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Year in Review: The 2015 Tax Person of the Year

Summary by taxanalysts®

The 2015 tax person of the year is Robert Stack, Treasury deputy assistant secretary (international tax affairs), for his work representing the United States' interests in the OECD's base erosion and profit-shifting project.

With the release of the OECD's base erosion and profit-shifting final reports last October, the fiscal stakes were high for all countries involved during 2015. Representing the United States and its interests at the BEPS negotiating table was Robert Stack, Treasury deputy assistant secretary (international tax affairs) and lead U.S. delegate to the OECD's Committee on Fiscal Affairs. Because of his role in shaping the final BEPS reports and protecting U.S. interests, Stack is *Tax Notes*' 2015 person of the year.

Robert Stack, Tax Notes' 2015 Person of the Year (Tax Analysts/Derek Squires)

The United States had much to lose in several action items of the project that had been in the forefront of European minds for some time, but that had taken many Americans by surprise. Senate Finance Committee member Charles E. Schumer, D-N.Y., characterized the BEPS project as "a game of Hungry Hungry Hippos," as many countries -- some having faced austerity measures -- sought to realize more revenue through new international tax rules. Some U.S. multinational companies, in particular, had been the subject of intense public scrutiny over tax planning that had resulted in low effective tax rates.

At the center of it all was Stack, who has been praised by practitioners for his role in defending the United States in the multiyear BEPS process. In a divided political climate around tax policy, it may be difficult to imagine a President Obama appointee winning an award from a conservative-leaning think tank, but that is what Stack accomplished in 2015 with recognition from the Tax Foundation for his work

on the BEPS project. While the final reports cannot be seen as a universal success for U.S. interests, the culmination of the project saw several key victories for the United States.

Included among those is the preservation of the transfer pricing arm's-length standard that respects separate entities and contractual arrangements. That standard was one Stack had consistently championed in the face of staunch resistance from other OECD member countries that had instead advocated for vague antiabuse-style language within transfer pricing rules, and left the standard vulnerable to recharacterizations on the whims of tax administrators, according to Stack.

"We had to be extraordinarily aggressive at the OECD in order to push that work to the place we finally wanted it to be," Stack said.

Stack also successfully safeguarded U.S. multinationals and the U.S. fisc from new rules for the digital economy, which would have subjected U.S. companies to new taxes abroad. The Digital Economy task force, co-chaired by Stack and his French counterpart, Edouard Marcus ("two scorpions in a bottle," Stack, known for his candor, called them), failed to reach a recommendation on three options previously considered for taxing income from sales of digital goods and services by foreign suppliers lacking a permanent establishment under current rules.

"When I became the chair . . . no one trained me, so I had no idea that the chair of an OECD committee is supposed to be the person that just sits there and calls on people and says, 'Oh, thank you very much,' and picks the next flag, and convenes the meeting, and rings the bell to start after coffee," Stack said. "I was a chair a little bit like a professor of a first-year law course. . . . I certainly wasn't a potted plant." When Stack asked why income from e-commerce sales should be treated differently from more traditional cross-border sales, "the class fell silent," he said.

The OECD's work on harmful tax practices, which led to agreement on a framework for improving tax transparency through spontaneous exchange of specific tax rulings, was viewed as a positive accomplishment by Stack as a way to end some of the worst BEPS practices.

Further, the work on country-by-country (CbC) reporting was implemented in a way that should not be overly burdensome to U.S. companies from a compliance perspective. CbC reporting will require parent companies to report to their home-country tax authorities revenue and tax information on a CbC basis. Home-country tax authorities can share that information with other countries under tax treaties or tax information exchange agreements. A master file must contain a high-level narrative overview of the multinational group's operations and tax profile.

"Outside the U.S., there is a tidal wave for this kind of transparency," Stack said. "Country-by-country was going to happen, and the question was going to be how we are going [to] manage it."

Despite some objection from congressional Republicans on the CbC reporting rules and exchange of potentially sensitive information with foreign governments, Stack has not wavered in his support for the authority of Treasury to issue rules. Treasury has maintained that the coordination of CbC reporting through the BEPS project has avoided more onerous and less uniform reporting rules that may have been issued if countries sought to establish reporting requirements individually.

Treasury and Stack's work is not yet done on the BEPS project because the OECD is now moving toward the implementation phase. The United States still supports binding arbitration in resolving treaty disputes, which will be developed as part of the negotiation of the action item on

multilateral instruments. Binding arbitration has been endorsed by the G-7, but the OECD and some developing countries have expressed objections regarding cost, fairness, accessibility, sovereignty, information security, and coordination with domestic law. Stack is hoping to convince the G-20 that a focus on fair and efficient "rule of law" tax administration must accompany the substantive BEPS work. He has observed that country leaders come to the United States seeking more foreign direct investment from U.S. companies but are insufficiently focused on how weak tax administration deters that investment. "This could be a win-win for companies and countries," Stack told Tax Analysts.

Before joining Treasury in 2013, Stack worked at Ivins, Phillips & Barker Chtd., where he headed the international tax practice group, as well as Wilmer Cutler Pickering Hale and Dorr LLP. He is a graduate of Georgetown University Law Center and clerked for retired Supreme Court Justice Potter Stewart.

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Erik Corwin

The IRS official who for the last four years has had jurisdiction over public guidance in the areas of corporate, financial products, tax accounting, international, passthroughs, and tax-exempt entities has a reputation for being meticulous. By not rubber-stamping everything that comes across his desk, IRS Deputy Chief Counsel (Technical) Erik Corwin and his counterpart at Treasury, Krishna Vallabhaneni, have been the target of quiet criticism from those who believe the extensive guidance approval process involving multiple levels at both the IRS and Treasury creates a bottleneck.

Erik H. Corwin (Tax Analysts/Derek Squires)

In 2015 the IRS published about 150 guidance plan projects, several of which were significant. Those that Corwin helped steer included the spinoff concern notice, the final F reorganization regs, the final dividend equivalent regs, the simplified method change revenue procedures, the final substantial business activities regs, the new anti-inversion notice, the proposed publicly traded partnership regs, the proposed fee waiver regs, and the final excessive compensation regs.

But behind the scenes, Corwin has managed to charm many of the tax law specialists with whom he works, impressing them with his diligent, substantive reviews designed to ensure that the big-picture policies embodied in guidance make sense in light of the agency's priorities and mesh with the larger body of tax law. "In many ways, Erik is the gatekeeper, carefully reviewing guidance from both a practical and technical standpoint. He's got a broad breadth of knowledge and a sense of humor, both of which are needed for the job," said one attorney who works in the chief counsel's office.

In many ways, Corwin has the perfect government job because it allows him to be powerful but largely out of sight. He's high enough to exert influence on guidance but generally shielded from

the brunt of political and outside pressures primarily borne by IRS Chief Counsel William J. Wilkins. Corwin's stint at the IRS isn't the first time he's teamed up with Wilkins. The two worked together at Wilmer Cutler Pickering Hale and Dorr before Corwin left in 2007 for Ropes & Gray LLP.

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Robert Wellen

Robert H. Wellen (Tax Analysys/Derek Squires)

When word got out last March that a successor to former IRS Associate Chief Counsel (Corporate) William Alexander had been named, the corporate tax bar was giddy over the news that the extremely capable and highly respected leader of Ivins, Phillips & Barker's corporate tax group, Robert H. Wellen, had stepped up to the plate.

Few people could have predicted what happened next. Within weeks of his start date and with the weight of government authority behind him, Wellen unapologetically threw a wrench into transactions designed to qualify as tax-free spinoffs in which a large proportion of passive investment assets are separated. The barrage of criticism he faced for issuing Notice 2015-59, 2015-40 IRB 467, and Rev. Proc. 2015-43, 2015-40 IRB 459, only served to cement his resolve as he emphasized at public speech after public speech: "Yes, we did mean it," and "No, I can't promise that we won't go after you."

Imposing new no-rules as one of his first official acts had to have been a challenge for Wellen, an ardent supporter of the office's historically vibrant ruling practice. Acknowledging that the no-rules reflected "a significant departure . . . from prior practice and in some ways [from] prior thinking about [section] 355," Wellen went out of his way to be as responsive as possible to the tax bar's concerns. His candor disturbed some who thought the market would misinterpret his comments and threaten pending deals.

Wellen's resolute steps, which have yet to give rise to any new regulations, have nevertheless had a chilling effect on some spinoffs that implicate the small active trade or business issue. It's rare for a public official to make such a significant impact within his first six months on the job, but we hope Wellen is in it for the long haul to deal with the consequences that these waves will be sure to have for years to come.

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Quinn Emanuel Urquhart & Sullivan LLP

Quinn Emanuel Sign

A boutique litigation law firm with no discernible tax practice, Quinn Emanuel Urquhart & Sullivan LLP found itself in the middle of a dispute between the IRS and Microsoft Corp. after the firm accepted a contract to assist the IRS in a transfer pricing audit of the tech giant. That dispute has escalated into the ongoing Justice Department litigation seeking to enforce IRS summonses.

The contract, worth almost $2.2 million to the perennially cash-strapped IRS, is intended to provide the agency with "professional evaluation, expert witness, consultation and other related expert services." The contract lists two Quinn Emanuel partners, John B. Quinn and John S. Gordon, as the experts providing services. Several other attorneys and a paralegal are also named in the contract.

The IRS entered into the contract with Quinn Emanuel in May 2014. In June 2014 Treasury released temporary regulations permitting the IRS to allow third parties to review material provided in response to a summons and to participate in summons interviews.

Microsoft objected to Quinn Emanuel's participation in the audit, and in November 2014 it failed to fully comply with summonses issued by the IRS seeking documents. The Justice Department then filed a petition to enforce the summonses in the U.S. District Court for the Western District of Washington.

Summons enforcement proceedings are typically straightforward. In this case, the district court's decision to grant Microsoft's motion for an evidentiary hearing was not typical. Microsoft had filed the motion arguing that the IRS improperly outsourced the transfer pricing audit to Quinn Emanuel and that enforcing the summonses would be an abuse of process. According to the court, Microsoft had "plausibly rais[ed] an inference of impropriety in Quinn Emanuel's role in the summons process."

The evidentiary hearing was held in August 2015. Eli Hoory, senior adviser (transfer pricing operations), IRS Large Business and International Division, was the sole witness. Microsoft later withdrew its request for additional discovery after receiving over 2,000 more documents in preparation for the evidentiary hearing.

A second hearing was held November 6 on whether the court should enforce the IRS's summonses. Microsoft reiterated its view that Quinn Emanuel's participation in the audit contravened the IRC and that enforcing the summonses would constitute an abuse of the court's process.

The court on November 20 ordered Microsoft to comply with the IRS summonses despite being troubled by Quinn Emanuel's participation in the audit. According to the court, the IRS's ability to obtain legal assistance from a "private law firm is by no means established by prior practice." Microsoft failed to demonstrate that the IRS was not permitted to use Quinn Emanuel attorneys in the audit, and the company failed to establish that the summonses were issued in bad faith or for an improper purpose, the court said.

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Gerry L. Ridgely Jr.

Gerry L. Ridgely

It's been 18 months since the U.S. District Court for the District of Columbia held in *Ridgely v. Lew*, No. 1:12-cv-00565 (D.C. 2014), that the IRS may no longer prohibit the use of contingent fees in refund claim preparation before any IRS examination or adjudication, but the decision continues to drive debate over its implications for Circular 230.

Gerry L. Ridgely Jr. of Ryan LLC challenged Circular 230's section 10.27 prohibition against charging contingent fees and argued that it severely restricted his ability to represent taxpayers before the IRS and caused him to lose clients and revenue.

Treasury has authority under 31 U.S.C. section 330(a) to "regulate the practice of representatives of persons before the Department of the Treasury." Ridgely argued that section 330(a) limits the IRS's authority to regulate "practice" and that preparing and filing ordinary refund claims does not constitute practice because the claims must be filed before a refund suit is initiated.

The court in *Ridgely* relied on the determination in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), that section 330(a) applies to "practice during an investigation, adversarial hearing, or other adjudicative proceeding." According to the court, a CPA "hardly 'practices' before the IRS when he simply prepares and files a taxpayer's refund claim, before being designated as the taxpayer's representative and before the commencement of an audit or appeal."

The IRS Office of Professional Responsibility has indicated it will narrowly apply *Ridgely* and *Loving*, but former OPR Director Karen Hawkins has acknowledged that the challenges to Circular 230 provisions are affecting how the office functions. Hawkins left the IRS in July 2015.

Ridgely also calls into question whether the IRS continues to have the authority to regulate CPAs and attorneys. Practitioners have pointed to similarities between how *Ridgely* defines practice and their interactions with clients.

Several bills intended to undo the damage caused by *Ridgely* and *Loving* were proposed in 2015, but Congress has yet to act on any legislation. Before leaving the IRS, Hawkins said legislation was needed to restore the IRS's authority to regulate tax return preparers.

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Ronald E. Byers

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While the Tax Court's status has been clarified regarding Article I versus Article III of the Constitution, some uncertainties remain as to just how completely it is a court rather than an agency. Ronald E. Byers filed a lawsuit at the end of September, which will go a long way toward addressing those uncertainties.

In 2014 the D.C. Circuit decided in *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), that the Tax Court is under the executive branch, and that the president's ability to remove a Tax Court judge is therefore not a violation of the separation of powers. However, the circuit court left unaddressed other distinctions between courts and agencies, such as the application of the Freedom of Information Act (agencies are subject to it, whereas courts are not).

Byers sent a FOIA request to the Tax Court in March asking for various information about its internal workings. When the Tax Court clerk responded that the court is not subject to FOIA as a court, Byers sued in the D.C. District Court.

Byers won an unrelated appeal in 2014 in the D.C. Circuit concerning venue for collection due process appeals. In July 2015 the IRS responded by issuing a notice to its attorneys not to object to the taxpayer's choice of venue for appealing a Tax Court CDP hearing -- either to the D.C. Circuit or to the appropriate regional circuit.

Byers is a high school graduate who taught himself the tax law and constitutional law that he has used in state and federal litigation.

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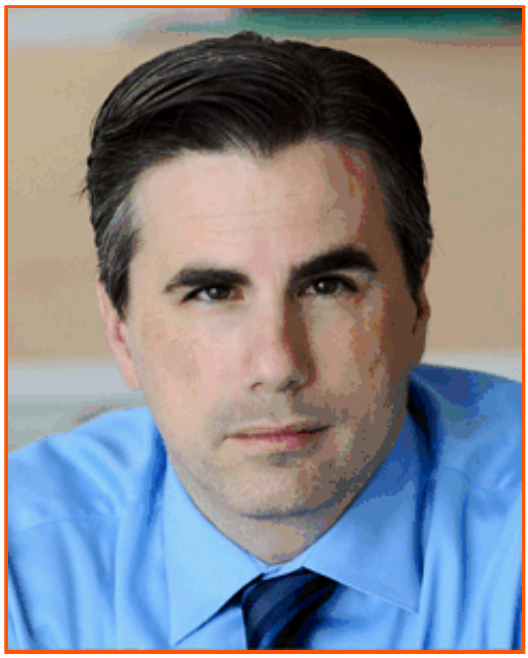
Thomas Fitton

If the IRS hosted a party during the recent holidays, chances are that Thomas Fitton, president of Judicial Watch, would not have been on the guest list.



Thomas Fitton

Under Fitton's leadership, Judicial Watch, a self-described conservative, nonpartisan educational foundation, has relentlessly tried to get to the bottom of the targeting controversy ever since then-IRS exempt organizations director Lois Lerner admitted in May 2013 that the agency had selected the exemption applications of Tea Party organizations and other conservative groups for extra scrutiny. The organization has gone to court in pursuit of Lerner's e-mails and other IRS communications regarding the IRS's review of exemption applications. Among the findings: Lerner used personal e-mail accounts for work-related communication, and the IRS targeted donors to conservative groups, Judicial Watch says.

Though Fitton is loath to take much credit for his organization's work on the IRS case, choosing instead to cite the efforts of Judicial Watch attorneys such as Ramona Cotca, Fitton has been the public voice of those efforts. As some congressional committees and the Justice Department have finished their probes, Fitton and Judicial Watch attorneys have kept the heat on the IRS in the courtroom, forcing the government to turn over e-mails and other documents pertinent to the organization's FOIA requests.

Fitton, a graduate of George Washington University who worked for the International Policy Forum, the Leadership Institute, and Accuracy in Media before joining Judicial Watch in 1998, said that in many ways the targeting affair is the most significant episode of abuse by the IRS since the agency's inception. "You had the most significant political movement in a generation suppressed in a way that helped guarantee an election result, which is the president's reelection," he told Tax Analysts. "In my view, this is how one steals an election in plain sight." The IRS's actions have made many Americans afraid to participate in the public policy process, he added.

When asked why pursuing the matter is so important, Fitton said it goes to the heart of whether the United States has a republican form of government. "Can a president and political appointees, in league with members of Congress, use the powers of government to illegally go after people that they disagree with?" he asked.

The Justice Department's decision not to bring charges against anyone involved is outrageous but not surprising in that the Justice Department's Public Integrity Section and the FBI were "co-conspirators" with the IRS, according to Fitton. "They were hopelessly conflicted," he said.

It is also unsurprising that congressional Democrats, after having encouraged the IRS to target conservative groups, would conclude that there is no evidence of criminal wrongdoing by the agency "because any full investigation would involve the abuse of their offices to go after individuals and target people they don't like," Fitton said.

Fitton says his work on the IRS matter and on other issues pursued by Judicial Watch has been an incredible experience. "It's been gratifying to know that we could go in and confront an agency such as the IRS and require it to account for itself and its behavior," he said. "That should be

encouraging to the American people -- that the system does work in some respects."

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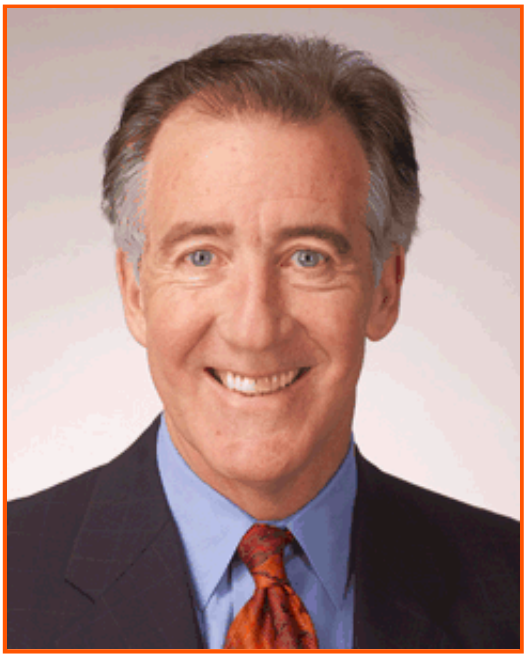
Charles W. Boustany Jr. and Richard E. Neal

House Ways and Means Committee members Charles W. Boustany Jr., R-La., and Richard E. Neal, D-Mass., announced an innovation box proposal in July 2015 to mixed reviews.

Charles Boustany, (Courtesy of Th Office of Charles Boustany)

Although the proposal remains under discussion and no new details or a rewritten draft emerged in the following months, observers agree that an innovation box proposal could be a significant component of any international tax reform package.

The Innovation Promotion Act of 2015, released as a discussion draft with an accompanying technical explanation, seeks to allow for a deduction that would result in an effective tax rate of approximately 10 percent on innovation box profits. The deduction would be equal to 71 percent of the lesser of the taxpayer's innovation box profits or taxable income.



Richard Neal (Courtesy of the Office of Richard Neal)

"Utilizing an innovation box approach . . . will protect U.S. companies from current vulnerabilities that have led to inversions and acquisitions by foreign competitors, provide a lower effective tax rate for most corporations across many industries, encourage greater investment in R&D, and attract R&D jobs back to the United States from overseas," Neal said in a joint statement with Boustany.

The lawmakers have said their proposal would help technology companies as well as biological, pharmaceutical, and other intellectual property-intensive industries.

Schumer and Paul D. Ryan, R-Wis., the former House Ways and Means chair before he became speaker, began talks on international tax reform based on the report of a Senate working group.

Although those talks have stalled, the idea of international tax reform with an innovation box

component continues to have legs in Congress.

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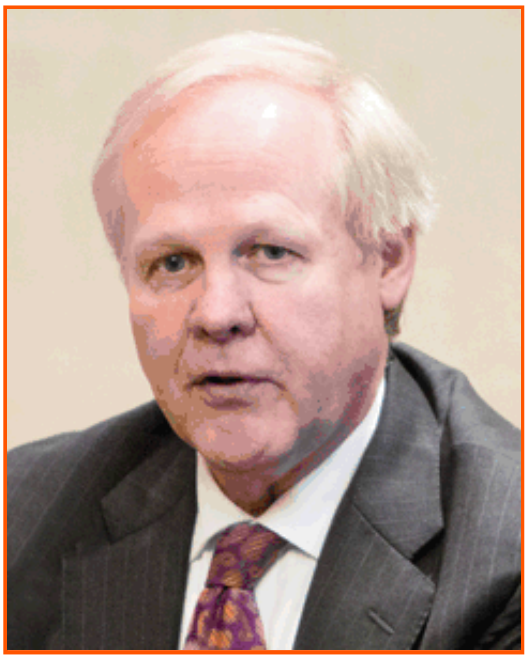
Karl Walli



Karl Walli (Photo by Derek Squires)

Showing a willingness to work with an industry resistant to change while holding the government's position, Karl Walli, senior counsel (financial products), Treasury Office of Tax Legislative Counsel, became the face of the recently finalized and long-awaited section 871(m) dividend equivalent withholding regulations.

The regulations, finalized in September, went through several iterations, the first being proposed regs in 2012 with what were colloquially referred to as the "seven deadly sins." The regulations were then reproposed in 2013 and included the novel "delta" test for dividend equivalents. The delta approach raised some questions but was regarded as a more workable solution.

Throughout the finalization process, the government, with Walli as its spokesman, showed an understanding of the efforts for stakeholders in building new systems that implement a complex set of rules. When it was apparent that the regulations wouldn't become final long before the initial effective date, Walli announced a delayed effective date to the relief of the financial services industry.

As the regulations' principal drafter at Treasury, Walli stood tall against myriad attacks at public speaking appearances and stayed the course on the government's mission. His wit, intelligence, and expertise -- developed from a 10-year stint with the financial institutions and products division of IRS chief counsel and nine years as a partner at Weil, Gotshal & Manges LLP -- allowed the government to develop an answer that works for both the government and taxpayers.

Walli also worked on and provided thoughtful perspective on the embedded loan rule for notional principal contracts regulations and two notices on basket options.

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The Tax Foundation

Economists at the Tax Foundation normally have little problem staying busy, but a year like 2015 forced them to put their tax and growth models into hyperdrive.

That was in part because of an unprecedented number of Republicans -- 17 -- who announced that they would be running for their party's 2016 presidential nomination, with most releasing comprehensive tax reform plans. Analysts at the foundation scored them all, assessing their potential 10-year impact on federal revenues and on such metrics as GDP and capital stock.

For the most part, candidates eagerly embraced the foundation's projections. Viewers of their nationally televised debates often heard Tax Foundation figures cited.

While some on the left criticize it for being too optimistic about tax cuts spurring economic growth, the foundation's dynamic analysis of the most attention-getting Republican tax plan of them all -- the one put forth by billionaire real estate developer Donald Trump -- fell close to that of the more liberal Citizens for Tax Justice. Both saw it costing between $10 trillion and $12 trillion over a decade.

Meanwhile, the foundation continued with other well-known products, including its International Tax Competitiveness Index, cited by news media worldwide. In all, it released nearly three dozen reports on various tax topics, including a 60-page chart book on the federal income tax. It also provided testimony and presentations in more than 30 states, along with an update of its State Business Tax Climate Index.

To top it off, the foundation celebrated its 78th birthday. "For any private organization that relies on voluntary contributions to survive for eight decades shows that it must be doing something right," said Chris Edwards, a former Tax Foundation economist who now directs tax studies at the Cato Institute.

Another former foundation economist, Curtis Dubay of the Heritage Foundation, discounts criticism that his former employer is too business-friendly.

"If some think that it is too slanted toward the views of business, it is likely because they have never seen models, estimates, or analyses that properly account for the negative impact of bad policy," Dubay said. "The Tax Foundation captures these effects in ways that other analysts do not."

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