LA PRESA PARTNERS LLC
SOPHISTICATED BOUTIQUE TAX ADVISORY

CLIENT ALERT | ASSET MANAGEMENT | SEPTEMBER 2026

Good Enough to Be True

What Revenue Ruling 2026-20 and Notice 2026-62 change for §351 ETF conversions and tax-aware funds, what they leave open, and what to do before October 28

ETF CONVERSIONS · TAX-AWARE FUNDS · IRS GUIDANCE

By Carlos Schmidt, CPA | La Presa Partners LLC | September 28, 2026

WHY YOU SHOULD READ THIS

On September 28 the IRS issued Revenue Ruling 2026-20 and Notice 2026-62. The ruling treats an investor's contribution of appreciated stock to a new ETF as a taxable exchange when, under an integrated plan, the ETF promptly uses that stock to redeem an authorized participant. The notice describes seven related fund strategies, says the IRS may challenge them under existing law, and asks for comments by October 28. The guidance follows two years in which sponsors marketed §351 ETF launches through advisers, with minimums as low as $150,000 for some custody arrangements. By BNY's count, 77 U.S. ETFs had launched with about $16.6 billion of seed assets from individual investors by May 2026.

Access broadened before the guidance arrived. Sponsors marketed §351 ETF launches through advisers at lower minimums. Investors now need to test the complete transaction against the guidance.

The holding is narrower than Treasury's posture. Secretary Bessent's message on these conversions: “they don't work under existing law.” The holding, though, reaches only the lots that left: for our hypothetical family, $4 million of $10 million ($714,000, not $1.9 million). It does not approve the rest.

The end of Chevron does not end the challenge. A ruling persuades rather than controls, but the IRS can still invoke step-transaction doctrine. *Loper Bright* matters more for future regulations.

It applies to open years. Rulings apply retroactively unless limited, and this one is not. Completed conversions need review.

Losing mostly accelerates tax, but the cash cost is immediate. Paying $714,000 five years early costs about $155,000 in present value; the payment is still $714,000.

A fund's tax benefit is worth what the investor can use. A $102,000 claimed straddle benefit becomes an $83,000 current cost if only half the loss is deductible this year.

Pause matching deals, test the rest on their facts, and consider commenting by October 28.

Congress wrote the in-kind redemption rule, now §852(b)(6), so a fund meeting redemptions with securities would not pay tax on the appreciated stock it hands out. ETFs built a business model on it, and officials say they have no quarrel with that. In July they told a tax conference that some newer uses looked “too good to be true.” That is a reaction, not a Code section. Their quarrel is with a §351 contribution through the front door and a §852(b)(6) redemption out the back, which together swap an already diversified portfolio for a materially different one without a current tax bill. The government's answer is the oldest it has: step back, treat the steps as one, and quote *Minnesota Tea* on results reached “by following a devious path.” Perhaps. But Congress paved both paths, and the question is how much of Congress's road the IRS may close by ruling.

Our view: the guidance is narrower, and in places weaker, than the headlines suggest, and stronger in one spot than the market would like. New conversions built on an integrated plan (contribution, creation by the participant, prompt redemption with the contributed stock) should pause until counsel addresses the ruling by name; the absence of a written selling list is not a safe harbor. Much of the rest is defensible on its facts, and clients should defend it with the statute open on the table.

A PERSONAL NOTE

This topic is close to my heart. I have spent most of my career in the tax departments of asset managers, including as Head of Tax at Highbridge and building the global tax team at Ares, where these rules decide how funds are built and run. So I take the "too good to be true" line personally. Tax-free transfers to a controlled corporation date to 1921. Congress drew the investment-company limit in 1966 and Treasury issued the first regulations in 1967. Congress protected in-kind fund redemptions in 1969 and re-enacted that protection as §852(b)(6) in 1986; ETFs have run on it since 1993. Treasury adopted today's diversified-portfolio rule, with its 25/50 tests, in 1996. What is new is the combination the ruling targets, and I will be candid that the leading academic critic of these structures thinks it should be stopped, though he looks first to Congress to do it. Decades of statute and regulation deserve to be read as written. — C.S.

YEAR	WHAT CONGRESS OR TREASURY DID
1921	Revenue Act: tax-free transfers to a controlled corporation (predecessor of §351)
1966	Foreign Investors Tax Act: investment-company limit, now §351(e)
1967	Treasury issues the first investment-company regulations
1969	Tax Reform Act: in-kind redemption exception to former §311
1986	Tax Reform Act relocates the redemption exception to §852(b)(6)
1993	ETFs begin operating on §852(b)(6)
1996	Treasury adopts the diversified-portfolio rule (25/50 tests) implementing §351(e)

Exhibit 1. The operative rules have been on the books for decades; the ruling targets how they are combined. Dates from the personal note above and its sources.

01 HOW §351 ETF CONVERSIONS REACHED MORE ADVISED CLIENTS

Traditional partnership exchange funds have long offered tax-deferred diversification under §721, generally with substantial minimums and multiyear withdrawal restrictions. Section 351 ETF contributions use a different structure and different qualification rules. By late 2024, sponsors were marketing ETF launches more broadly through advisers, allowing qualifying investors to contribute portfolios in exchange for listed ETF shares. (Buying ETF shares after launch is a different thing; the tax question arises only for those who contribute appreciated securities at launch.) Lower minimums and improved custody processes then expanded access.

WHEN	WHAT HAPPENED	WHY IT MATTERS
Dec. 2024	Cambria and ETF Architect launch the Cambria Tax Aware ETF (TAX), seeded by §351 contributions; 0.49% management fee at launch	Pitched as bringing a tool "previously only accessible to accredited investors" to a public fund; demand reported at "10 times" expectations
2025	Cambria follows with ENDW, GEW (about $150 million before its September launch), and USEW (0.25% fee); Alpha Architect's US Equity ETF gathers nearly $500 million after a July launch	The §351 launch becomes a repeatable product line, not a one-off deal

WHEN	WHAT HAPPENED	WHY IT MATTERS
Oct. 2025	Alpha Architect sets a $150,000 contribution minimum for Schwab accounts (transfer setup in as little as 20 minutes); Cambria plans minimums as low as $100,000	Custodian automation brings the entry point within reach of ordinary advised clients
Mar. 2026	Alpha Architect passes $1 billion across its public §351 ETFs, with further funds planned	Evidence of broader distribution; individual transaction facts still control
Sept.–Nov. 2026	Guidance issued Sept. 28. Cambria lists sponsor dates for its Global EW 3 ETF: Oct. 1 contribution coordination, Oct. 13 paperwork, Nov. 10 anticipated trading	Sponsor dates, subject to change, not IRS deadlines; investors in the pipeline weigh the ruling during the comment period

Exhibit 2. How §351 conversions reached advised clients. Sponsor and press figures as reported; La Presa has not verified fund-level data.

Broader distribution may help explain the attention, but the guidance does not establish why the IRS acted when it did. The notice describes the strategies as "not the result of conventional, long-established tax planning" and says the IRS may challenge them on examination under existing law. Separately, Senator Wyden's 2025 PARTNERSHIPS Act would deny nonrecognition for specified transfers of marketable securities to investment companies and certain diversification vehicles; that proposal is distinct from the IRS's existing-law challenge and would apply only to transfers after enactment. None of this makes any particular fund offend the ruling. A sponsor that seeds a fund with stock it means to keep is outside the ruling's facts, and advisers still describe these conversions as a niche tool. The practical issue is whether the investor's complete plan matches the challenged facts.

02 WHAT THE IRS ACTUALLY DID

	REVENUE RULING 2026-20	NOTICE 2026-62
What it covers	A §351 contribution to a new ETF followed, under an integrated plan, by a §852(b)(6) redemption of the participant with the contributed stock	Seven strategies: a partnership variation, box spreads, record-date rotation, the RIC income test, identified straddles, same-day currency elections, and swap terminations
What it concludes	A taxable §1001 exchange with the participant for the stock used in the redemption	Identifies challenged fact patterns and theories; requests comments
Legal weight	Binds IRS personnel; a court decides the issue itself	No new binding rule or designation; existing law still applies
Past transactions	Applies to earlier open years; no prospective-only limit	Future guidance "could apply … retroactively"; reach depends on the guidance and statute
Reporting	Creates no filing duty of its own	Not a listed transaction or transaction of interest (yet)
What to do	Pause matching deals; refresh advice on completed ones	Map each product to the examples; comment by October 28

Exhibit 3. Two documents, two jobs. La Presa summary.

Can the IRS really challenge this after Chevron?

Yes. After *Loper Bright*, courts exercise independent judgment on what a statute means. A revenue ruling may persuade a court but does not control the answer. The IRS can still invoke step-transaction and substance-over-form doctrines (and, for some strategies, codified economic substance), which judges apply themselves, so the end of Chevron does not dispose of the challenge. It matters more for what comes next. If Treasury writes regulations to narrow §852(b)(6), §351, or §1092, a court will ask whether each rule falls within the authority Congress granted and satisfies administrative-law requirements; a rule that cuts against plain text ("shall not

apply" in §852(b)(6), for instance) will be exposed. Rules resting on an express delegation will be harder to attack: §988(a)(1)(B) itself lets the Secretary set an earlier election deadline.

03 THE CONVERSION, AND WHERE THE LINE RUNS

Oakridge Family Holdings owns $10 million of stock with a $2 million basis and contributes it to Harbor Core Equity ETF, a new fund, for ETF shares. An authorized participant (the dealer that creates and redeems ETF shares in bulk) delivers $4 million of cash or stock that fits Harbor's strategy. Shortly afterward, Harbor redeems the participant's shares with $4 million of Oakridge's stock.

	AS PLANNED	AS THE RULING RECASTS IT
Step 1	Oakridge contributes $10M of stock to Harbor for ETF shares (§351)	Same contribution, read as the first leg of one integrated plan
Step 2	Authorized participant delivers $4M to Harbor for its own ETF shares	Treated as the mechanism carrying Oakridge's stock out the door
Step 3	Harbor redeems the participant with $4M of Oakridge's contributed stock (§852(b)(6))	Recast as Oakridge exchanging $4M of stock directly with the participant, using Harbor as a conduit

Exhibit 4. The conversion as planned and as recharacterized. Hypothetical figures; all steps assumed to be part of one plan.

The IRS reads the planned steps as one. Its holding expressly identifies a taxable exchange of the contributed securities used to redeem the authorized participant. On our assumed facts, Oakridge exchanges $4 million of stock with the participant, using Harbor as a conduit. The ruling does not approve the treatment of the remaining $6 million. The ruling leans on *Kuper*, a 1976 Fifth Circuit decision that recast a contribution followed by a distribution of the same property, and on Rev. Rul. 71-336. Those authorities are real, and they fit the facts the ruling assumes. Clients should not pretend otherwise.

The taxpayer's best case

The ruling assumes each contributed portfolio already passed the 25/50 test, so §351(e) did not stop the contribution; the IRS goes around the test with a conduit theory. The taxpayer's reply is structural. Congress and Treasury wrote a specific regime for diversification through planned transfers, with its own plan rule, and Congress wrote the in-kind redemption rule knowing redemptions carry appreciated stock out the door. Where two specific provisions each apply by their terms, a general doctrine should not stitch them into a third transaction Congress never described. And Oakridge never holds the participant's property; it holds ETF shares. *Summa Holdings*, which refused to recast transactions that followed the statute, supports that argument by analogy. Its strength depends on whether Harbor is a genuine continuing owner or a pass-through for a prearranged swap.

> **THE FACTS THAT DECIDE IT**
>
> The notice leaves out of scope assets "consistent with the ETF's investment thesis" that the fund intends and expects to keep. A plan can be proved by a written selling list, an oral understanding, target allocations, a model portfolio, or coordinated redemptions; ordinary later trading does not prove it alone. Good records support a good position. They cannot rescue a bad one.

04 OAKRIDGE, IN DOLLARS

The holding reaches the stock used to redeem the participant and does not approve the rest, which makes the lot-level record the most valuable document in the file.

HYPOTHETICAL	ILLUSTRATION: ALL $10M EXCHANGED	ILLUSTRATION: ONLY $4M EXCHANGED
Value treated as exchanged	$10,000,000	$4,000,000
Basis of those lots	$2,000,000	$1,000,000
Gain recognized	$8,000,000	$3,000,000
Federal tax at 23.8%	**$1,904,000**	**$714,000**
Basis in ETF shares afterward (assumed)	$10,000,000	$5,000,000
Gain still deferred (assumed)	$0	$5,000,000

Exhibit 5. La Presa calculations; $10 million contributed. Long-term gain at 20% plus 3.8% NIIT; state tax and fees excluded. Basis rows are conditional.

The lots matter. At the portfolio's 20% average basis, the $4 million would carry $800,000 of basis and $761,600 of tax: $47,600 too much, on a return someone has to sign. And the other $6 million is not automatically safe; the $5 million share basis assumes the remaining contribution qualifies.

What losing actually costs

If the ruling applies, Oakridge owes $714,000 now, and its ETF-share basis rises by the $3 million of gain recognized, so it owes less at exit. Losing accelerates tax more than it creates tax, and the cost of acceleration depends on the exit.

YEARS UNTIL SALE	PRESENT VALUE OF PAYING $714,000 TODAY INSTEAD
1	$34,000
3	$97,000
5	$155,000
10	$272,000

Exhibit 6. La Presa calculation, PV = $714,000 × (1 − 1/1.05^n) at 5%. Excludes interest, penalties, financing, fees, state tax, and changes in value or rates.

A family that planned to hold until death, expecting a §1014 step-up, has the full $714,000 at stake. A family planning to sell in five years is arguing about roughly $155,000 of timing value, plus interest and any penalty. Either way the cash requirement today is $714,000.

> **THE FUNDING RULE**
>
> Name the source of the $714,000 before the next conversion. Selling ETF shares is itself taxable: with $5 million of basis in $10 million of shares, and on proportional-basis assumptions, half of each dollar sold is gain, so Oakridge would sell about $810,000 to net $714,000. A strategy that cannot fund its own downside is a bet, and it should be sized like one.

05 THE REST OF THE NOTICE: WHAT MUST BE RESOLVED

Some of the other seven strategies are aggressive. Others rest on statutory elections the IRS argues are being used against their purpose. Exhibit 7 maps the arguments without grading them.

STRATEGY	THE IRS'S CONCERN	THE TAXPAYER'S BEST REPLY	WHAT MUST BE RESOLVED

Exhibit 7. La Presa map of Notice 2026-62, §§2.03–3.04, on its assumed facts; not an opinion on any transaction.

Where a position rests on a statutory election, the government's case turns on purpose, on facts (qualification, closing order, measurement), and on economic substance. Character is not rate: gain from same-day forwards or short swaps is often short-term, so the benefit may be absorbing capital losses rather than a 20% rate. A client within one of the notice's scope exclusions should document why.

06 MERIDIAN AND THE CURRENCY STRADDLE

Meridian Taxable LLC, a partnership owned by a top-bracket family, invests in a tax-aware fund, also a partnership, so the fund's items reach the family's returns. The fund enters a currency forward and an offsetting futures contract, identifies them as a §1092(a)(2) straddle, and treats the futures leg as closing first. One leg gains $1 million, the other loses $1 million, and before fees the fund has made nothing.

When the futures leg wins, 60% of its gain is long-term and 40% short-term: $268,000 of tax. The $1 million ordinary loss on the forward saves $370,000. The family claims $102,000 of benefit from a trade that earned zero. When the futures leg loses, the loss moves into the forward's basis and the result is a wash. Heads, a tax benefit; tails, nothing. That asymmetry is the IRS's target, and it is also what the investor should underwrite. The $102,000 assumes full use of the deduction at 37% this year; if some limit left only $500,000 deductible now, the result is an $83,000 current cost. Ask whether the pitch book models that case.

The box-spread ETF runs on the same logic. On $50,000 of interest-like return, ordinary tax at 37% is $18,500; long-term gain at 20% would be $10,000. That $8,500 is the rate advantage if the shareholder's gain is long-term; deferral is a separate benefit. Ask what is left without either.

07 PENALTIES, RETROACTIVITY, AND THE CALENDAR

DATE	WHAT IT IS
Sept. 28, 2026	Revenue Ruling 2026-20 and Notice 2026-62 issued
Oct. 28, 2026	Comment deadline on Notice 2026-62 — a deadline, not a grace period
Open tax years	The ruling applies retroactively; completed conversions in open years are in scope now

Exhibit 8. The calendar. La Presa summary.

Penalties are where confidence gets expensive. A 20% accuracy-related penalty on Oakridge's $714,000 adjustment adds $142,800. If the penalty for an undisclosed transaction lacking economic substance applies, the rate is 40%, or $285,600, with no reasonable-cause defense. Interest is extra, and an adverse ruling does not itself establish a penalty. If the item is a tax shelter within §6662(d)(2)(C), substantial authority and disclosure do not provide the ordinary reductions in the substantial-understatement calculation under §6662(d)(2)(B). Where reasonable-cause relief remains available, it depends on the facts and on actual, reasonable, good-faith reliance; an opinion alone is not enough.

On timing, do not assume future regulations will protect completed transactions. Their reach depends on the guidance, the statute, and which version of §7805(b) governs: the 1996 limits on retroactive regulations cover only regulations under statutes enacted on or after July 30, 1996, and much of the Code at issue is older. The abuse exception is also available. On reporting, the notice alone creates no Form 8886 duty, but existing categories apply, a fund's exceptions may not protect its investors, and Form 8275 does not replace a required Form 8886.

08 WHAT WE WOULD REQUIRE

- **The plan evidence.** When, by whom, and how the outgoing securities were identified, including oral understandings, target allocations, and redemption arrangements.
- **A lot-level reconciliation.** Each holding contributed, its basis, and whether and when it left in a redemption.
- **An after-tax model with the investor in it,** showing the tax benefit apart from investment return.
- **A funding plan.** The tax if the position fails, and the cash (net of tax on any sale) that pays it.
- **Refreshed advice and honest marketing.** Advice that applies both documents to the executed facts, and sales materials without promises of "tax-free diversification."

What we would watch next

1. October 28, 2026. Comments close; the public docket will show who is making the case for the statute. Silence is a choice.
2. A listed-transaction or transaction-of-interest designation, which could create Form 8886 duties for covered participants, subject to the applicable rules and exceptions.
3. Proposed regulations under §§351, 721, and 852. Read the effective-date clause first, then ask the *Loper Bright* question.
4. The first examinations, and whether sponsors pause launches or move toward genuine seeding.

OUR TAKE

Tax efficiency is a legitimate goal, and ETFs deliver it because Congress wrote the rules that way, long before anyone had heard of an ETF. The IRS has not changed those rules. It has drawn a line around one pattern and pointed at several others, by ruling and notice, the tools of an agency making its case.

We would pause new conversions that closely match the ruling's integrated plan and refresh the advice on completed ones. For the other strategies, match the trades to the notice's examples, test the claimed treatment under existing law, and determine whether a scope exclusion applies (an exclusion is not approval). Then price the decision for the actual investor: cash tax, basis benefit, usable losses, interest, penalties, and fees. And comment. The provisions are longstanding; whether a particular combination qualifies depends on their terms, the complete plan, and the judicial doctrines. Taxpayers who think the line is drawn in the wrong place should say so, on the record, by October 28.

The market is asking whether the §351 ETF is finished. The better question is whether the file shows, lot by lot and date by date, that the fund wanted the stock it received. If it does, the taxpayer has an argument worth making. If it does not, quantify the liability now and agree the filing and payment response with your advisers before an examiner does it for you.

SELECTED RESEARCH AND PRIMARY AUTHORITIES

Internal Revenue Service. Revenue Ruling 2026-20 and Notice 2026-62 (Sept. 28, 2026), irs.gov.

Colon, Jeffrey M. "Unplugging Heartbeat Trades and Reforming the Taxation of ETFs." 2 U. Chi. Bus. L. Rev. 53 (2023).

New York State Bar Association Tax Section. Report No. 1252, Report on Investment Company Provisions: Sections 351(e) and 368(a)(2)(F) (Dec. 28, 2011).

Colon, Jeffrey M. "The Black Hole of Capital Gains: ETF Swap Funds." 75 DePaul L. Rev. 821 (2026).

Hodaszy, Steven Z. "Exchange-Traded Funds Use Section 852(b)(6) for Tax Avoidance, Not Just Tax Deferral: So Why Is This Loophole Still Open?" The Tax Lawyer (ABA, Spring 2022).

BNY. “Section 351 Conversions: Unlocking Value in ETFs” (June 5, 2026).

K&L Gates. “IRS and Treasury Discuss Current Issues With ETFs and Tax Aware Strategies” (July 22, 2026).

Zollars, Ed, CPA. Current Federal Tax Developments (Sept. 28, 2026).

Hallez, Emile. The Daily Upside (Oct. 29, 2025, and Mar. 30, 2026); Salinger, Tobias. Financial Planning (Jan. 23, 2025).

Minnesota Tea Co. v. Helvering, 302 U.S. 609 (1938); Kuper v. Commissioner, 533 F.2d 152 (5th Cir. 1976); Summa Holdings, Inc. v. Commissioner, 848 F.3d 779 (6th Cir. 2017); Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

Code §§351, 358, 362, 368, 721, 852, 988, 1001, 1012, 1092, 1234A, 1256, 6662, 6662A, 6664, 6707A, 7701, 7805; Treas. Reg. §§1.351-1, 1.446-3, 1.988-3, 1.6662-4, 1.6664-4.

IMPORTANT NOTES

U.S. federal income tax only, as of September 28, 2026. Oakridge Family Holdings, Harbor Core Equity ETF, and Meridian Taxable LLC are hypothetical; figures are illustrative and rounded. Market figures come from the sources named; other counts differ. Exhibit 7 identifies issues and is not an opinion on any transaction. No client's documents, trades, elections, or returns have been examined.

This client alert is for general information only. It is not tax, legal, investment, or accounting advice. Consult your own advisers about your particular circumstances before acting on any matter discussed here. Questions: Carlos Schmidt, CPA, La Presa Partners LLC, carlos@lapresallc.com, (917) 558-6393. © 2026 La Presa Partners LLC. All rights reserved.

* * *

C . A . S .