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YEAR IN REVIEW

The 2016 Tax Person of the Year: Donald Trump

Even before the results of the November 8 election were tallied, President-elect Donald Trump was primed to leave a lasting mark on the tax world. Voters were inundated by a constant stream of news on his ever-shifting tax reform plan, speculation about "bombshells" hidden in his tax returns, and allegations that he used his private foundation for some less-than-charitable purposes.

But if there was any thought that candidate Trump would be an ephemeral phenomenon — a year-and-a-half-long footnote in the history of U.S. presidential campaigns — the Election Day results obliterated that line of thinking. Trump's victory continually defied expectations and vindicated his strategy of upending historical precedent and common campaign wisdom, and it opens the door to sweeping changes in federal tax policy and more.

Fittingly for the candidate who described nearly everything in hyperbole, Trump's first proposed tax plan sent shock waves through the tax community for its sheer scale. Initially estimated to cost between $10 trillion and $12 trillion in federal revenue over a decade, Trump's tax cutting plan went through several iterations before arriving at a more modest — by Trump standards — $4.4 trillion to $6.2 trillion 10-year cost using conventional scoring estimates.

The Trump campaign caused a flap among policy wonks and business groups after it announced the final major version of Trump's tax reform plan in September. The controversy — dubbed "passthrough-gate" by some — began when it appeared that Trump had walked back his proposal for a uniform 15 percent tax rate on all business income for both passthrough entities and C corporations and was instead limiting it only to corporate entities.

In the subsequent days, the campaign's answer to that question seemed to depend on who was asking. The National Federation of Independent Business was told passthroughs would still be able to claim that rate, while scorekeepers at the Tax Foundation were informed the rate would apply only to C corporations — the latter answer apparently yielding a sharply reduced cost estimate of the Trump tax plan.

The campaign ultimately clarified that passthroughs would be able to claim the 15 percent rate — but only those small passthrough businesses that retain earnings; large passthroughs would be excluded. Details, such as what constitutes a large passthrough entity, remain unanswered.

Trump's plan also called for individual income tax brackets with a top rate of 33 percent. That difference of 18 percentage points between the top individual rate and the 15 percent business income rate prompted many observers to warn it would lead to widespread tax avoidance as higher-income earners seek to reclassify wage income as business income.

But Trump economic advisers dismissed that concern, saying that it just requires a few rules to be drawn up to prevent abuse. "If all the people in Washington, if all the lawyers, if all the tax experts can't figure out how to draft a simple thing like that successfully, they ought to quit," senior economic adviser Wilbur Ross said at one point.

Given a campaign irresistibly drawn to drama, Trump's commitment to bucking the 40-year precedent of major party presidential nominees releasing their tax returns should have surprised no one.

Associated Press

Donald Trump, Tax Notes' *2016 Tax Person of the Year*

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The usually freewheeling Trump never strayed far off message when it came to his returns. The early excuse for not releasing them was that an ongoing IRS audit prevented him from doing so. But after it became clear that he could release them if he wanted to — audit or no — his reason shifted to a more nebulous "shouldn't," at least until the audit was over, as recommended by his lawyers in a March 30 letter.

In the meantime, the secrecy around the returns fueled speculation by Democrats and even some prominent Republicans that Trump's true reason for not releasing them had less to do with an IRS audit and more to do with ensuring embarrassing information contained within was kept from the public.

In the absence of Trump's federal tax returns themselves, observers were left to scrutinize what little official information there was. Casino filings from the 1980s and 1990s indicated that Trump paid no federal income taxes for several years, and Trump himself bragged that he tries to pay as little tax as possible. When *The New York Times* published several pages of his leaked 1995 state tax returns that showed what he reported as income for that year — nearly $1 billion in losses that appear to have been calculated through aggressive tax strategies — taxpayers were given a glimpse of what the rest of his returns might reveal.

And while Trump's critics blasted him as a self-proclaimed billionaire who avoided paying his "fair share" of taxes, he took that criticism and turned it into a compliment: "That makes me smart," he retorted during his first debate with Hillary Clinton. A comment like that would have almost certainly sunk the campaign of 2012 Republican presidential nominee Mitt Romney, who often tiptoed around the issue of his personal net worth and taxes, even declining to claim $1.8 million in charitable deductions to ensure his effective tax rate was sufficiently high on his tax returns.

Not so with Trump.

The president-elect also managed to shrug off questionable activities by the Donald J. Trump Foundation, including allegations of self-dealing and bribery.

A $25,000 donation by the Trump Foundation to a section 527 political group backing Florida Attorney General Pam Bondi was the subject of a complaint filed with the IRS by a watchdog group in early 2016.

On its face, the donation violated the section 501(c)(3) ban on political campaign intervention, but the donation took on suspicious undertones as it was revealed that the money came at a time when Bondi's office was considering joining a lawsuit against Trump University, which it ultimately declined to do. Further, the Trump Foundation failed to disclose the donation on its returns, instead reporting that the donation was made to an unrelated nonprofit based out of Kansas.

The mistake was chalked up as a clerical error by the Trump campaign, and several months later the campaign announced that the foundation had voluntarily paid a $2,500 excise tax penalty to the IRS.

The foundation's past exploits continued to dog Trump's campaign into the late stage of the campaign. As other questionable transactions were uncovered, they took on an almost predictably bizarre quality. A $125,000 settlement of fines between Trump's Mar-a-Lago Club and Palm Beach, Florida, over Trump's refusal to remove an oversized American flag on the property was paid for with a check from the Trump Foundation, as was a $10,000 four-foot-tall portrait of Trump that he bought at a fundraiser, later discovered hanging in one of his properties.

Tax as a topic of discussion in a presidential election year is typically grounded in substance, not scandal. What's the best way to grow the economy? Is the tax burden for insert-economic-group-here too high? Should corporations pay more or less in taxes? What effects will a particular tax plan have?

But this was no typical election. For all the analysts who fretted about the cost of Trump's tax plan, the journalists who uncovered devious doings by Trump's nonprofit organization, and the pundits who speculated about the secrets held within his elusive returns, Trump overwhelmed tax conversations in 2016 and appears poised to continue to shake things up in 2017 and beyond.

Clifford Warren

A self-proclaimed "poacher turned game warden," Clifford Warren special counsel to the IRS associate chief counsel (passthroughs and special industries), has been feared by taxpayers ever since he joined the government in 2010 and started regularly spouting words like "fairness" and "loopholes." Because he worked in the tax departments at General Electric and private equity firm Kohlberg Kravis Roberts & Co., he knows firsthand some of the most sophisticated strategies used to avoid tax.

In the six years since, Warren has brought attention to the lack of large partnership audits, prepped for legislative action on carried interest, and issued warnings that some of the more common management fee waivers run afoul of current law. He became the face of an IRS on the offensive on

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partnership tax issues and is known for his ability to distill complicated controversies into simple line-drawing exercises.

But in 2016 Warren was at the forefront of the most dramatic change to subchapter K in decades with the promulgation of final and temporary section 707 and 752 regulations that end tax-motivated guarantees, including those used in many leveraged partnerships. His deeply held animosity toward bottom-dollar guarantees surprised many in the real estate tax bar who viewed those guarantees as a non-offensive right.

A sought-after speaker at tax conferences, Warren is known for his bold and witty remarks. Practitioners appreciate his practical experience and technical aptitude. Those from both ends of the spectrum admit they're glad for the influence of his more measured colleagues. But one said that while Warren might come off as a little hostile toward taxpayers, it's appropriate because taxpayers have stretched some of the partnership tax rules to their breaking point.

Michael L. Schler

Tax lawyers in the private sector all owe a debt of gratitude to Cravath, Swaine & Moore LLP for keeping Michael Schler gainfully employed and out of the government, for if he were writing the rules, taxpayers — especially multinational corporations — wouldn't have as many opportunities to avoid paying taxes. Or so they say. But in fact, Schler has managed to have significant influence on the shape of tax policy during the more than 40 years that he's practiced law at Cravath.

Schler is an intellectual powerhouse behind the New York State Bar Association Tax Section Executive Committee, which meets monthly to review and shape detailed reports on the latest tax policy developments, offering suggestions to the IRS and Treasury for how to write fair and equitable rules that are in the public's interest and not solely in the interest of a law firm's clients. Often it's his thoughts on a draft report — even though he may be in the minority — that serve as the starting point for discussion, and not the report itself.

Although Schler technically retired as a Cravath partner at the end of 2014, he continues to remain as active as ever, coming into the office around 11 a.m. and leaving for the day around 8 p.m.

"Mike knows more tax than any tax lawyer I've ever met," said Cravath partner Andrew W. Needham. The tax department at one of Schler's longtime clients was so impressed by his skills that it created an internal award (appropriately named the Schlery) for any attorney who can stump him — a rare feat.

Cravath partner Stephen L. Gordon says Schler is a sage whom partners seek out to acid test all their tax matters. "He's brilliant in a way that very few people are," Gordon said. When Schler was a freshman at Harvard University majoring in pure math, he scored the highest grade in the country on the actuarial exam.

"He's very straightforward, he has very little filter on what he says, and he just always speaks the truth," Gordon said. "He is somewhat iconoclastic. He is — in public — not influenced by client interests, and it's remarkable. There's almost no one else like that."

At times, Schler is ridiculed by some in the tax bar for his views — which can be more pro-government than the government's views are. But many silently agree with him. And there are those — especially in the government — who wish more people like Schler would step up and advocate for sound tax policy at tax law conferences and in public comments.

Those who hear Schler speak up at conferences may believe that he's always advocating for the government, erring on the side of conservative positions when advising clients. They could not be more wrong. "At the office, he wears a completely different hat. When he's advising firm clients, his one and only goal is to minimize their tax liabilities under current law without regard to the policy implications," Needham said. "It's that he understands the difference between law and policy and cares so deeply about both that makes him such an effective tax lawyer. The clients who work with Mike just adore him."

Gordon noted that because Schler always speaks the truth — even when it isn't in his client's interest — the government listens when he makes a tax policy recommendation that happens to support a client's position. "That credibility is more valuable than a client being pleased or displeased about any one thing that gets said."

Lily Batchelder

Seeing that then-candidate Donald Trump's tax plan seemed to raise taxes on many families, New York University School of Law professor and former Senate Finance Committee and White House tax counsel Lily Batchelder conducted research to predict the size of the impact.

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"It was pretty obvious from just the structure that it would be raising taxes on a lot of people," Batchelder told Tax Analysts.

"I had no idea of the magnitude," Batchelder said. She also said she didn't realize she would find that more than half of single parents would owe more in taxes. She added that the plan raised taxes on single filers without children because of the way "Trump consolidated the rate bracket."

Batchelder said she sees her research as "a subpart of" what she described as very strong analysis conducted by the Tax Policy Center, the Tax Foundation, Citizens for Tax Justice, and others on Trump's tax plan. Her research shows that under his plan, some taxpayers will be "really winning and some . . . really losing," she added.

The conservative-leaning Tax Foundation corroborated Batchelder's analysis — Kyle Pomerleau, director of federal projects, wrote on Twitter, "We were able to replicate many of the numbers in the report. The results seem reasonable to me." But Trump's national policy director, Stephen Miller, said in a statement to *The Washington Post* that the "entire exercise is fatally flawed" because of parts of the plan he said Batchelder's analysis didn't take into account.

Democratic presidential nominee Hillary Clinton used Batchelder's analysis as the basis of an argument she made in the first presidential debate. PolitiFact reported that Clinton's campaign referenced Batchelder's analysis when Clinton said at that debate, "Independent experts have looked at what I've proposed and looked at what Donald's proposed, and basically they've said this, that [his tax plan] would blow up the debt by over $5 trillion and would in some instances disadvantage middle-class families compared to the wealthy."

Batchelder said that Trump ran on a promise of lowering taxes on middle-income earners and that she "was surprised that [the Trump campaign] didn't fix the plan."

William J. Wilkins

The top lawyer at the IRS during a particularly turbulent period for the agency has been a master of poise. Faced with monumental guidance demands stemming from the enactment of the Foreign Account Tax Compliance Act and the Affordable Care Act, shrinking resources, and a scandal that turned an already despised arm of the government into one many lawmakers want to eliminate, IRS Chief Counsel William J. Wilkins has met every challenge with common sense and judicious control.

In the early years of his time in office, which began August 3, 2009, Wilkins navigated the legal hurdles of initiatives that had the potential to address some of the most critical challenges of the agency. Uncertain tax position disclosure promised to simplify audit risk assessment. The offshore account voluntary disclosure program promised to curb the use of tax havens. The codification of the economic substance doctrine and its harsh penalty scheme promised to change the calculus of aggressive tax planning. And the IRS's return preparer oversight regime promised to reform the tax return preparation industry.

When the revamps promised by those initiatives ran into various difficulties or were never realized, Wilkins responded by refocusing the efforts of his office with a less-is-more mantra. In the face of resource challenges that went from bad to worse, the head of the IRS office that develops guidance interpreting the tax laws directed his team to not let the quest for perfect get in the way of releasing "pretty good" guidance. Efforts that helped only a narrow population of taxpayers, including the private letter ruling program, were scaled back while efforts that could change the shape of some of the highest-dollar tax disputes — specifically transfer pricing litigation — were prioritized.

In the meantime, Wilkins faced a ballooning scandal that began with the IRS's mishandling of exemption applications of politically conservative organizations. He avoided the fate of acting IRS Commissioner Steven Miller, who was forced to resign in 2013 as a result of his involvement in the controversy, only to spend much of the following years overseeing the agency's response to numerous scandal-related investigations, including the 2015 discovery that email backup tapes (that could have contained information relevant to the investigations) were destroyed.

In 2016 Wilkins responded to more bad news for the IRS with upfront resolve. After calling for Congress to fix the large partnership audit rules since 2012 only to have lawmakers hastily enact a poorly-thought-out solution without seeking input from the tax administrator, Wilkins wasn't shy in his appeals for Congress to improve its work product by enacting technical corrections. When Congress failed to enact stricter anti-inversion and earnings stripping laws, he worked with Treasury to defend the corporate tax base by regulation. He spoke publicly about the importance of removing red tape in the promulgation of tax regulations. And he predicted that the growing uncertainty

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caused by judicial challenges to tax regulation validity under both the Administrative Procedure Act and the Anti-Injunction Act would not be good for tax administration.

The drama-filled years of Wilkins's tenure as chief counsel would make for a good story or even a good song. As the lyricist and rhythm guitar player for "The Traveling Helverings," an all-tax-lawyer rock cover band specializing in tax parody, Wilkins is most qualified to come up with a few good verses. He should write them to the tune of Taylor Swift's "Shake It Off," because although the haters gonna hate, Wilkins has proven that he can shake it off.

Diane L. Kroupa

Former Tax Court Judge Diane L. Kroupa made headlines for all the wrong reasons in 2016. On April 4 she and her husband, Robert Fackler, were indicted on tax-related conspiracy, tax evasion, false return, and tax obstruction charges. One practitioner described her indictment as "unprecedented."

The conduct underlying the charges included deducting personal expenses as business expenses, false representations to the IRS during two audits, and misrepresentation of land sale proceeds as money received in an inheritance — and it occurred while Kroupa was a Tax Court judge.

Fackler pleaded guilty to one count of tax obstruction on September 23, and Kroupa pleaded guilty to one count of conspiring to defraud the IRS of over $450,000 in taxes on October 21. According to the plea agreements, the personal expenses deducted as business expenses included international vacations, wine, jewelry, music lessons, Chinese tutoring, and Christmas cards.

Kroupa was appointed by President George W. Bush to the Tax Court for a 15-year term set to run from 2003 to 2018, but she retired in 2014. She had previously served on the Minnesota Tax Court, where she was chief judge from 1998 to 2001. She received her JD from the University of South Dakota Law School and her BSFS from Georgetown University School of Foreign Service.

Taxpayers have begun to use Kroupa's criminal charges to attempt to get her prior rulings reconsidered. Technology company Eaton Corp. was able to get a motion heard for reconsideration nearly three years late when it asked the Tax Court to reconsider the burden allocation decided in *Eaton Corp. v. Commissioner*, 140 T.C. No. 18, for a then-upcoming trial concerning the IRS's decision to cancel an advance pricing agreement. While Eaton mentioned the investigation of Kroupa in its motion to file for reconsideration, its arguments focused on the merits of the original decision.

Robert McHugh

On May 5 Iowa enrolled agent Robert McHugh climbed off his motorcycle in Red Oak, Iowa, with a story to tell. Riding down from Kimballton for a Taxpayer Advocate Service public forum, he said he stopped six miles south of Elk Horn to direct traffic around a stranded semitruck. But that was not the story he wanted to share with National Taxpayer Advocate Nina Olson.

"When I mentioned that I had an elderly taxpayer receive a phone call from an IRS agent . . . notifying him that he is being audited, I saw the look of disbelief in Nina's face," McHugh told Tax Analysts. The IRS had for years insisted that it would never initiate contact by phone.

The audience lit up with practitioners murmuring about similar experiences. McHugh continued his story: "And I went backwards up the channel to make sure it was a valid audit, and then I called the auditor, and we had some words," he told Olson. McHugh expressed frustration that his elderly client could have been distressed by the call, which he later said occurred in 2015.

On May 6 the IRS announced that it would formally suspend a call-first policy some of its campuses followed when contacting taxpayers and practitioners. Olson later told Tax Analysts that IRS Commissioner John Koskinen "was very surprised" to learn that policy existed.

"If only all problems between taxpayers and the IRS could be solved that quickly!" McHugh said.

Though McHugh exposed the issue, he deflected praise to Olson. "It was a fabulous pleasure to have someone like Nina Olson come to rural Iowa," he said. "I was pleased to see what came out of the forum."

McHugh also shared his thoughts about the IRS's future state vision for online taxpayer services, which had spurred Olson to organize the forum series. "Out here in the trenches, oftentimes we laugh — in bewilderment — at some of the things a few people in IRS think they can do," he said of agency plans for automated self-service. "I work mostly with farmers, and no two are alike."

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Tamera Ripperda

When Tamera Ripperda became director of IRS exempt organizations in January 2014, the IRS was still feeling the heat from its admission the previous May that it had selected the exemption applications of conservative organizations for extra scrutiny. The agency was taking a beating from Congress, the press, and the public.

If Ripperda had any trepidation about taking on the EO leadership position in that stormy atmosphere, she didn't show it. At a tax conference in September 2014, after she had been in the EO position for nine months, she cited improvements in the EO division and said it was her goal that the division continue to improve its service and processes for evaluating compliant and noncompliant EOs.

During Ripperda's tenure as EO director, the IRS has worked to process exemption applications faster, introduced a simplified exemption application for small charities, and published final regulations on requirements for tax-exempt hospitals.

Moreover, Ripperda has made a point of interacting with EO division employees. At the 2014 conference, she said, "I always try to get out and meet as many employees as I possibly can and really review the operations . . . because I truly believe that that's the best way for me to learn where the improvement opportunities are."

In October Ripperda, who joined the IRS in 1988 and worked in several different divisions before joining EO, announced she would be leaving her EO post to become deputy commissioner of the IRS Small Business/Self-Employed Division. She said she was leaving EO "with a solid sense of accomplishment" that she attributed to the "hardworking, dedicated, and talented directors, managers, and employees" in the division.

"I really do feel that together we've rallied during a very difficult time in EO's history and really got EO back on a positive and constructive track," Ripperda said.

Jacob Lew

Treasury and the IRS authored the most fundamental change to the tax rules in decades in 2016 with the promulgation of the final and temporary section 385 debt-equity regulations. In the face of adamant protests from large segments of the tax bar, the business community, and lawmakers, Treasury stood firm and issued a scaled-down but remarkably gutsy effort to limit companies' ability to erode America's corporate tax base.

Even the most honest defender of the fisc will admit that the rules as originally issued weren't perfectly suited to address the problem. Treasury safely landed the project by reducing the scope significantly. But who was at the controls? While there really wasn't one person who held himself out as the pilot, the one who might be viewed as the most senior and the most committed to seeing the controversial recast rules through was Treasury Secretary Jacob Lew. The recast rules, which comprise both general and funding rules, treat issuances of new debt among related parties as equity if they occur in connection with or close in time to specified transactions. Because the rules are mechanical in nature and don't look to intent, they cast a wide net, picking up many arguably inoffensive transactions.

Lew's "whatever it takes" mentality to shutting the door to corporate inverters isn't all that different from Trump's recent efforts to stop Carrier Corp. from moving jobs from Indiana to Mexico. Both efforts are relatively unorthodox and rife with collateral consequences. Both are contrary to free-market capitalism, with government twisting the arms of private companies in business decisions deemed unpatriotic. And both were praised by those who viewed the dodging of corporate taxes and the offshoring of jobs as unfair to everyday Americans.

Lew's crusade may soon be viewed less admirably by historians. While scores of tax attorneys spent the bulk of 2016 either drafting, justifying, understanding, or tearing apart the regulations, those new gray hairs were likely for naught. The smart money is on the rules disappearing sometime in 2017.

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Kevin Brady

House Ways and Means Committee Chair Kevin Brady, R-Texas, released the ''Better Way'' tax reform blueprint in 2016.

Trump's presidential win, paired with Republicans maintaining the majority in both the House and Senate during last year's election, has made it more likely that tax reform will happen in early 2017. The Better Way plan, which Republicans say would fix the ''broken'' tax code, includes proposals to lower the corporate rate to 20 percent, lower individual income rates while decreasing the number of individual tax brackets, repeal the estate tax, and eliminate various deductions and credits.

Although many of the president-elect's tax proposals are in line with the Better Way agenda, there are some differences: Trump's tax proposals have included offering tax incentives for infrastructure construction and lowering the corporate rate to 15 percent.

Negotiations must still occur to align the plans of the president-elect and Brady, but Brady expects tax legislation in the first 100 days of Trump's presidency. He has suggested that he favors simultaneous corporate and individual tax reform.

Brady has said the most important things to address during Trump's presidency are redesigning the way the federal government taxes companies so that they can be competitive anywhere, eliminating incentives for companies to move jobs or headquarters overseas, and replacing the Affordable Care Act.

Brady said he is open to ideas from Democrats when working to simplify the code. Emphasizing his hope for bipartisan tax reform, he said constituents in both Republican and Democratic states are unsatisfied with the state of the economy. ■

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