

PAYING FOR THE WALL: WILL PRESIDENT TRUMP'S ADMINISTRATION SCRUTINIZE, TAX, OR SEIZE REMITTANCES?

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One of the most significant post-election questions for the financial-services industry—particularly global financial institutions that move money across borders—is what is the status of President-elect Trump's proposal to tax electronic remittances to Mexico to pay for the wall between Mexico and the United States?

MR. TRUMP'S PROPOSAL

During the 2016 Republican presidential primaries, Mr. Trump laid out various ways to force Mexico to pay for a wall along the U.S.-Mexico border in a two-page memo^[1] to *The Washington Post*,^[2] which is now linked to the immigration section of Mr. Trump's transition website. The first proposal listed is aimed at remittances to Mexico and reads as follows:

On day 1 promulgate a "proposed rule" (regulation) amending 31 CFR.130.121 to redefine applicable financial institutions to include money transfer companies..., and redefine "account" to include wire transfers. Also include in the proposed rule a requirement that no alien may wire money outside of the United States unless the alien first provides a document establishing his lawful presence in the United States. On day 2 Mexico will immediately protest. They receive approximately \$24 billion a year in remittances from Mexican nationals working in the United States. The majority of that amount comes from illegal aliens. It serves as de facto welfare for poor families in Mexico. There is no significant social safety net provided by the state of Mexico. On day 3 tell Mexico that if the Mexican government will contribute the funds needed to the United States to pay for the wall, the Trump Administration will not promulgate the final rule, and the regulation will not go into effect.^[3]

LEGAL ANALYSIS

The proposal alludes to Bank Secrecy Act ("BSA") regulations that Mr. Trump would use to implement his policy. Regulations related to the BSA (as amended by the USA PATRIOT Act) formerly appeared at Title 31, Section 103.^[4] These regulations have already been updated to expand the definition of "financial institution" to include "money-services businesses."^[5]

Additionally, federal criminal and civil laws have long allowed the U.S. government to seize and take ownership of accounts (or wire transfers) which contain the proceeds of or are derived from criminal activity. These laws have been used successfully to seize billions of dollars in drug money, human-trafficking proceeds, gun-running profits, trade/export violations, and numerous other crimes, including crimes committed by documented and undocumented immigrants from Mexico (and many other countries). Under existing law, the Department of the Treasury has significant rule-making abilities and discretion in taking action to investigate, seize, and spend the money obtained from these criminal enterprises, foreign and domestic.

At the heart of Mr. Trump's proposal is a policy shift away from existing Financial Crimes Enforcement Network ("FinCEN") guidance.^[6] Presently, FinCEN indicates that an individual's status as an undocumented immigrant does not alone make that person's transfer "suspicious."^[7]

Mr. Trump's proposal of essentially making it unlawful to send money without having proof of legal residence is an aggressive use of existing law and a spin on already-strict customer-due-diligence requirements imposed on financial institutions. Mr. Trump's proposal raises constitutional questions. Stuart Anderson, the Executive Director of the National Foundation for American Policy, has questioned Mr. Trump's reading of Section 326 of the PATRIOT Act as too broad and anticipates that the proposal would be challenged in court.^[8]

The Government Accountability Office reported that it is logistically difficult to track the amount of money being sent from the United States to Mexico from legal immigrants versus undocumented immigrants.^[9] For instance, while many remittances through money-services businesses are done "via brick and mortar stores," an increasing number of transactions now take place through mobile applications, making the tracking of the recipient and sender more challenging.^[10] Additionally, transfers could be done between two accounts where one individual is in the United States and the other is in Mexico but perhaps would not register as "cross-border transfers" if both accounts are U.S.-based.^[11] Of course, protestations that this money is too difficult to track may backfire on financial institutions and government agencies legally required to have know-your-customer, counterterrorist financing, and antimoney-laundering programs in place, as well as the ability to quickly seize transactions meeting certain criteria, such as a match to an Office of Foreign Assets Control-sanctioned location or individual. Any comment by a financial institution on these policies should be made carefully in light of how such comments may resurface in later licensing or enforcement actions.

THE PROPOSAL'S POTENTIAL SIGNIFICANT IMPACT ON FINANCIAL INSTITUTIONS

Raul Carrillo of *American Banker* warned that firms and customers should take the remittance threat seriously.^[12] He sees the proposal as bad for business.^[13] Looking at some of the largest money-services businesses in the world, which have thousands of locations in Mexico, reveals the potential impact.^[14] According to World Bank data,^[15] "the average consumer cost of a \$200 U.S.-to-Mexico remittance was \$12.71, and \$22.47 for a \$500 remittance."^[16] These institutions stand to lose significant remittance revenue if the number of eligible senders is slashed by the proposal. Even a mistaken perception by existing consumers that they will be questioned regarding their citizenship or immigration status may lead to a drop in business. Michelle Buckalew, a spokeswoman for one of the largest companies in the business of sending remittances to Mexico, said her

customers "depend on our services to pay for basic needs like education, housing and health care."^[17] Richard Crone, a payments consultant, said, "[f]or traditional guys in the business, I'd watch out."^[18]

Financial institutions also should be concerned with the additional regulations that would accompany a requirement to screen the immigration status of their customers, which currently does not exist.^[19] Mr. Trump has identified one specific requirement that "aliens" in the United States must prove their lawful presence in the United States before transferring money outside the country.^[20] However, his policy memo^[21] leaves some questions open regarding how other financial transactions would be affected.^[22] For instance, could a tax be imposed on all wire transfers at the outset with citizens and legal immigrants getting tax refunds at the end of the year?^[23] Oklahoma imposes a 1% fee for wire transfers outside the state.^[24] While Oklahoma residents get the money back when they file their state income taxes, undocumented immigrants who do not file state income taxes do not.^[25] Financial institutions in Oklahoma have criticized^[26] this tax because it increases fees for consumers.^[27]

Another route Mr. Trump could pursue would be supporting S. 79, the Remittance Status Verification Act of 2015, that Senator David Vitter (R-LA) introduced in 2015.^[28] Senator Vitter's legislation called for imposing a 7% fine of the amount to be transferred if the sender of the remittance is unable to prove his or her lawful status in the United States.^[29] The legislation directed the fees collected to go toward border protection for border security fencing, infrastructure, and technology.³⁰ While the legislation never got traction after it was introduced in the 114th Congress, something similar could be introduced in the 115th Congress.

CONCLUSION

Whether and how Mr. Trump's remittance proposal moves forward is yet to be determined. However, going forward, financial institutions, among others, should watch for signals from the President-elect, his nominee for Treasury Secretary (Steven Mnuchin^[31]), and other future policymakers as this proposal will certainly be discussed. Financial-services providers in particular should also consider inventorying available internal and external resources for engaging with policymakers, regulators, and enforcement agencies as these proposals evolve.

Notes:

^[1] Donald J. Trump for President, Inc., *Immigration*, https://assets.donaldjtrump.com/Pay_for_the_Wall.pdf (last visited Jan. 12, 2017).

^[2] Bob Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for Border Wall*, Washington Post, Apr. 5, 2016, https://www.washingtonpost.com/politics/trump-would-look-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html?utm_term=.00d6b07fc597.

^[3] Donald J. Trump for President, Inc., *Immigration*, https://assets.donaldjtrump.com/Pay_for_the_Wall.pdf (last visited Jan. 12, 2017).

^[4] On March 1, 2011, the regulations were renumbered by nonsubstantive technical amendments. See Transfer and Reorganization of Bank Secrecy Act Regulations; Final Rule, 75 Fed. Reg. 65,806, 65,806 (Oct. 26, 2010).

^[5] See 31 C.F.R. § 1010.100(t)(3) & (ff).

[6] FinCEN has clarified that "[i]f a reporting money services business suspects that one of its customers is an undocumented foreign national, it would be inappropriate to infer, without any additional facts, that any funds possessed by that customer necessarily derive from illegal activity..." See Amendments to the Bank Secrecy Act Regulations—Requirement that Money Transmitters and Money Order and Traveler's Check Issuers, Sellers, and Redeemers Report Suspicious Transactions, 65 Fed. Reg. 13,683, 13,690 (Mar. 14, 2000) (FinCEN analysis of 103.20(a)).

[7] See *id.*

[8] Bob Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for Border Wall*, Washington Post, Apr. 5, 2016, https://www.washingtonpost.com/politics/trump-would-look-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html?utm_term=.00d6b07fc597.

[9] *Id.*

[10] John Adams, *Will Trump Really Hold Remittances Ransom?*, American Banker, Nov. 9, 2016, <http://www.americanbanker.com/news/bank-technology/will-trump-really-hold-remittances-ransom-1092355-1.html>.

[11] See *id.*

[12] Raul Carrillo, *Trump's Plan to 'Impound' Remittances Is Bad for Business*, American Banker, Dec. 5, 2016, <http://www.americanbanker.com/bankthink/trumps-plan-to-impound-remittances-is-bad-for-business-1092686-1.html>.

[13] *Id.*

[14] See John Adams, *Will Trump Really Hold Remittances Ransom?*, American Banker, Nov. 9, 2016, <http://www.americanbanker.com/news/bank-technology/will-trump-really-hold-remittances-ransom-1092355-1.html>.

[15] Remittance Prices Worldwide: Sending Money from United States to Mexico, The World Bank, Jul. 28, 2016, <https://remittanceprices.worldbank.org/en/corridor/United-States/Mexico>.

[16] Raul Carrillo, *Trump's Plan to 'Impound' Remittances Is Bad for Business*, American Banker, Dec. 5, 2016, <http://www.americanbanker.com/bankthink/trumps-plan-to-impound-remittances-is-bad-for-business-1092686-1.html>.

[17] Gabriel T. Rubin, *Donald Trump Says He Might Block Money Transfers to Mexico*, The Wall Street Journal, Apr. 5, 2016, <http://www.wsj.com/articles/donald-trump-says-he-might-block-money-transfers-to-mexico-1459892237>.

[18] John Adams, *Will Trump Really Hold Remittances Ransom?*, American Banker, Nov. 9, 2016, <http://www.americanbanker.com/news/bank-technology/will-trump-really-hold-remittances-ransom-1092355-1.html>.

[19] *Id.*

[20] *Id.*

[21] Donald J. Trump for President, Inc., *Immigration*, https://assets.donaldjtrump.com/Pay_for_the_Wall.pdf (last visited Jan. 12, 2017).

[22] Bob Woodward & Robert Costa, *Trump Reveals How He Would Force Mexico to Pay for Border Wall*, Washington Post, Apr. 5, 2016, https://www.washingtonpost.com/politics/trump-would-look-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html?utm_term=.00d6b07fc597.

[23] Jim Geraghty, *Could a President Trump Really Impound All Immigrant Payments to Mexico?*, National Review, Aug. 19, 2015, <http://www.nationalreview.com/article/422744/donald-trump-remittance-plan-evaluation>.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Jim Geraghty, *Could a President Trump Really Impound All Immigrant Payments to Mexico?*, National Review, Aug. 19, 2015, <http://www.nationalreview.com/article/422744/donald-trump-remittance-plan-evaluation>.

[28] See S. 79, 114th Cong. (2015).

[29] See S. 79, 114th Cong. (2015).

[30] See S. 79, 114th Cong. (2015).

[31] Julie Hirschfeld Davis, Binyamin Appelbaum & Maggie Haberman, *Trump Taps Hollywood's Mnuchin for Treasury and Dines with Romney*, N.Y. Times, Nov. 30, 2016, http://www.nytimes.com/2016/11/29/us/politics/steven-terner-mnuchin-trump-treasury-secretary.html?_r=0.

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