.02 of this notice) is less than 70 percent of the following:

(A) premiums earned by Captive during the Computation Period, less

(B) policyholder dividends paid by Captive during the Computation Period; or

(2) Captive has at any time during the Computation Period directly or indirectly made available as financing or otherwise conveyed or agreed to make available or convey to A, Insured, or a person related (within the meaning of § 267 (b) or 707 (b)) to A or Insured (collectively, the "Recipient") in a transaction that did not result in taxable income or gain to Recipient, any portion of the payments under the Contract, such as through a guarantee, a loan, or other transfer of Captive's capital.

Appendix D

A transaction described in this section 2.01 is identified as a transaction of interest regardless of whether the transaction has the characteristics described in section 1 of this notice.

.02 *The Computation Period*

The Computation Period is (a) the most recent five taxable years of Captive or (b) if Captive has been in existence for less than five taxable years, the entire period of Captive's existence. For purposes of the preceding sentence, if Captive has been in existence for less than five taxable years and Captive is a successor to one or more Captives created or availed of in connection with a transaction described in this notice, taxable years of such predecessor entities are treated as taxable years of Captive. For purposes of this section 2.02, a short taxable year is treated as a taxable year.

.03 *Exception for Compensatory Arrangements with Prohibited Transaction Exemption*

There may be limited circumstances in which a captive insurance company arrangement that provides insurance for employee compensation or benefits is described in this section and accordingly is identified as a transaction of interest under this notice. However, if such an arrangement is one for which the Employee Benefits Security Administration of the U.S. Department of Labor has issued a Prohibited Transaction Exemption, it is not treated as an arrangement identified as a transaction of interest under this notice.

SECTION 3. RULES OF APPLICATION

.01 *Effective Date*

Transactions that are the same as, or substantially similar to, the transaction described in section 2.01 of this notice are identified as "transactions of interest" for purposes of § 1.6011-4(b)(6) and §§ 6111 and 6112 effective November 1, 2016. Persons entering into these transactions on or after November 2, 2006, must disclose the transaction as described in § 1.6011-4. Material advisors who make a tax statement on or after November 2, 2006, with respect to transactions entered into on or after November 2, 2006, have disclosure and list maintenance obligations under §§ 6111 and 6112. See § 1.6011-4(h) and § 301.6111-3(i) and § 301.6112-1(g) of the Procedure and Administration Regulations.

Independent of their classification as transactions of interest, transactions that are the same as, or substantially similar to, the transaction described in section 2.01 of this notice may already be subject to the requirements of §§ 6011, 6111, or 6112, or the regulations thereunder. When the Treasury Department and the IRS have gathered enough information regarding potentially abusive § 831 (b) arrangements, the IRS and the Treasury Department may take one or more actions, including removing the transaction from the transactions of interest category in published guidance, designating the transaction as a listed transaction, or providing a new category of reportable transaction. In the interim, the IRS may challenge a position taken as part of a transaction that is the same as, or substantially similar to, the transaction described in section 2.01 of this notice under other provisions of the Code or judicial doctrines such as sham transaction, substance over form, or economic substance.

.02 *Participation*

Under § 1.6011-4 (c) (3) (i) (E), A, Insured, Captive, and, if applicable, Company C are participants in a transaction for each year in which their respective tax returns reflect tax consequences or a tax strategy of a transaction of interest described in section 2.01 of this notice.

.03 *Time for Disclosure*

For rules regarding the time for providing disclosure of a transaction described in section 2.01 of this notice, see § 1.6011-4 (e) and § 301.6111-3 (e). However, if, under § 1.6011-4(e), a taxpayer is required to file a disclosure statement with respect to a transaction described in section 2.01 of this notice after November 1, 2016, and prior to January 30, 2017, that disclosure statement will be considered to be timely filed if the taxpayer alternatively files the disclosure with the Office of Tax Shelter Analysis by January 30, 2017.

.04 *Material Advisor Threshold Amount*

The threshold amounts are the same as those for listed transactions. See § 301.6111-3(b)(3)(i)(B).

.05 *Disclosure*

(a) General rule. Under § 1.6011-4(d) and the Instructions to Form 8886, Reportable Transaction

Disclosure Statement, the required disclosure must identify and describe the transaction in sufficient detail for the IRS to be able to understand the tax structure of the reportable transaction and the identity of all parties involved in the transaction.

(b) *Information required of all participants.* For all participants, describing the transaction in sufficient detail includes, but is not limited to, describing on Form 8886 when and how the taxpayer became aware of the transaction.

(c) *Information required of Captive.* For Captive, describing the transaction in sufficient detail includes, but is not limited to, describing the following on Form 8886:

(1) Whether Captive is reporting because (i) the amount of the liabilities incurred by Captive for insured losses and claim administration expenses during the Computation Period is less than 70 percent of the amount specified in section 2.01(e)(1) of this notice; (ii) Captive has at any time during the Computation Period made available as financing or otherwise conveyed or agreed to make available or convey any portion of the payments under the Contract to A, Insured, or a person related (within the meaning of § 267(b) or 707(b)) to A or Insured through a separate transaction, such as a guarantee, a loan, or other transfer; or (iii) both (i) and (ii);

(2) Under what authority Captive is chartered;

(3) A description of all the type(s) of coverage provided by Captive during the year or years of participation (if disclosure pertains to multiple years);

(4) A description of how the amounts treated as premiums for coverage provided by Captive during the year or years of participation (if disclosure pertains to multiple years) were determined, including the name and contact information of any actuary or underwriter who assisted in these determinations;

(5) A description of any claims paid by Captive during the year or years of participation (if disclosure pertains to multiple years), and of the amount of, and reason for, any reserves reported by Captive on the annual statement; and

(6) A description of the assets held by Captive during the year or years of participation (if disclosure pertains to multiple years); that is, the use Captive has made of its premium and investment income, including but not limited to, securities (whether or not registered), loans, real estate, or partnerships or other joint ventures, and an identification of the related parties involved in any transactions with respect to those assets.

.06 *Penalties*

Persons required to disclose these transactions under § 1.6011-4 who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose these transactions under § 6111 who fail to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of advisees under § 6112 who fail to do so (or who fail to provide such lists when requested by the IRS) may be subject to the penalty under § 6708(a). In addition, the IRS may impose other penalties on parties involved in these transactions, including the accuracy-related penalty under § 6662 or § 6662A.

SECTION 4. REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments on how the transaction might be addressed in published guidance.

Comments should be submitted in writing on or before January 30, 2017. Send submissions to CC:PA:LPD:PR (Notice 2016-66), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2016-66), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. Comments may also be sent electronically, via the following e-mail address: Notice.comments@irscounsel.treas.gov. Please include "Notice 2016-66" in the subject line of any electronic communications. All comments submitted will be available for public inspection and copying.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is John E. Glover of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice contact Mr. Glover at (202) 317-6995 (not a toll-free call).