AMERICANS for TAX REFORM

722 12th Street N.W.
Fourth Floor
Washington, D.C.
20005
T: (202)785-0266
F:(202)785-0261
www.atr.org

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Via Electronic Submission at www.regulations.gov

Internal Revenue Service
Attn: CC:PA:01:PR
Room 5503
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2026-62: Guidance and Other Actions Being Considered Regarding Certain Potentially Abusive Investment Fund Strategies Involving Financial Products

Americans for Tax Reform (ATR) appreciates the opportunity to comment on the Department of the Treasury's and the Internal Revenue Service's Notice 2026-62 (the "Notice"), "Guidance and Other Actions Being Considered Regarding Certain Potentially Abusive Investment Fund Strategies Involving Financial Products."

ATR is a nonprofit, 501(c)(4) taxpayer advocacy organization founded in 1985 at the request of President Ronald Reagan. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR believes the government's power to control one's life derives from its power to tax. We believe that power should be minimized.

Americans for Tax Reform submits this comment to address a single issue: Notice 2026-62's warning that potentially forthcoming guidance could apply "retroactively to transactions that already have taken place at the time the guidance is issued."[1] **Regardless of the propriety of the "novel investment fund strategies" described in the Notice, and the merits of any forthcoming guidance, one facet of the U.S. legal code is clear: the retroactive application of such guidance would subvert core principles of administrative law, undermine the intent of Congress, and seriously disrupt a marketplace holding trillions of dollars of investor savings.**

A rule with retroactive force is an arbitrary tax hike. Every purported fix the notice contemplates would make investors pay more tax, sooner, on transactions that they would otherwise owe only when they sell.

We thus recommend that the Treasury Department and IRS:

[1] Notice 2026-62, § 1 (citing I.R.C. § 7805(b)(1), (3)).

1. Apply any regulation, revenue ruling, or guidance arising from the Notice only to transactions entered into after publication of guidance stating, in detail, the operative rule; and
2. Expressly state that no penalties will be asserted for any activities that occurred in the period before such guidance is published.

I. Retroactive Rulemaking Is Incompatible with Bedrock Principles of Fair Notice and Due Process, and Section 7805(b) Does Not Authorize It Here

The Supreme Court has often emphasized, "[r]etroactivity is not favored in the law."[2] This principle applies in full force to agency regulations, which are promulgated by unelected officials exercising delegated authority.[3] The reason is simple: retroactivity is fundamentally at odds with fair notice and due process—basic tenets enshrined not only in our Constitution but in statute.

The text of the Administrative Procedure Act ("APA") confirms that rulemaking is exclusively a forward-looking exercise.[4] When vesting agencies with the authority to issue rules, Congress took great care to define a "rule" as "an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy."[5] It follows that agencies generally may not issue rules that change the law retroactively. Any contrary rule would make a mockery of the notice-and-comment process, the entire point of which is to give potentially regulated parties fair notice before regulations issue.[6] After all, what purpose does a 30-day notice period serve if an agency may, at its own behest, impose rules that reach back in time?

Seeking to sidestep this conclusion, the Notice invokes I.R.C. § 7805(b) as authorization for retroactive guidance. Not so. Section 7805(b) confers no such sweeping authority on Treasury and the IRS, and permits retroactive application only in limited circumstances that must be read with the background limiting principles of the APA and fair notice in mind.

The text and legislative history of § 7805(b) confirm as much. Prior to 1996, Treasury regulations were presumed to apply retroactively.[7] In 1996, however, Congress flipped that presumption on its head.[8] By Congress's command, the Secretary of the Treasury must now invoke one of seven specifically enumerated exceptions before imposing a regulation retroactively. In other words, "[r]etroactivity requires justification," and such justification is subject to judicial review.[9]

[2] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).
[3] *See Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1351 (11th Cir. 2005) (explaining that "[r]etroactive application of administrative rules is highly disfavored"); *see also Orr v. Hawk*, 156 F.3d 651, 653 (6th Cir. 1998) (stating that "rules typically will not apply retroactively in the absence of an express statutory authorization of retroactive rulemaking").
[4] 5 U.S.C. §§551–559.
[5] *Id.* § 551(4) (emphasis added); *see Bowen*, 448 U.S. at 216 (Scalia, J., concurring) (stating that the APA makes clear "that rules have legal consequence only for the future").
[6] *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019) ("Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision.").
[7] *See Dixon v. United States*, 381 U.S. 68, 74 (1965).
[8] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101, 110 Stat. 1452 (1996); *see* I.R.C. § 7805(b)(1)(A)–(C).
[9] *Cemco Invs., LLC v. United States*, 515 F.3d 749, 752 (7th Cir. 2008).

The Treasury should also take care to note that Section 7805(b)(1)(C) allows a final regulation to reach back only to the date of a notice "substantially describing the expected contents" of that regulation.[10] Notice 2026-62 merely describes transactions. It poses four open-ended questions, and concedes that whether or not guidance is issued, its "timing, form and content" remain undecided.[11] A notice that does not have any clear idea of what the final rule will say cannot reasonably stand as having described the expected contents of the regulation itself.

The Notice cites only one exception to justify retroactive application: § 7805(b)(3), which permits retroactive application "to prevent abuse."[12] The Notice's reliance on this exception is legally unsound for two independent reasons.

First, the Notice impermissibly stretches the exception to swallow the default rule against retroactive applications.[13] Tellingly, the Notice never identifies what "abuse" would persist if forthcoming guidance applied only prospectively. Nor does it explain why the "novel investment fund strategies" it describes are particularly susceptible to abuse.[14] In other words, the Notice offers not a single reason why guidance addressing these strategies warrants special retroactive treatment. The irony is hard to miss: by invoking an anti-abuse exception in a way that swallows the rule—and resurrects the very regime Congress rejected in 1996—the Notice itself smacks of an abuse of the rulemaking process.

Second, the Notice misreads § 7805(b) as vesting the Treasury Secretary with vast, open-ended authority. Unlike the other enumerated exceptions (*i.e.*, correction of procedural defects[15] or congressional authorization[16]), the "prevention of abuse" exception is statutorily ambiguous. While the statute neither defines nor limits "abuse," the Notice turns bedrock canons of statutory interpretation on their head, reading that silence as vesting the Treasury Secretary with sweeping authority to impose any regulation retroactively under the guise of preventing "abuse." That reading finds no support in our current jurisprudential landscape or case law. To the contrary, time and again, the Supreme Court has emphasized that ambiguous statutes, especially those that vest agencies with delegated authority, are interpreted narrowly, not broadly.[17] Tax statutes and regulations are no exception.[18] Properly read, § 7805(b)(3) is a narrow grant of authority permitting the Treasury Secretary to apply regulations retroactively only when necessary to police a specific, identified "abuse."

In short, the Notice's invocation of § 7805(b)(3) to apply forthcoming guidance retroactively would not survive judicial scrutiny. It not only conflicts with principles of fair notice, but it stretches the

[10] I.R.C. § 7805(b)(1)(C)
[11] Notice 2026-62, §§ 1, 4.01
[12] 26 U.S.C. § 7805(b)(3) ("The Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse.").
[13] *Cf. Pac. Gas and Elec. Co. v. Fed. Energy Regul. Comm'n*, 113 F.4th 943, 949 (D.C. Cir. 2024) (stating that courts "cannot read an exception to swallow the rule" (citation modified)); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process.").
[14] Notice 2026-62, § 1.
[15] *Id.* § 7805(b)(4).
[16] *Id.* § 7805(b)(6).
[17] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024); *West Virginia v. EPA*, 597 U.S. 697, 721 (2022)
[18] *Cf. Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011).

meaning of § 7805(b)(3) beyond the plain meaning of the statutory text and what Congress could have intended.

II. Closing these Strategies by Administrative Action is an Unwarranted Tax Hike, and does not align with Congress' statutory intent for Section 852(b)(6)

It is also important to note Congress has declined to end Section 852(b)(6). In September 2021, then-Senate Finance Committee Chairman Ron Wyden released a discussion draft that would have repealed Section 852(b)(6) outright, forcing funds to recognize gains on every in-kind redemption.[19] The House Ways and Means Committee's tax title for the 2021 reconciliation bill left the provision untouched, and Congress never enacted a repeal. Congress never intended to undermine or diminish Section 852(b)(6), and as such the Treasury should not attempt to override Congress' decision.

Because capital gains are taxed only when an asset is sold, the tax itself gives investors an incentive to avoid selling their assets. This "lock-in" effect keeps savers tied to concentrated, poorly diversified portfolios that have outlived their usefulness for the investor. Section 351 contributions and in-kind redemptions provide a release valve for this distortion. Investors that use these strategies are not liquidating their assets, but are instead staying invested, moving savings to more productive assets, and deferring a tax they will still owe when they eventually sell. Forcing recognition at that moment also reduces a certain amount of new capital that would otherwise remain invested in American companies, leaving less for new businesses and jobs to emerge and grow. A tax regime that punishes diversification and rewards inertia reduces the efficacy of American capital markets, harming economic growth in the long run.

III. Because the Notice Provides No Fair Warning, Retroactive Penalties Cannot Apply to the Conduct It Describes

The law reserves retroactive penalties for those who had fair warning that their conduct was improper.[20] The Supreme Court has made clear that "one is not to be subjected to a penalty unless the words of the statute plainly impose it."[21] The Court has likewise refused to allow an agency to impose liability for conduct predating the announcement of its position, because doing so would undermine the principle that agencies must give regulated parties fair warning of the conduct a rule prohibits or requires.[22]

Here, the Notice provides investors no fair warning whatsoever. The Notice speaks only in vague terms to describe "novel investment fund strategies" that could be "inconsistent with the purpose and proper application of the relevant federal tax rules."[23] The lack of clarity is most acute in the Notice's treatment of selective NPC terminations, which occupies just four of its twenty-six pages. At day's end,

[19] S. Comm. on Fin., 117th Cong., *Wyden Pass-through Reform Discussion Draft*, § 17 (Sept. 10, 2021) (proposing repeal of I.R.C. § 852(b)(6))
[20] *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 191–92 (1977).
[21] *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (citation modified).
[22] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012).
[23] Notice 2026-62, § 1.

good-faith investors are left to guess which NPC strategies are permitted and which are prohibited—and a regime that requires guesswork cannot give rise to retroactive penalties.

Retroactive penalties may be defensible in extreme circumstances, for example where taxpayers took positions that existing laws already foreclosed. But they are indefensible where, as here, taxpayers follow the rules as written and an agency promulgates an ambiguous Notice that seeks to change existing law by retroactive rulemaking.

IV. The Notice's Signal That Retroactive Application and Penalties Remain on the Table Is Irresponsible and Has Already Disrupted the Markets

Although the Notice pays lip service to the notion that the scope of guidance it seeks to provide "does not adversely affect well-established market practice that is consistent with the intent of Congress,"[24] it irresponsibly suggests the door could be open to retroactive application and penalties where no such possibility seriously exists. Indeed, the mere signal that forthcoming guidance may reach back to completed transactions has already disrupted well-established market practice, injecting uncertainty into markets and the domestic economy before any operative rule has been announced.

ETF operations. U.S. exchange-traded funds held approximately $15.7 trillion in assets at the end of July 2026.[25] By threatening retroactive application and penalties for certain ETF operations, the Notice puts the stability of that market at risk, with potentially wide-scale consequences. Although the Notice disclaims any challenge to routine redemptions, the line it draws between "routine" and "suspect" turns on nebulous standards that are not yet defined by regulation (intent, timing, and whether assets "align" with a fund's investment thesis).[26] If completed transactions may later be recharacterized, sponsors, authorized participants, and shareholders must reserve against liabilities they cannot measure. And retroactive recharacterization of a fund's income could expose the fund to entity-level taxes that would ultimately fall on its shareholders, including ordinary investors.

Notional Principal Contracts. NPCs are among the most common tools in American finance, utilized by pension funds, insurers, banks, and investment funds alike. Some sources estimate that the total notional outstanding in interest rate swaps *alone* is in the hundreds of trillions of dollars.[27] Since 1993, market participants have built intricate investment strategies in reliance on the governing tax regulations. The Notice threatens to upend this regime by imposing retroactive penalties on funds simply because they lawfully terminate a particular NPC at a time that results in a potentially favorable tax consequence for the investor.[28] Faced with that risk, funds may avoid terminating swaps early altogether, even when doing so makes financial sense. The upshot: managing risk becomes costlier for everyday American investors, including the pension plans and retirement savers who rely on these funds.

[24] Notice 2026-62, § 4.
[25] Sarah Davis, *ETF Statistics 2026*, Axis Intelligence Research (Sept. 6, 2026), https://axis-intelligence.com/etf-statistics/.
[26] Notice 2026-62, §§ 2.01(2), 2.02(2), 2.06.
[27] Int'l Swaps & Derivatives Ass'n, *Key Trends in the Size and Composition of OTC Derivatives Markets in the Second Half of 2025*, at 6 (July 2026), https://www.isda.org/a/rGkiE/Key-Trends-in-the-Size-and-Composition-of-OTC-Derivatives-Markets-in-the-Second-Half-of-2025.pdf.
[28] Notice 2026-62, § 3.04(2).

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Americans for Tax Reform's request is a simple one : The Treasury should mitigate the aforementioned risks to our economy by clarifying that forthcoming regulations and guidance will apply prospectively, not retroactively. Freedom from arbitrary and capricious rulemaking and taxation is a cornerstone of the American legal system and is an essential element of the relative attractiveness of America's capital markets in comparison with the rest of the world. That is why the Treasury must avoid retroactive rulemaking at all costs. Doing so will enable investors to adopt new investment strategies with the benefit of clear regulation and without the fear of ballooning retroactive penalties.

V. Conclusion

Americans for Tax Reform appreciates the opportunity to comment on the Notice. Americans for Tax Reform respectfully submits that the surest way to honor the Notice's commitment to "respect market expectations with respect to conventional, long-established tax planning"[29] is to apply forthcoming regulations prospectively, to confirm that the Notice does not start a retroactivity clock, and to disclaim penalties for prior periods. Congress has already considered, and declined the broader change the Notice gestures toward. The Treasury should not raise taxes on American savers by arbitrary and capricious rulemaking. Thank you for your consideration of this comment.

Sincerely,

Americans for Tax Reform

[29] Notice 2026-62, § 1.