



March 14, 2017

Via E-mail: EBSA.FiduciaryRuleExamination@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210-AB79

Ladies and Gentlemen:

CresCom Bank appreciates the opportunity to provide comments to the proposed rule of the Department of Labor (Department) that would delay the applicability date of the Fiduciary Rule (Applicability Date) by 60 days, from April 10, 2017, to June 9, 2017.¹ For the reasons described below, the Bank believes that the Department should delay the Applicability Date by at least 60 days – and should consider a significantly longer extension – in order for the Department to properly reexamine the Fiduciary Rule and, in response to the questions raised in the President’s Memorandum (Memorandum), either rescind or revise the Rule.²

The Memorandum requires the Department to provide an updated economic and legal analysis which must consider at least three factors: first, whether the Fiduciary Rule is likely to harm investors due to a reduction in access to retirement products and services; second, whether the Fiduciary Rule’s anticipated applicability will result in dislocations or disruptions to the retirement services industry that may adversely affect investors or retirees; and third, whether the Fiduciary Rule is likely to cause an increase in litigation or in the prices that investors and retirees must pay to gain access to retirement services. Should the Labor Secretary find that the Fiduciary Rule is harmful under any of the three factors above, or if the Labor Secretary concludes for any other reason that the Fiduciary Rule is inconsistent with the priorities listed in the Memorandum, then the Secretary is directed to issue a proposed rule that would rescind or revise the Fiduciary Rule. The Bank with some certainty can conclude that at least one of these factors will be triggered regarding its retirement customers; therefore, the Department will need a delay in order to either revise the Fiduciary Rule or repeal it altogether.

Since the Fiduciary Rule was finalized in April 2016, the Bank has engaged in good-faith efforts to comply with all of the Rule’s requirements. Because the Fiduciary Rule calls for a significant

¹ The Fiduciary Rule (Rule) defines who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act (ERISA) as a result of giving investment advice to a plan, or to its participants or beneficiaries. The Fiduciary Rule also defines as a “fiduciary” anyone who renders investment advice to the owner of an individual retirement account (IRA) under the Internal Revenue Code (Code).

² See Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017).

industry restructuring of the design and delivery of retirement products and services, the Bank has undertaken a wholesale review of its entire line of retirement products and services. In doing so, the Bank has expended enormous time, labor, and costs to comply by the Applicability Date.

In particular, the Bank has been engaged in the process of restructuring its retirement business, negotiating or renegotiating and revising compensation packages and structures, renegotiating fee and service arrangements with third parties, creating and implementing bank policies and procedures, creating and/or modifying software and other technology systems to record, produce, and store significant amounts of new data, drafting new contracts for IRA customers, and revising contracts with all existing retirement customers. In addition, every current customer account has been or is being reviewed, evaluated, and revised as necessary in order to conform to the Fiduciary Rule's requirements. All of these actions further must be evaluated for consistency with the current bank legal and regulatory requirements to which the Bank is subject.

Despite these sustained good-faith efforts, the Bank is still dependent on its third party service providers and vendors to deliver timely products or updates to comply with the Fiduciary Rule. Some of these providers and vendors have struggled to meet the deadline for delivery, which has impeded and delayed the Bank's timetable for compliance. Because there may not have been sufficient time for testing (and with it, opportunity for adjustments and/or remediation), there is also no assurance that these third party service provider/vendor products and updates will fully work as intended on the Applicability Date.

Finally, the Fiduciary Rule does not yet appear to be properly functional. There remain critical ambiguities and uncertainties in how to comply with the Rule. For instance, it is still not clear what constitutes, and what does not constitute, a "recommendation," the linchpin of whether or not investment advice is given under the Rule. The absence of certainty in the definition has made it problematic for the Bank to generate compliant marketing materials and to train its employees to comply with the Rule. The Department's issuance of guidance in January 2017 confirms that the definition of "recommendation" requires further explanation and refinement, guidance which the Bank is expected to adjust to and comply with only a few months before the Applicability Date. Furthermore, the Department has not yet determined whether bank IRA/CD programs are subject to the Fiduciary Rule or whether they are exempt under statute.³ The Bank's structuring or restructuring of its IRA business – which would take months to complete – hinges entirely on the agency's decision, which at this time still is unknown.

Such uncertainties has compelled the Bank to take an unnecessarily conservative and restrictive interpretation of the Fiduciary Rule in order to ensure compliance. This has forced the Bank to constrain its retirement services to a greater degree than otherwise may be required, or forego

³ According to an August 24, 2016, white paper issued by the law firm of Morgan Lewis & Bockius LLP, section 4975(d)(4) of the Code permits a bank to advise its customers on IRA investments and on IRA rollovers, so long as the IRA is designed to invest exclusively in the bank's deposits in accordance with that section of the Code. We understand that the American Bankers Association and Department staff are in discussions on the applicability of this statutory exemption to bank IRA/CD programs.

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offering entirely certain services, thereby depriving its retirement customers of the benefits of retirement assistance and services they expect and to which they are entitled.

Given these significant challenges and obstacles, it was unrealistic for the Department, when it finalized the Rule, to expect full compliance in 12 months. The American Bankers Association concluded that 36 months would be required to comply with the Fiduciary Rule, which the Bank believes is a more workable timetable. Therefore, the Bank requests that the Department delay the Applicability Date for at least 60 days, and consider a substantially much longer period, as the Department reexamines the Fiduciary Rule and works either to rescind or revise Rule, consistent with the Memorandum's directives.

Thank you for your consideration of our comments. If you have any questions or require any additional information, please contact me at 843-429-2402.

Sincerely,



David L. Morrow
President & CEO