A Quick Look at S. 2538, the "ICE Agent Support Act of 2016"

By Dan Cadman

Sens. Jeff Sessions (R-Ala.) and Ted Cruz (R-Texas), the presidential candidate, have introduced a bill into the Senate dubbed the "ICE Agent Support Act of 2016", whose intent is "[t]o provide resources and incentives for the enforcement of immigration laws in the interior of the United States."

It is a good bill and deserves to be recognized as such, although it's unlikely to become law in a hotly contested election year, particularly given that this president would almost certainly veto the legislation.

The bill would direct that certain civil fines collected into the Treasury Department's Immigration Enforcement Account be used to offset money appropriated to Immigration and Customs Enforcement (ICE) for identifying and removing criminal aliens, including maintenance and updating of systems used for that purpose, reimbursement of salaries and expenses, and provision of firearms, vehicles, and equipment within ICE's Enforcement and Removal Operations Division (ERO), which handles virtually all of the immigration work within ICE. This is accomplished by amending a portion of Section 280 of the Immigration and Nationality Act (INA). (8 U.S.C. Sec. 1330)

Additionally, the bill requires within 30 days of enactment that the Homeland Security Secretary establish a percentage of positions in ERO to be designated as criminal investigators (special agents).

The bill reflects a clear recognition on the part of Sens. Cruz and Sessions that ERO has from the outset been the stepchild in ICE, and accorded de facto second class status as compared to the agents in the other division of ICE, Homeland Security Investigations — by grade and pay, by allocations for training and equipment, you name it. (When one considers these impediments on top of all the obstacles thrown at ERO officers via prohibitive policies and restrictive procedures designed to defeat meaningful enforcement, it's a wonder that there are any officers left in the division.)

Taxpayers should also like the notion that the account would be used to pay back *into* the Treasury's General Fund at least some of the money being appropriated to ICE/ERO. How much would depend entirely on how much is collected in civil fines under the relevant sections of law. Therein lies one of the logistical difficulties, because with one exception, there are no substantive regulations or procedures laying out how to actually obtain the fines when levied. Here are the fines involved, and the areas that I think need to be shored up for this approach to work:

Failure to Depart (Voluntary Departure). If an alien is granted the privilege of departing voluntarily in lieu of formal deportation, and then fails to leave within the time frame granted, he is subject to a fine of between $1,000 and $5,000 (8 U.S.C. Sec. 1229c(d)).

The fine only comes into play after the alien has failed to depart and absconded. Serving a fine notice on him will only occur once he is found — but that is at precisely the juncture at which ICE officers will be most interested in promptly effecting his removal. Are they to hold his removal in abeyance to collect what will likely be a nominal

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sum? Permitting him to remain would be costly, especially if the alien is in detention — which he ought to be after having already proven once he can't be trusted to depart on his own. If, on the other hand, they serve the notice and continue with the removal, what are the alien's due process rights if he chooses to contest the fine? Can he do so in his absence and how? For this provision to be effective, lawmakers should provide additional guidelines. Finally, how does the government obtain the money if the fine is upheld? It would be helpful to have laws or regulations authorizing federal immigration authorities to seize cash, discover and attach bank accounts, or to have income tax withholdings (if any) debited and refunds seized. Otherwise, the government would have to file a lawsuit in U.S. District Court — time consuming and expensive, thus unlikely to occur. The results would not be worth the expenditure.

Document Fraud. If an individual knowingly commits document fraud in order for himself or another to obtain immigration benefits, or work, or entry into the United States, he is subject to a fine of between $250 and $2,000 per document, which raises to between $2,000 and $5,000 per document for repeat offenders (8 U.S.C. Sec. 1324c).

First, it should be noted that there is an extensive — to the point of onerous — hearing process before an administrative law judge (ALJ) laid out in the statute, by which fines can be contested. This presents a significant disincentive on the part of both officers and legal counsel to proceed to fine. And with specific reference to deportable aliens, the question again arises as to whether they must be permitted to remain in the United States during the pendency of fine proceedings before the ALJ. If so, this clearly acts as a disincentive to fine aliens unless the amount proposed is substantial.

Another problem involves the delimiters contained in the language of the law, which requires that an individual "knowingly" engage in the fraud and, at paragraph (a)(3), that the document have been "lawfully issued to ... a person other than the possessor (including a deceased person)" when complying with the work authorization requirements of the INA. Because of this requirement, the government must prove that aliens who purchase and present, or employers who accept, false Social Security cards *know* that the names and numbers relate to "a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter." If the numbers and name on the card are facially legitimate, but fictitious — that is, they don't relate to "a [real] person other than the possessor" — then no violation has occurred. If they do relate to a real person, live or dead, the government must prove that the applicant or employer knew this. (The Center has previously recommended a fix to this problem, which also plagues the federal criminal identity theft statutes.) See the CIS *Backgrounder* "Fixing Flores: Assuring Adequate Penalties for Identity Theft and Fraud".

The positive side of the civil document fraud provision, though, is that it holds the greatest promise for substantial collection of funds, especially for egregious violations like those committed by document forgers and wholesalers. (See, for instance, *Noriega-Perez v. United States*, 179 F.3d 1166, 1173 (9th Cir. 1999.) This is because 1) it applies not just to aliens, but all individuals and "entities" engaged in the fraud, which can include companies when foremen conspire with unauthorized workers to supply or accept fraudulent documents; 2) it isn't happening only at the point of illegal crossing or removal, but also in and around the workplace where it is easier to identify earnings or profits made and tie them to fines levied and, most relevantly, against third party conspirators such as the professional forgers and vendors mentioned earlier.

Failure to Depart (Final Order of Removal). If an alien is under a final order of removal and willfully fails to comply, or conspires or takes actions to hamper the removal, he is subject to a fine of $500 per day (8 U.S.C. Sec. 1324d).

The issues here are the same as those outlined above for failure to depart under a grant of voluntary departure.

Improper Entry by Alien. If an alien crosses (or attempts to cross) the border illegally, or enters or attempts to enter at a time or place other than as designated by immigration officers, which is to say, at official ports of entry, he is subject to a fine of between $50 and $250 for each such entry (8 U.S.C. Sec. 1325(b)).

Because these fines occur at the time of an alien's entry, or attempt at entry, they don't pose the same issues as those relating to failure to depart, but the same questions arise as to the time and effort that might be put into collection, versus the value of return when the fines are so minimal. There are also serious public perception problems — does one seize the cash of aliens crossing the border with little but the clothes on their backs? How about women and children? If a fine is paid, does this somehow lead them, and others back home, to believe that on payment of the fine one is entitled to stay? This could very well be the result, unless agents are directed to use expedited removal to ensure that aliens are so quickly repatriated that the mental nexus is broken.

However for those aliens who are released in lieu of detention, it seems likely, even probable, that they will seek work (lawfully or otherwise) while awaiting their court hearings, which according to the most recent estimates from the Transactional Records Access Clearinghouse, are backlogged 667 days: nearly two years. In such circumstances, it seems appropriate that the federal government levy, and collect, fines for illegal entries. The question is how to do so? As mentioned above, there is a need for mechanisms by which bank accounts or tax withholdings and refunds can be leveraged in order to ensure the fines go to the Immigration Enforcement Account as intended by law.

Conclusion. The good senators deserve kudos for the legislation and one can hope that if it doesn't go anywhere now, it will be preserved and reintroduced in the possible event of a president who actually cares about enforcing the immigration laws.

At that time, serious thought should be given to the processes by which federal immigration authorities can actually obtain the fines when levied, and those processes should be written into the statute. The existing obstacles are not insurmountable. But unless and until the collection processes are defined, streamlined and simplified, the fines will likely go unlevied or uncollected, the Immigration Enforcement Account will never rise to its potential, and reimbursement of appropriated funds will not likely to occur.