



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
CORPORATION FINANCE

May 19, 2022

Elizabeth A. Marino, Esq.  
Sidley Austin LLP  
60 State Street  
36<sup>th</sup> Floor  
Boston, MA 02109

Re: **First Republic Investment Management, Inc.**  
**Waiver of disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D**  
**Release No. 6030, May 19, 2022**  
**Administrative Proceeding File No. 3-20865**

Dear Ms. Marino:

This is in response to your letter dated May 18, 2022 (“Waiver Letter”), written on behalf of First Republic Investment Management, Inc. (“FRIM”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, FRIM requests relief from any disqualification that will arise as to FRIM under Rule 506 of Regulation D under the Securities Act as a result of the entry of the Commission’s order entered May 19, 2022 against FRIM in the Matter of First Republic Investment Management, Inc. pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Release No. 6030 (the “Order”).

Assuming that FRIM complies with the Order, we have determined that FRIM has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny reliance on Rule 506 of Regulation D by reason of the entry of the Order. Accordingly, the relief requested in the Waiver Letter is hereby granted on the condition that FRIM complies with the terms of the Order. Any different facts from those represented in the Waiver Letter or FRIM’s failure to comply with the terms of the Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler  
Chief, Office of Enforcement  
Liaison  
Division of Corporation Finance



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May 18, 2022

## By Email

Timothy Henseler, Esq.  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: *In the Matter of First Republic Investment Management, Inc.*

Dear Mr. Henseler:

We are writing on behalf of First Republic Investment Management, Inc. (“FRIM” or the “Firm”) in connection with the anticipated settlement with the United States Securities and Exchange Commission (“SEC” or “Commission”) relating to *In the Matter of First Republic Investment Management, Inc.* The settlement will result in an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the “Order”) against FRIM. The Order requires that the Firm comply with certain undertakings, discussed herein, within 45 days of the entry of the Order. Therefore, as discussed below, absent a waiver, FRIM will be disqualified with regard to offerings pursuant to Rule 506 of Regulation D under the Securities Act of 1933 (“Securities Act”) until such time as it satisfies the undertakings enumerated in the Order.

On behalf of FRIM, we hereby respectfully request a waiver of any disqualification that will arise pursuant to Rule 506 of Regulation D under the Securities Act with respect to FRIM as a result of the entry of the Order.

## BACKGROUND

FRIM expects to submit an Offer of Settlement that will agree to the Order, which will be presented by the staff to the Commission.

FRIM is registered with the Commission as an investment adviser and is a wholly owned direct subsidiary of First Republic Bank.

The Order will find that FRIM breached its fiduciary duty in connection with its affiliated broker’s receipt of third-party compensation from advisory client investments without adequately disclosing its conflicts of interest. In particular, the Order will find that FRIM (1) invested

clients in certain mutual funds and cash sweep products that resulted in its affiliated broker receiving revenue sharing payments without providing full and fair disclosure of the conflicts of interest arising from the compensation; (2) breached its duty to seek best execution by causing certain advisory clients to invest in share classes of mutual funds that paid revenue sharing when share classes of the same funds were available to the clients that presented a more favorable value for the clients under the particular circumstances in place at the time of the transactions; and (3) failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with its mutual fund share class selection and cash sweep revenue sharing practices.

The Order will find that FRIM willfully violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Without admitting or denying the findings in the Order, except as to the Commission's jurisdiction over FRIM and the subject matter of the proceeding, FRIM will consent to the issuance of the Order and to (i) cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, (ii) be censured, (iii) pay a civil money penalty in the amount of \$250,000, (iv) pay disgorgement in the amount of \$1,332,664 plus prejudgment interest in the amount of \$243,289, and (v) comply with certain undertakings enumerated in the Order.

## DISCUSSION

FRIM understands that, absent a waiver, the entry of the Order will disqualify it from relying on Rule 506 of Regulation D under the Securities Act pursuant to Rule 506(d)(1)(iv)(B), which provides that issuers and certain covered persons may not rely on Rule 506 of Regulation D when the issuer and/or covered persons are, in relevant part, the subject of an SEC order entered pursuant to Section 203(e) of the Advisers Act that places limitations on the activities, functions or operations of such person. Since the Order will be issued pursuant to Section 203(e) of the Advisers Act and contains undertakings, absent a waiver, FRIM and third parties that engage FRIM to act in a covered capacity outlined in Rule 506 of Regulation D would be unable to rely on Rule 506 until the completion of the undertakings enumerated in the Order that it will be ordered to complete within 45 days of the entry of the Order.

The Commission has the authority to waive this disqualification upon a showing of good cause that such disqualification is not necessary under the circumstances.<sup>1</sup> FRIM respectfully requests that the Commission do so here, on the following grounds:

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<sup>1</sup> See Rule 506(d)(2)(ii).

1. *The Violations Involved the Offer and Sale of Securities*

The conduct set forth in the Order involved the offer and sale of securities. As discussed herein, the Order will find that FRIM did not adequately disclose to its advisory clients conflicts of interest in connection with the receipt of revenue sharing by FRIM's affiliate arising from no-transaction fee ("NTF") registered, open-end mutual funds and certain registered money market mutual funds and that FRIM violated its duty to seek best execution for its advisory clients in connection with the sale of NTF registered, open-end mutual funds to such clients.

2. *The Misconduct Does Not Involve Violations of Scierter-Based Statutory or Regulatory Provisions and Does Not Involve a Criminal Proceeding*

The violations in the Order are not criminal in nature and do not involve scierter-based fraud or other scierter-based violations.

3. *Duration of the Misconduct*

The conduct described in the Order related to the disclosure to advisory clients of conflicts of interest in connection with the receipt of revenue sharing by FRIM's affiliate arising (1) from NTF registered, open-end mutual funds occurring from February 2014 through January 2019, and (2) from certain registered money market funds occurring from February 2014 through January 2020. The conduct described in the Order related to the failure to adopt and implement certain written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder since 2014.

4. *Responsibility for the Misconduct*

With respect to who was responsible for the misconduct, the Division of Corporation Finance has stated that it would also consider, among other factors, whether (1) "the misconduct reflects more broadly on the entity as a whole" or (2) "the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct, or actions or omissions by the party seeking the waiver, or any of its affiliates, obstructed the regulatory or law enforcement investigation."<sup>2</sup>

The Order finds conflicts of interest in connection with revenues received by FRIM's affiliated broker-dealer. The Order describes FRIM's conduct with respect to disclosures and best execution practices surrounding the receipt of third-party compensation by FRIM's affiliated broker from advisory client investments, which the Commission will find resulted in a breach of fiduciary duty by FRIM. As the Order explains, the conflicts at issue in the Order

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<sup>2</sup> See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

relate to FRIM's affiliated broker's receipt of third-party compensation from advisory client investments that the Order finds were not disclosed in sufficient detail. At FRIM, the disclosures were drafted within the compliance and legal groups, with input from the relevant FRIM business lines. Certain individuals at FRIM also hold roles with FRIM's affiliated broker-dealer; however, the FRIM compliance and legal organization that supports FRIM is a First Republic enterprise function independent of the business, reporting directly to First Republic Bank's Office of the General Counsel. FRIM believes that the alleged disclosure deficiencies at issue were caused primarily by insufficient communication between FRIM and its affiliated broker-dealer, which actually received the revenues at issue.

The Commission has not sought to charge any individuals currently associated with FRIM with violations in connection with the conduct underlying the Order.

5. *Remedial Steps Undertaken by FRIM*

FRIM has taken extensive remedial steps to address the conduct at issue in the Order. Specifically, FRIM has implemented the following remedial actions:

- FRIM has enhanced and formalized its ADV approval process to address the communication issue and now involves input from compliance, numerous business lines, legal and FRIM's executive team in its ADV approval process. This includes the Form CRS approval process (collectively, the "ADV approval process").<sup>3</sup> In particular, the Compliance Department, which manages the ADV update process, sends the different sections of the Form ADV to the applicable business partners (e.g., the section on fees is sent to the billing and reporting group). Legal then reviews the Form ADV after Compliance has input all feedback received by the applicable business lines and the proposed disclosures. FRIM also instituted a new process through which it has quarterly correspondence with the FRIM executive team to learn about changes to business practices as well as annual processes across the business as a whole to develop and update the conflicts inventory. For the quarterly correspondence, Compliance circulates an email to certain executives at FRIM and its affiliates to help Compliance identify any compensation coming in. FRIM also conducts an annual conflict inventory process where FRIM and the other lines of business review their sections of the conflict inventory, make updates and meet with various business partners to identify any new conflicts and discuss existing conflicts.
- In January 2019, FRIM amended its Form ADV disclosures to provide enhanced disclosure regarding the NTF Program stating that FRIM will select the lowest-cost share class of a mutual fund for which its clients are eligible and that is available at its custodians. By 2021, FRIM moved its clients from the NTF class of mutual fund

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<sup>3</sup> The Form ADV, including the Form CRS, constitutes the entirety of the disclosures for FRIM.

shares, except in situations in which the fund family only offered NTF share classes or if the Firm's clients were only eligible for NTF share classes.<sup>4</sup> Even in such situations, the Firm's affiliated broker does not accept any NTF revenue.

- In January 2020, FRIM discontinued making available to its clients as a sweep option money market funds that would have resulted in FRIM's affiliated broker receiving revenue sharing, and, by June 2021, FRIM moved its clients out of money market mutual fund sweep accounts and into bank sweep programs.
- All of the remedial actions detailed above are intended to prevent a recurrence of the conduct at issue in the Order by enhancing FRIM's conflict of interest disclosures regarding receipt of third-party compensation from advisory client investments and by moving clients into share classes of mutual funds intended to present a more favorable value for the clients and to achieve best execution for the clients.

As detailed in the Order, FRIM will also agree to the following undertakings:

- Reviewing and correcting, as necessary, all relevant disclosure documents concerning its selection process of mutual funds, mutual fund share classes, and money market sweep funds. This undertaking is complete.
- Evaluating whether existing clients should be moved to a lower-cost share class, mutual fund or money market sweep fund and moving clients as necessary. This undertaking is complete.<sup>5</sup>
- Evaluating, updating (if necessary), and reviewing for effectiveness of their implementation, FRIM's policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act and rules thereunder in connection with both (1) the disclosure of the conflicts of interest presented by its mutual fund share class selection practices, and money market sweep fund selection, and (2) making recommendations of mutual fund share classes that were in the best interest of its advisory clients. This undertaking is complete.
- Notifying affected investors of the settlement terms of the Order by sending a copy of the Order to each affected investor via mail, email, or such other method

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<sup>4</sup> This process is ongoing in the case of clients who transfer to FRIM mutual funds purchased at firms other than FRIM, in situations in which mutual funds change the eligibility criteria for mutual fund share classes, and in situations in which mutual funds create new share classes.

<sup>5</sup> Please note that new inflows of mutual funds are evaluated and moved to the lowest share classes, as necessary, within 30 days.

not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff; and

- Certifying compliance with the undertakings to the Commission staff.

FRIM thus has taken, and has committed to taking further, concrete and substantial steps to remediate the conduct at issue in the Order. This will prevent the recurrence of the conduct at issue in the Order. Accordingly, it is not necessary to disqualify FRIM from relying on Rule 506 in connection with an offering.

## 6. *Disqualification Would Have a Material Impact on FRIM and its Clients*

FRIM currently acts, and in the future desires to continue to act, as investment manager to pooled investment funds, which are offered in reliance on Rule 506(b) of Regulation D (the “Funds”).<sup>6</sup> The Funds may constitute private equity funds, venture capital funds, hedge funds or hybrid funds and are offered and sold in reliance on applicable exemptions under the Securities Act, including Rule 506 under Regulation D. FRIM’s inability to act as investment manager to the Funds would have an immediate and ongoing adverse impact on FRIM, the current investors in the Funds, other current FRIM customers and the issuers of the Funds that have retained, or may retain, FRIM during the pendency of the undertakings, in connection with transactions that rely on the exemption under Rule 506(b). FRIM’s period of disqualification will expire upon its certification of completion of the undertakings, which it anticipates occurring within 45 days after entry of the Order.

As of February 28, 2022, 17 FRIM-advised Funds offered in reliance on the registration exemptions in Rule 506 were open for investment, totaling approximately \$436 million in capital raises from August 1, 2021 through February 28, 2022.<sup>7</sup> Further, in March 2022, FRIM anticipates raising over \$116 million in total capital from four new funds and at least 13 other open funds, and in April 2022, FRIM anticipates having 15 open Funds. FRIM is also working with approximately eight funds that may launch in the second or third quarter of 2022. During the period of FRIM’s disqualification, FRIM would be unable to advise such Funds, absent

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<sup>6</sup> FRIM’s Rule 506 of Regulation D Funds-advised business represents a significant portion of its advisory business, representing approximately 11% of FRIM’s investment advisory business in 2020 and growing steadily year over year.

<sup>7</sup> During the period starting January 1, 2016 and ending December 31, 2021, approximately 49 FRIM-advised Funds offered in reliance on the registration exemptions in Rule 506 raised over approximately \$2.3 billion in capital from investors and FRIM continued to advise approximately 54 additional Funds. Collectively, FRIM advised over 100 Funds offered in reliance on Rule 506 of Regulation D, totaling approximately \$5.5 billion in capital raises over the life of the Funds. Further, approximately 2,500 FRIM clients are invested in the FRIM-advised Funds and approximately 5,000 FRIM clients are eligible to invest in the Funds. Please note that the totals described herein include both subscription amounts for hedge funds and commitment amounts for private equity funds.

receipt of a waiver of the disqualification, since the Funds have ongoing offerings that rely on Rule 506. FRIM anticipates that such Funds will raise approximately \$500 million more in capital in 2022 in connection with the ongoing offerings. Because of FRIM's role as investment manager with respect to these Funds, the Funds would be disqualified from relying on Rule 506 to raise new capital during the period of disqualification if the Order is issued and there is no waiver. Many Funds rely on an ongoing offering of interests to increase the amount of new assets that can be deployed, and current investors in the Funds would be harmed if the Order is issued and there is no waiver for future capital raises during the period of disqualification. The inability to seek and raise capital, even for a short timeframe, represents a lost opportunity for the Funds as well as the current investors in the Funds, which could limit the diversification of assets in certain funds and could result in a smaller asset base over which Fund expenses are shared. Furthermore, the portfolio funds of the Funds have a right to take action against the FRIM-managed funds in the event of a Rule 506 disqualification (such as a forcing a redemption of the Funds). Therefore, if FRIM was disqualified even for a short period of time, all of their advisory relationships could be terminated, resulting in disruption and additional costs to the Funds as well as to FRIM clients who sought to invest in such Funds.

As noted above, certain FRIM-advised Funds are also in the process of launching and fundraising in reliance on Rule 506. FRIM has undertaken significant preparatory steps in anticipation of these efforts and, absent receipt of a waiver of the disqualification, FRIM would be unable to advise such Funds during the period of disqualification. The result would be at best a delay in launch and additional costs, and at worst an inability to launch at all, which would materially and adversely affect the Funds and the FRIM clients who seek to invest in such Funds.

If FRIM were disqualified from acting as an investment manager pursuant to Rule 506, it would not be able to meet the needs of the Funds who rely on the Rule 506 safe harbor in order to effectuate their capital raising needs during the pendency of the undertakings. Furthermore, it would present substantial challenges for FRIM to satisfy the asset allocation goals of its existing clients who have specified certain percentage asset allocations to be invested in privately placed funds. The private funds at issue provide an important portion of the asset allocation goals of many FRIM clients, as set forth in those clients' Investment Policy Statements, and only FRIM clients can invest in FRIM-advised funds at the point of the initial investment. Without a waiver, FRIM clients would be disadvantaged by losing access during any period of disqualification to FRIM-advised private funds that provide them a private funds platform on which to seek broader asset diversification in asset classes that are not correlated with the equities market.

While Section 4(a)(2) of the Securities Act is theoretically available the Funds for which FRIM serves as investment manager, the Funds that are currently open have already commenced their offerings in reliance on Rule 506 and therefore may not be able to now rely on Section 4(a)(2) with the certainty afforded a Rule 506 of Regulation D offering. Likewise, the Funds that are in the process of launching have already determined to rely on Rule 506. Further, the issuer



determines whether it is seeking an offering pursuant to Rule 506 or Section 4(a)(2). The negative impact discussed above would present a disproportionate hardship (to FRIM, the Funds and its investors) in light of the underlying misconduct at issue.

7. *Provision of Written Description of Administrative Order*

If this requested waiver is granted, until FRIM provides the certification to the Commission staff described above and detailed in the Order, FRIM agrees to furnish (or cause to be furnished) to each purchaser in a Rule 506 offering that would otherwise be subject to the disqualification under Rule 506(d)(1) as a result of the Order, a description in writing of the Order a reasonable time prior to sale.

## REQUEST FOR WAIVER

In light of the nature of the violations in the Order, the enforcement remedies that already will be obtained by entry of the Order, and the remedial measures FRIM has taken and will take, FRIM respectfully submits that it has shown good cause that relief from the Rule 506 disqualification should be granted.

Accordingly, we respectfully urge the Division, on behalf of the Commission, or the Commission, pursuant to Rule 506(d)(2)(ii), to waive the disqualification provisions in Rule 506 under the Securities Act applicable to FRIM as a result of the entry of the Order.

We appreciate your consideration of this request. Please feel free to contact me with any questions.

Very truly yours,



Elizabeth A. Marino