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Alien to Financial Services: Should Social Security Numbers Be Required for Banking Services Provided to Immigrants?

I. INTRODUCTION

Antonio Sanchez is a Hispanic immigrant who works two jobs, earns about \$25,000 a year, and supports three children.¹ His dream is the same as many other people living in America.² He aspires to build his credit so that he can one day purchase a home for himself and for his family.³ However, unlike most Americans, Mr. Sanchez faces a unique obstacle to attaining that dream – he does not have a social security number (SSN).⁴ In the past, this would have made it difficult for him to establish a credit history.⁵ Recently, however, in an attempt to serve the growing Hispanic population in the United States, many banks have begun offering credit opportunities to immigrants who do not have SSNs.⁶ While many critics claim that these products pose potential legal problems for banks, this Note argues that not only are these financial products within the scope of the law, but they offer a needed and valuable banking service to a growing population in the United States. Part II of this Note illustrates the need for banking services in the immigrant community.⁷ Part III discusses the products banks have developed to address that need, and the criticism these products have encountered.⁸ Part IV examines the legal requirements for offering financial services and concludes

1. Miriam Jordan & Valerie Bauerlein, *Bank of America Casts a Wider Net for Hispanics*, WALL ST. J. ONLINE, Feb. 13, 2007, http://online.wsj.com/article/SB117133501870406767.html?mod=home_whats_news_us.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; Shaheen Pasha, *Banking on Illegal Immigrants: Banks are Seeing an Untapped Resource in Providing Home Loans to Undocumented U.S. Residents*, CNN MONEY.COM, Aug. 8, 2005, http://money.cnn.com/2005/08/08/news/economy/illegal_immigrants/index.htm.

7. *See infra* Part II.

8. *See infra* Part III.

that these products do not violate current law.⁹ Finally, Part V explores the negative policy implications of asking financial institutions to act as gatekeepers for illegal immigration.¹⁰

II. THE NEED FOR FINANCIAL SERVICES IN A GROWING COMMUNITY

According to the Department of Homeland Security, between the year 2000 and 2006, an estimated 11,550,000 unauthorized immigrants came to the United States.¹¹ In 2006 alone, 1,266,244 immigrants became legal residents.¹² A large portion of both unauthorized and legal immigrants are of Hispanic origin.¹³ One study reveals that forty-three percent of individuals identifying themselves as of Hispanic or Latino origin do not have bank accounts.¹⁴ Additionally, while eighty percent of all United States households use credit card products, only fifty-six percent of Hispanic families have them.¹⁵

The Hispanic population, therefore, is probably the largest and fastest growing population in the United States with no, or

9. See *infra* Part IV.

10. See *infra* Part V.

11. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., POPULATION ESTIMATES: ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES, 4 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf [hereinafter POPULATION ESTIMATES].

12. *Id.* at 3.

13. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS 3 (2006) available at http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496_LPRFlowReport_04vaccessible.pdf; POPULATION ESTIMATES, *supra* note 11, at 4.

14. DULCE BENAVIDES, SERGIO BENDIXON, B. LINDSEY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., BILLIONS IN MOTION: LATINO IMMIGRANTS REMITTANCES AND BANKING 19 (2002), <http://pewhispanic.org/files/reports/13.pdf>. This number is representative of all people identifying themselves as Hispanic origin, not just Hispanic immigrants. *Id.* Presumably, the number of Hispanic immigrants who do not have bank accounts would be even larger. See *id.*

15. *Latino Credit Card Use: Overcoming Disparities, Structural Challenges, and Harmful Industry Practices: Hearing on H.R. 2146 and H.R. 1510 Before H. Comm. on Financial Services*, 110th Cong. 2 (2007) [hereinafter *Overcoming*] (statement of Raul Gonzalez, Legislative Director, National Council of La Raza), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/gonzalez.pdf. This number is also representative of all Hispanic families, immigrants or not. *Id.* Additionally, the eighty percent number does not isolate all other groups and includes Hispanic households. *Id.*

limited, access to financial services.¹⁶ Credit cards and other basic financial services can be important tools for immigrants to use in order to enter the world of banking and to build a credit history.¹⁷ Additionally, credit cards can serve as financial protection for immigrant families who often do not have sufficient income to pay for unexpected needs.¹⁸ From the financial institution's standpoint, creating new credit card products that can be utilized by this growing population is an attractive business opportunity.¹⁹ Such products reach a largely under-banked population at a time when the saturated credit card market has limited areas of potential growth.²⁰ Consequently, new financial service products that can be utilized by the growing immigrant population in the United States are useful and beneficial for both the consumers utilizing them and the banking industry offering them.²¹

Increasing immigrants' access to products like bank accounts and credit cards could also have the effect of increasing the physical safety of immigrants.²² The immigrant population is

16. Linda Punch, *Beckoning the Unbanked: Eyeing New Transaction Volume and Profit Opportunities, the Card Industry is Paying Increasing Attention to the 14 Million-Plus Unbanked Households in the U.S. But What About the Risks?*, CREDIT CARD MANAGEMENT, Oct. 1, 2004.

17. *See id.*

18. Azam Ahmed & Karoun Demirjian, *Undocumented Immigrants Enter Financial Mainstream in U.S.*, CHI. TRIB., Feb. 14, 2007, at 1, 2; *see also Overcoming*, *supra* note 15, at 1. For example, a Hispanic man used a credit card to pay for repairs on his truck. Ahmed & Demirjian, *supra* at 1, 2. He would not have been able to pay for the repairs without the credit card, and thus would have been without a mode of transportation. *Id.*

19. Punch, *supra* note 16, at 1; *see Bank of America Finds Itself in Illegal Immigration Debate with New Credit Card*, INT'L HERALD TRIB., Mar. 5, 2007, at 1, available at <http://www.iht.com/articles/ap/2007/03/06/business/NA-FEA-FIN-US-Bank-of-America-Immigrants.php?page=1> [hereinafter *Debate*].

20. Punch, *supra* note 16, at 1.

21. Laura Sonderup, *The Business of Immigrant Markets: Providing Access to Consumer Services*, 60 CONSUMER FIN. L. Q. REP. 503, 503 (2006); *see Debate*, *supra* note 19.

22. *Patriot Act Oversight: Investigating Patterns of Terrorist Financing: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 107th Cong. (2002) [hereinafter *Oversight*] (statement of John Herrera, Vice President for Latino/Hispanic Affairs, Self-Help Credit Union and Board Chair of the Latino Community Credit Union), available at <http://financialservices.house.gov/media/pdf/107-53.pdf>; *see* ROBIN NEWBERGER, ANNA PAULSON, AUDREY SINGER & JEREMY SMITH, FED. RESERVE BANK OF CHI., THE BROOKINGS INSTITUTION, *FINANCIAL ACCESS FOR IMMIGRANTS: LESSONS FROM DIVERSE PERSPECTIVES 7* (2006), available at http://chicagofed.org/community_development/files/fai-lessons_from_diverse_perspectives.pdf. In Austin, Texas, a local Police Department took

vulnerable to robberies and thefts because immigrants so frequently deal with cash rather than take advantage of banking services.²³ Indeed, a disproportionately high number of Latinos have received medical attention as a result of crime.²⁴ Therefore, increasing access to financial services could reduce immigrants' vulnerability to crime and need for medical services as a result of crime.²⁵

III. THE PRODUCTS

Financial institutions have recognized this growing immigrant population and their need for financial services.²⁶ Banks now offer a number of products designed to attract recent immigrants, none of which require SSNs.²⁷ These products include bank accounts, loans, and credit cards.²⁸

One of the most basic products that banks offer without requiring a SSN for identification purposes is a checking account.²⁹ In order to offer checking accounts to a greater number of Hispanic and immigrant customers, banks require only an Individual Tax Identification Number (ITIN)³⁰ and one other form of identification to open an account.³¹ ITINs are required only for tax purposes on interest bearing accounts, and are not considered valid forms of identification.³² The additional form of required

measures to increase immigrants access to financial services in order to increase safety. *Id.*

23. *Oversight*, *supra* note 22.

24. *Id.*

25. *See id.*

26. Ahmed & Demirjian, *supra* note 18, at 1; *see also* Punch, *supra* note 16, at 1; *see also* Sonderup, *supra* note 21, at 503.

27. *See* Ahmed & Demirjian, *supra* note 18, at 1.

28. *Id.*

29. Mark Rodgers, *Banking Without Borders: How Citibank's New Services Help Consumers in the U.S. and Mexico*, OCC COMMUNITY DEV. NEWSL. (Comptroller of the Currency, Washington, D.C.), Fall 2004, at 15, *available at* http://www.occ.treas.gov/cdd/bank_borders.html.

30. *Oversight*, *supra* note 22. Getting an ITIN is not an easy process for all Mexican immigrants. *Id.* Some immigrants are made nervous by the questions they are asked by officials during the process. *Id.* They feel that the officials are excessive in questioning and suspicious of immigrants seeking an ITIN. *Id.*

31. *Id.*; Rodgers, *supra* note 29, at 15.

32. Internal Revenue Service, Individual Taxpayer Identification Number (ITIN), What is an ITIN Used for?, <http://www.irs.gov/individuals/article/0,,id=96287>

identification can include a passport, a driver's license, a U.S. government-issued photo ID card, and, most controversially, the *Matricula Consular*.³³ The *Matricula Consular* is a photo identification card that the Mexican government distributes to individuals immigrating to the United States.³⁴ Some, including the Federal Bureau of Investigation, argue that the *Matricula Consular* is not a legitimate method of identification.³⁵ This is because it does not have as many sophisticated features as United States-issued identification tools.³⁶ Others maintain, however, that the card is entirely secure due to procedures such as background checks that are completed when a Mexican citizen applies for a *Matricula Consular*.³⁷ For security purposes, the card includes holograms and other elements that can only be viewed with detection tools designed to recognize valid cards.³⁸ Additionally, to make the card even more secure, the Mexican government maintains a database of individuals holding the cards and will not issue them to certain suspicious persons.³⁹

Checking accounts are not the only financial service

00.html (last visited Oct. 19, 2007).

33. Rodgers, *supra* note 29, at 15.

34. Sonderup, *supra* note 21; NEWBERGER, PAULSON, SINGER & SMITH, *supra* note 22, at 36.

35. *Consular I.D. Cards in a Post 9-11 World: Hearing Before the Subcomm. on Immigration, Border Security, and Claims on Consular I.D. Cards of the H. Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter *Consular*] (statement of Steve McCraw, Assistant Director of The Office of Intelligence, FBI), available at <http://www.fbi.gov/congress/congress03/mccraw062603.htm>; Marsha Blackburn, *Banking on Corruption*, NAT'L REV. ONLINE, Aug. 7, 2007, <http://article.nationalreview.com/?q=Zjk2YzRhNjI3N2ZlMmM0NjA0NGYxMmZiNzViNjYzOWE=>.

36. *Consular*, *supra* note 35. The FBI reported that there were several problems with the *Matricula Consular*, including "non-existence of any means of verifying the true identity of the card holder" and "no centralized database to coordinate the issuance of consular ID cards." *Id.*

37. Sonderup, *supra* note 21, at 504.

38. Katheryn Holloman, *The New Identity Crisis: USA Patriot Act Customer Identification Programs and the Matricula Consular as Primary Identity Verification for Mexican Nationals*, 7 N.C. BANKING INST. 125, 128 (2003); CONG. RESEARCH SERV., LIBRARY OF CONG., CONSULAR IDENTIFICATION CARDS: DOMESTIC AND FOREIGN POLICY IMPLICATIONS, THE MEXICAN CASE, AND RELATED LEGISLATION 2 n.2 (2005) [hereinafter RESEARCH], available at <http://fpc.state.gov/documents/organization/45470.pdf>. Other security features include a seal, the paper it is printed on, and elements visible with florescent light. *Id.* at 2 n.2.

39. RESEARCH, *supra* note 38, at 1-2. The list of suspicious persons that the Mexican government will not issue *Matricula Consulars* to includes "fugitives or people who have attempted to use fake documents in the past." *Id.*

products that utilize alternative identity verification procedures.⁴⁰ Some banks even offer mortgage loans to individuals using ITINs rather than SSNs.⁴¹ ITIN mortgages were initially offered by banks during a recent mortgage boom in an attempt to prepare for a downturn in the mortgage market.⁴² The idea was to grow a largely untouched customer base in order to compensate for an anticipated decrease in traditional mortgages.⁴³ One risk for banks who issue these loans, however, is the absence of a large secondary market for ITIN based loans.⁴⁴ Several banks have decided to accept that risk, and, as a result, they have seen significant growth in business from the immigrant population.⁴⁵

Despite the fact that banks have offered multiple banking products to immigrants without SSNs for quite some time, it is credit cards that have drawn the sharpest criticism from recent commentators.⁴⁶ One such product recently offered by Bank of America placed the bank at the center of the debate about access to credit for immigrants.⁴⁷ This product requires only that customers hold a checking account at the bank with no overdrafts for three months.⁴⁸ An overdraft occurs when more money is requested from the account than is available to the customer.⁴⁹ An overdraft would disqualify the customer for the credit card.⁵⁰ If

40. See *infra* notes 41-53 and accompanying text.

41. *Wells Fargo to Offer Home Loans to Los Angeles and Orange County Borrowers with Individual Taxpayer Identification Numbers*, HISPANICBUSINESS.COM, Dec. 12, 2005, <http://www.hispanicbusiness.com/news/newsbyid.asp?id=27195>; Kate Berry, *Embracing Aliens: Wells Fargo Offering Home Loans to Illegals*, L.A. BUS. J., Jan. 16, 2006, available at http://findarticles.com/p/articles/mi_m5072/is_3_28/ai_n16058693; Pasha, *supra* note 6.

42. Pasha, *supra* note 6.

43. *Id.*

44. NEWBERGER, PAULSON, SINGER & SMITH, *supra* note 22, at 47. While small programs have been developed to purchase ITIN loans, presently, Fannie Mae and Freddy Mac do not do so. *Id.*

45. See Pasha, *supra* note 6.

46. Ahmed & Demirjian, *supra* note 18, at 1. ITIN mortgage loans discussed above also received a great deal of attention when they were first offered, but the most recent debate has been sparked by credit cards. *Id.*; Pasha, *supra* note 6.

47. Jordan & Bauerlein, *supra* note 1.

48. *Id.*

49. See Federal Reserve Board, *Protecting Yourself from Overdraft and Bounced Checks*, <http://www.federalreserve.gov/pubs/bounce/#happen> (last visited Dec. 31, 2007).

50. Jordan & Bauerlein, *supra* note 1.

customers qualify, they receive a credit card by paying a \$99 fee that is reimbursable after three to six months.⁵¹ Customers initially have a \$500 credit limit, but that limit may be increased over time.⁵² Customers who want to utilize this product are only required to produce those forms of identification that are necessary to open a bank account.⁵³

A. *Criticism of the Products*

While most of the above products have come under fire at some point, the recent criticism has been focused on the credit card products, and, in particular, the Bank of America card.⁵⁴ Bank of America CEO Ken Lewis points out that the particular credit card that has received much of the criticism is not a new product, but it has been marketed in a way that has given it tremendous attention.⁵⁵ Perhaps another reason so much criticism has been directed at credit cards is because they can be the entry level product for consumers who want to establish credit.⁵⁶ Thus, the product is available to a greater portion of the immigrant population than loan products requiring some existing credit history.⁵⁷ Although Bank of America insiders thought that the card would bring positive attention to their company, the card instead brought the bank to the forefront of a public debate about immigration.⁵⁸

The criticism surrounding any product that does not require a SSN centers around two claims: that the product may violate portions of the USA Patriot Act⁵⁹ and that the product encourages illegal immigration.⁶⁰ This criticism has resulted in

51. *Id.*

52. *Id.*

53. *See supra* notes 48-52 and accompanying text.

54. Ahmed & Demirjian, *supra* note 18, at 1.

55. *See* Kenneth D. Lewis, *Not in the Cards*, WALL ST. J., Feb. 22, 2007, available at http://online.wsj.com/article/SB117211624809015805.html?mod=opinion_main_comments.

56. *See* Punch, *supra* note 16, at 5.

57. *See id.*

58. Lewis, *supra* note 55.

59. U.S.A. Patriot Act, Pub. L. No. 107-56, § 326, 115 Stat. 272, 317-18 (2001).

60. Azam & Demirjian, *supra* note 18, at 2.

many customers closing their accounts and boycotting banks that offer such products.⁶¹ Additionally, the House of Representatives has proposed the Photo Identification Security Act, which would require specific forms of identification to be used by financial institutions.⁶² Representative Marsha Blackburn, who introduced the bill, claims that new banking products that do not require SSNs “are consciously exploiting loopholes in federal money-laundering law and ‘gray areas’ within IRS regulations to allow illegal immigrants access to credit cards and loans.”⁶³ Additionally, Blackburn has been joined by other representatives in requesting that the Financial Services Committee investigate banks that are issuing credit cards to illegal immigrants.⁶⁴ Furthermore, the banking products have raised eyebrows in the Department of Homeland Security, which views the programs as “problematic” because they might promote identity theft or other financial crimes.⁶⁵

Despite all the criticism Bank of America has taken for its credit card product, it has decided to continue offering it.⁶⁶ Bank of America CEO Ken Lewis claims that the product “meets the identification requirements of the USA Patriot Act, U.S. Treasury Department regulations, and internal fraud prevention procedures.”⁶⁷ Additionally, other banks offer or plan to begin similar programs while maintaining that the services are completely legal.⁶⁸ Thus, the controversy continues over these

61. *Hometown Lawmaker Takes Aim at BofA Credit Card Program*, TRIAD BUS. J., Mar. 19, 2007, at 1; Bank of America Boycott Homepage, <http://www.bankofamer icaboycott.com> (last visited Oct. 19, 2007) (attempting to organize a grassroots boycott of Bank of America and other banks that provide services to immigrants without SSNs). United States Representative Sue Myrick stopped doing business with Bank of America despite the fact that the bank has been a major contributor to her political career. *Id.*

62. H.R. 1314, 110th Cong. (2007). The bill proposes that the financial institutions only be allowed to use the following forms of Identification: A social security card with a photo ID or real id act identification, a passport, or a USCIS photo ID card. *Id.* § 2(a).

63. Blackburn, *supra* note 35.

64. *Congresswoman Takes Aim at Banks Issuing Credit Cards to Illegal Immigrants*, 7 CARDLINE 1, 1 (2007).

65. Azam & Demirjian, *supra* note 18, at 2.

66. Lewis, *supra* note 55.

67. *Id.*

68. *See Congresswoman Takes Aim at Banks Issuing Credit Cards to Illegal Immigrants*, *supra* note 64, at 1.

programs and the role that banks should play in monitoring illegal immigration.⁶⁹

IV. LEGAL REQUIREMENTS OF FINANCIAL SERVICES

A. *The Patriot Act*

A month following the tragic terrorist attack of September 11, 2001, Congress passed the USA Patriot Act.⁷⁰ Part of the Patriot Act includes rules for financial institutions concerning how the identification of accountholders must be verified.⁷¹ Specifically, the Patriot Act spells out certain minimum requirements for financial institutions and directs the Secretary of the Treasury to “prescribe regulations” consistent with those minimum requirements for opening an account.⁷² The minimum requirements set forth compel banks to establish procedures for “verifying the identity of any person seeking to open an account to the extent reasonable and practicable; maintaining records of information used to verify a person’s identity;” and “consulting lists of known or suspected terrorists or terrorist organizations . . . to determine whether a person seeking to open an account appears on any such list.”⁷³

Pursuant to the Patriot Act, the Department of the Treasury required financial institutions to create “Customer Identification Programs” (CIPs).⁷⁴ CIPs require that a bank use “risk based procedures” to verify the identity of customers “to the extent reasonable and practicable” so that the bank can “form a reasonable belief that it knows the true identity of each customer.”⁷⁵ The Department of Treasury also prescribed certain minimum information that must be obtained by a bank’s CIP.⁷⁶ The minimum information includes the customer’s “(1) name, (2)

69. *See supra* notes 54-68 and accompanying text.

70. U.S.A. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

71. *Id.* § 326, 115 Stat. at 317-18.

72. *Id.* § 326(d), 115 Stat. at 317.

73. *Id.*

74. Anti-Money Laundering Programs, 31 C.F.R. § 103.121 (2007).

75. *Id.* § 103.121(b)(2).

76. *Id.* § 103.121(b)(2)(i).

date of birth . . . (3) address . . . and, (4) identification number.”⁷⁷ For the purposes of those customers who are not United States citizens, the Department of the Treasury indicated that banks may use a variety of identification numbers including “a taxpayer identification number; passport number and country of issuance; alien identification card number; or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.”⁷⁸ Thus, neither the Act itself nor the implementing regulations state that a SSN is a minimum identification requirement for bank accounts.⁷⁹ As long as banks are complying with these minimum identity verification requirements, they are not violating the Patriot Act or the Department of the Treasury regulations by offering financial products to immigrants.⁸⁰

The federal regulations do not require a SSN for identity verification purposes, and they specifically contemplate banking customers who do not have them.⁸¹ Acceptable forms of identification specifically for “non-U.S. person(s)” include “alien identification card number(s).”⁸² Furthermore, a newsletter published by the Office of the Comptroller of the Currency (OCC) identifies the use of the *Matricula Consular* for identification purposes as an easy way for banks to reach out to individuals who have emigrated from Mexico.⁸³

Those who feel the Patriot Act and Treasury regulations do present problems for these banking products might focus on the requirement that CIPs instituted by banks be “risk based.”⁸⁴ Certainly, some believe that these products present specific risks that might require heightened measures beyond those suggested as

77. *Id.* § 103.121(b)(2)(i)(I)-(4).

78. *Id.* § 103.121(b)(2)(i)(4)(ii).

79. *See* U.S.A. Patriot Act, Pub. L. No. 107-56, § 326, 115 Stat. 272, 317-18 (2001); 31 C.F.R. § 103.121.

80. *See* U.S.A. Patriot Act § 326, 115 Stat. at 317-18; 31 C.F.R. § 103.121.

81. *See* 31 C.F.R. § 103.121.

82. *Id.* § 103.121(b)(2)(i)(4)(ii).

83. Rodgers, *supra* note 29, at 15. This article was published in an OCC newsletter, but was written by a Vice President at Citigroup. *Id.* at 14. In a footnote in the article, the author makes clear that the CIP rule “neither endorses nor prohibits bank acceptance of information from particular types of identification documents issued by foreign governments.” *Id.* at 15.

84. 31 C.F.R. § 103.121(b)(2).

the minimum requirements.⁸⁵ The wording of the Department of the Treasury regulations, however, indicates that banks themselves should determine the level of risk involved in verifying the identification of their customers.⁸⁶ Critics then might argue that banks have incorrectly assessed the level of risk involved with these products and customers.⁸⁷ However, the Treasury regulations empower banks to make that determination.⁸⁸

The minimum identification requirements for banks as defined by the Patriot Act and the implementing regulations have the stated general purpose of “uniting and strengthening America by providing appropriate tools required to intercept and obstruct terrorism.”⁸⁹ Some have suggested that allowing banking services to individuals without SSNs has “undermined” that purpose.⁹⁰ However, regulations concerning identity verification by banks are not designed to help regulate whether or not immigrants are legally living in the United States.⁹¹ Rather, they are designed to secure the United States against terrorism.⁹²

B. Aiding and Abetting Illegal Aliens

Banking products marketed towards immigrants are also

85. Blackburn, *supra* note 35; Ahmed & Demirjian, *supra* note 18, at 2.

86. 31 C.F.R. § 103.121; *Serving the Underserved: Initiatives to Broaden the Access to the Financial Mainstream: Hearings before the Subcomm. on Financial Institutions and Consumer Credit “Serving the Underserved: Initiatives to Broaden Access to the Financial Mainstream,”* 108th Cong. (2003), available at <http://financialservices.house.gov/media/pdf/062603sb.pdf> (statement of Sheila Blair, Dean’s Professor of Financial Regulatory Policy, University of Massachusetts). Specifically, the wording is “[t]he CIP must include risk based procedures for verifying the identity of each customer to the extent reasonable and practicable These procedures must be based on the banks assessment of the relevant risks, including those presented by the various types of accounts maintained by the bank, the various methods of opening accounts provided by the bank, the various types of identifying information available, and the banks size, location, and customer base.” 31 C.F.R. § 103.121(b)(2).

87. See 31 C.F.R. § 103.121.

88. See *id.* § 103.121(b)(2).

89. U.S.A. Patriot Act, Pub. L. No. 107-56, § 326, 115 Stat. 272, 317-18 (2001).

90. Ahmed & Demirjian, *supra* note 18, at 2.

91. U.S.A. Patriot Act § 326, 115 Stat. at 317-18. Regulations are designed to prevent money laundering and to help identify terrorists and other potential security threats in the wake of the events of September 11, 2001. *Id.*

92. *Id.*

challenged on the grounds that financial institutions offering them are aiding and abetting illegal immigration.⁹³ Criminal penalties are imposed on anyone who “encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law . . . or aids or abets the commission of any of the preceding acts,” under 8 U.S.C.S. 1324.⁹⁴ To establish that a financial institution has violated § 1324, the prosecution must establish three things: first that the immigrant is an illegal alien, second that the financial institution encouraged or induced entry or residence of that alien, and third that the financial institution either had knowledge or had reckless disregard for the fact that the alien entered or resided illegally.⁹⁵ Bank of America has conceded that “in some cases illegal immigrants are able to sign up for the bank’s products and services.”⁹⁶ This suggests that Bank of America has knowledge of the fact that some of its customers reside in the United States illegally.⁹⁷ The question then is whether the act of offering this financial product induces or encourages that residence.⁹⁸

In order to show that a party induced or encouraged an illegal alien, one must show that the party “knowingly helped or advised”⁹⁹ the alien.¹⁰⁰ This definition taken in the context of the remainder of the statute does not mean that merely influencing an alien to come to the United States constitutes a violation of § 1324.¹⁰¹ Banks may be aware that some illegal aliens are able to utilize their products,¹⁰² but making those products available does not mean that the banks are knowingly helping or encouraging

93. *Hometown Lawmaker Takes Aim at BofA Credit Card Program*, *supra* note 61, at 1.

94. 8 U.S.C.S. § 1324(a)(1)(iv) (LexisNexis 2007).

95. 8 U.S.C.S. § 1324(a)(1)(iv); *U.S. v. Fuji*, 301 F.3d 535, 539 (7th Cir. 2002); *U.S. v. He*, 245 F.3d 954, 957 (7th Cir. 2001).

96. *Lewis*, *supra* note 55.

97. *Id.*

98. 8 U.S.C.S. § 1324(a)(1)(iv); *Fuji*, 301 F.3d at 539; *He*, 245 F.3d at 957; *Lewis*, *supra* note 55.

99. *Fuji*, 301 F.3d at 540.

100. *He*, 245 F.3d at 960.

101. *Id.*

102. *Lewis*, *supra* note 55.

illegal immigrants.¹⁰³ Banks are not identifying specific individuals as illegal aliens and attempting to assist them in residing in the United States illegally.¹⁰⁴ Rather, they are merely offering banking services to a population of immigrants that is growing tremendously every year.¹⁰⁵ The products that banks are offering to immigrants are not just offered to or utilized by illegal aliens.¹⁰⁶ In fact, Bank of America CEO Ken Lewis has stated that eighty-four percent of customers who utilize the particular Bank of America credit card product have SSNs.¹⁰⁷

Actions that have been successfully prosecuted under 8 U.S.C. § 1324(a)(1)(A)(iv) include assisting an illegal alien by offering a residence, paying for travel, or accompanying or transporting an alien into the United States.¹⁰⁸ In all of these situations, a specific illegal alien was being assisted by the defendant.¹⁰⁹ There is a stark contrast between these actions and offering a financial service to a large population, some of whom may be illegal aliens.¹¹⁰ Some argue that a court could find that offering financial services to a population that includes some illegal aliens might fit within the language of the statute.¹¹¹ The current interpretations of that statute, however, do not rise to the level of generality required to prosecute banks for offering such products.¹¹²

C. *Proposed Legislation*

The legal requirements for banks offering financial services

103. See *Fuji*, 301 F.3d at 539, 540; see also *He*, 245 F.3d at 960.

104. *Lewis*, *supra* note 55.

105. *Id.*; *Rodgers*, *supra* note 29, at 15.

106. *Lewis*, *supra* note 55.

107. *Id.*

108. See generally *Fuji*, 301 F.3d at 535 (finding that assisting in bringing illegal immigrants to the United States is a violation of the law); *He*, 245 F.3d at 954 (finding that helping an illegal immigrant travel to the United States is a violation of the law).

109. *Fuji*, 301 F.3d at 536; *He*, 245 F.3d at 955.

110. *Lewis*, *supra* note 55; *Rodgers*, *supra* note 29, at 15.

111. 8 U.S.C.S. § 1324(a)(1)(iv) (LexisNexis 2007); *Hometown Lawmaker Takes Aim at BofA Credit Card Program*, *supra* note 61, at 1 (claiming banks are aiding and abetting).

112. 8 U.S.C.S. § 1324(a)(1)(iv); see *Fuji*, 301 F.3d at 540; see also *He*, 245 F.3d at 960.

to immigrants could change, however, pending the outcome of legislation that has been proposed in Congress.¹¹³ The bill, introduced by Representative Marsha Blackburn, would compel banks to deny financial transaction services to all persons who are not legal residents of the United States.¹¹⁴ The result of the bill passing would be that financial institutions would no longer be able to offer many of the products that they currently offer to immigrants in the United States.¹¹⁵

V. THE POLICY DEBATE

Should offering banking products to immigrants without SSNs be made illegal? Should banks be asked to help regulate immigration laws through identity verification procedures?

Some argue that acceptance of alternative forms of identification for the purpose of financial services adversely impacts our nation's efforts to control immigration by making it easier for illegal immigrants to live normal lives in the United States.¹¹⁶ Similarly, it is currently a violation of federal law to employ a person known to be an unauthorized immigrant, because doing so enables and encourages immigrants to stay in the United States illegally.¹¹⁷ However, financial products do not give immigrants access to salaries; rather, they offer secure options for managing money or access to credit that must be repaid.¹¹⁸ Access to financial products is often an issue of financial and physical safety for immigrants, rather than an enticement to enter the United States.¹¹⁹ Moreover, immigrants are enticed to come to the United States because of potential employment opportunity,¹²⁰ not

113. H.R. 1314, 110th Cong. (2007).

114. *Id.*; *Congresswoman Takes Aim at Banks Issuing Credit Cards to Illegal Immigrants*, *supra* note 64, at 1.

115. H.R. 1314.

116. RESEARCH, *supra* note 38, at 2 n.2.

117. 8 U.S.C.S. § 1324a (LexisNexis 2007).

118. NEWBERGER, PAULSON, SINGER & SMITH, *supra* note 22, at 8.

119. *See supra* notes 21-23 and accompanying text.

120. *See* RAKESH KOCHAR, ROBERTO SURO & SONYA TAFOYA, PEW HISPANIC CTR., THE NEW LATINO SOUTH: CONTEXT AND CONSEQUENCES OF RAPID POPULATION GROWTH 18 (2005), available at <http://pewhispanic.org/files/reports/50.pdf> (indicating that the growth of immigration in the United States has followed increases in the availability of jobs).

because of potential access to financial services.¹²¹ This is evidenced by the fact that many immigrants who are living and working in the United States legally do not utilize financial services.¹²² Thus, requiring a SSN for financial services would do little to deter individuals from illegally immigrating to the United States.¹²³

An additional relevant policy question is whether identity verification procedures at financial institutions are efficient for monitoring illegal immigration. Banks are asked to use identity verification procedures to actively take part in the investigation of certain crimes such as money laundering.¹²⁴ Additionally, they are asked to report suspicious transactions.¹²⁵ Therefore, it is not unprecedented for banks to be asked to take part in the investigation of illegal activities.¹²⁶ However, these illegal activities that banks help regulate are activities that happen through the use of banks.¹²⁷ Illegal immigration, on the other hand, happens at borders rather than in banks.¹²⁸ So the connection financial institutions might have to illegal immigration is more attenuated than the relationship they have to activities they currently help to regulate.¹²⁹

Yet another reason financial institutions should not be made to regulate immigration is that financial institutions should be allowed to make a profit by whatever legal means they deem appropriate.¹³⁰ Because immigrants are largely unserved by

121. *See supra* notes 13-15 and accompanying text.

122. *See id.*

123. *See supra* notes 120-22 and accompanying text.

124. U.S.A. Patriot Act, Pub. L. No. 107-56, § 326, 115 Stat. 272, 317-18 (2001).

125. 31 U.S.C.S. § 5318(g) (LexisNexis 2007).

126. *Id.*; U.S.A. Patriot Act § 326, 115 Stat. at 317-18.

127. 31 U.S.C.S. § 5318(g); U.S.A. Patriot Act § 326, 115 Stat. at 317-18.

128. *Cf.* Edward Sufuentes, *Credit Cards for Illegal Immigrants Cause Controversy*, NCTIMES.COM, Feb. 24, 2007, http://www.nctimes.com/articles/2007/02/25/news/top_stories/20_25_502_24_07.txt (quoting Bank of America as stating “[t]he issue of customers citizenship, tax paying status is not any bank’s focus. Know your client, Patriot Act issues and compliance with any government required documentation are our concern. This matter reflects the reality of all banks, and many retailers and U.S. businesses”).

129. *See supra* notes 123-27 and accompanying text.

130. Lewis, *supra* note 55 (Bank of America maintaining that there is nothing illegal about its credit card, and that it makes good business sense); Pasha, *supra* note 6 (suggesting that there is nothing wrong with using ITINs for mortgages).

financial institutions, banks have a great incentive to find ways to bring them into the banking fold.¹³¹ In doing so, financial institutions will also be enhancing the security and the lives of an important and growing community in the United States.¹³² Bank of America CEO Ken Lewis presented the perspective of financial institutions when he wrote that the Bank of America program that does not require an SSN, “is not about illegal immigrants [; rather,] . . . it is . . . to help Bank of America customers build a credit history.”¹³³

It is true that SSNs are required for people living in the United States to receive certain public benefits.¹³⁴ For example, food stamps and welfare benefits are not available to individuals who do not have SSNs.¹³⁵ Immigrants without SSNs can be denied state benefits, despite the fact that they may pay taxes using ITINs.¹³⁶ The difference, however, is that these public benefits are conferred by the state, whereas financial services such as credit products are provided by private industry.¹³⁷

If financial institutions required SSNs for accounts, credit cards, loans, and other services, they would be discouraging all immigrants from utilizing these services, thus reducing the effectiveness of some of the financial institutions’ other reporting functions.¹³⁸ In other words, reducing the number of people who can legally bank in the United States would also reduce the number of people who can be subjected to scrutiny by banks.¹³⁹ The proposed Photo Identification Security Act introduced by

131. Sonderup, *supra* note 21, at 503.

132. *See supra* notes 11-25 and accompanying text; *see generally* JAMES H. JOHNSON & JOHN D. KASARDA, FRANK HAWKINS KENAN INST. OF PRIVATE ENTER., THE ECONOMIC IMPACT OF THE HISPANIC POPULATION ON THE STATE OF NORTH CAROLINA (2006), available at http://www.kenanflagler.unc.edu/ki/reports/2006_HispanicStudy/ (explaining the importance of the growing immigrant community to the state of North Carolina).

133. Lewis, *supra* note 55.

134. 7 U.S.C.S. § 2025(e) (LexisNexis 2007); 42 U.S.C.S. § 602(a)(25) (LexisNexis 2007).

135. 7 U.S.C.S. § 2025(e); 42 U.S.C.S. § 602(a)(25); *Bowen v. Roy*, 476 U.S. 693, 695 (1986).

136. 7 U.S.C.S. § 2025(e); 42 U.S.C.S. § 602(a)(25); *Bowen*, 476 U.S. at 695.

137. 7 U.S.C.S. § 2025(e); 42 U.S.C.S. § 602(a)(25); *Bowen*, 476 U.S. at 695.

138. Lewis, *supra* note 55.

139. *Id.*

Representative Blackburn would require that financial institutions use only one of the following forms of identification: a SSN coupled with a photo ID, a United States issued passport, or an identification card issued by the Department of Homeland Security.¹⁴⁰ Such a bill, however, would only deny services to a large portion of the immigrant population without equipping banks to actively report or take part in the investigation of illegal activity.¹⁴¹

VI. CONCLUSION

After attempting to expand its customer base to include more of the growing Hispanic population, the banking industry has been pulled into the immigration debate.¹⁴² Some critics believe that banks are perilously close to breaking current regulations, and should play a role in securing this nation from illegal immigrants.¹⁴³ On the other hand, banks and their supporters believe that banks are doing nothing illegal.¹⁴⁴ They also believe that denying services to individuals without SSNs discriminates against a very large immigrant population in the United States.¹⁴⁵

Nothing in any of the current banking regulations, in the Patriot Act or elsewhere requires that banks use a SSN for the purposes of identity verification.¹⁴⁶ The practice of offering credit cards and other banking services without requiring a SSN is not in itself illegal.¹⁴⁷ While many believe that this practice should be made illegal with new legislation,¹⁴⁸ doing so would be poor public policy.¹⁴⁹ In determining whether to enact legislation requiring SSNs for financial services, legislators should weigh the effectiveness of such a law in deterring illegal immigration with the

140. H.R. 1314, 110th Cong. § 2(a) (2007).

141. *See supra* notes 124-40 and accompanying text.

142. *See supra* notes 54-69 and accompanying text.

143. Blackburn, *supra* note 35.

144. Lewis, *supra* note 55.

145. *Id.*

146. *See* U.S.A. Patriot Act, Pub. L. No. 107-56, § 326, 115 Stat. 272 (2001); 31 C.F.R. § 103.121 (2007).

147. *See supra* notes 70-112 and accompanying text.

148. *See supra* notes 61-65, 113-15 and accompanying text.

149. *See supra* notes 116-41 and accompanying text.

negative impact the law would have on all who would be affected. Denying banking services to all who do not have SSNs would have a minimal deterrent effect on illegal immigration.¹⁵⁰ It would also negatively impact a large number of immigrants¹⁵¹ as well as the banking industry itself.¹⁵²

Although banks have recently taken a great deal of criticism for offering products to individuals who do not have SSNs, these banks have done nothing illegal.¹⁵³ They have simply put themselves in a position to organically grow their customer base and to provide a much needed and valuable service to a group that has typically been under-banked.¹⁵⁴ Additionally, any regulation that would prevent banks from providing financial services to those without SSNs would be ineffective in accomplishing its goal.¹⁵⁵ Therefore Congress should not enact new laws regulating financial services that use alternative forms of identity verification.¹⁵⁶

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150. *See supra* notes 120-23 and accompanying text.

151. *See supra* notes 11-25 and accompanying text.

152. *See supra* notes 19-21 and accompanying text.

153. *See supra* notes 11-53 and accompanying text.

154. *See id.*

155. *See supra* notes 118-41 and accompanying text.

156. *See id.*