

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6049 / June 14, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20900

In the Matter of

**ENERGY CAPITAL
PARTNERS
MANAGEMENT, LP**

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 203(e) AND
203(k) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), against Energy Capital Partners Management, LP (“ECP” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-And-Desist Proceedings Pursuant to Sections 203(e) and Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

These proceedings arise from registered investment adviser Energy Capital Partners Management, LP's ("ECP") undisclosed, disproportionate allocation of certain deal-related expenses to a private equity fund it advises. In connection with a take private transaction that closed in March 2018, ECP reached an agreement with a consortium of third-party equity co-investors that these co-investors would not have to bear expenses related to a credit facility used to finance the transaction. As a result, ECP allocated a disproportionate share of these expenses to an acquisition entity acting on behalf of its fund, without disclosing to the fund or its Limited Partner Advisory Committee prior to the transaction that the fund would bear a proportion of these deal-related expenses in excess of its investment allocation. ECP also failed to implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act. By virtue of this conduct, ECP violated Section 206(2) and 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder.

Respondent

1. **ECP** is a Delaware Limited Partnership with its principal place of business in Summit, New Jersey. Founded in 2005, ECP is a private equity and credit investment adviser that has been registered as an investment adviser with the Commission since March 2012. ECP currently manages, among others, the private equity funds Energy Capital Partners III, LP and Energy Capital Partners IV, LP. As of December 31, 2020, ECP had approximately \$13.23 billion in regulatory assets under management.

Other Relevant Entities

2. **Target Portfolio Company A** was a publicly-traded independent power producer acquired by ECP through the Funds and a consortium of co-investors in a take private transaction that closed in March 2018.

3. **Energy Capital Partners III, LP** (together with its parallel funds, "Fund III") is a Delaware Limited Partnership formed in 2013 to make private equity investments. Fund III launched in 2013 and closed in April 2014 with approximately \$5.05 billion in capital commitments.

4. **Pre-Deal Co-Investors** are a consortium of third-party investors that, prior to the signing of the take private merger agreement in August 2017, committed to make an equity investment in Target Portfolio Company A.

5. **Post-Deal Co-Investors** are a pool of third-party investors that invested in the take private transaction following the signing of the merger agreement in August 2017.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

6. **Energy Capital Partners IV, LP** (together with its parallel funds, “Fund IV” and together with Fund III, the “Flagship Funds” or “Funds”) is a Delaware Limited Partnership formed in 2017 to make private equity investments. Fund IV launched in September 2017 and closed in January 2020 with approximately \$3.3 billion in capital commitments, and an additional \$3.5 billion in a consortium pool to invest alongside the Funds in the take private transaction.

Background

7. ECP is an adviser to private equity funds that focuses its investments in energy transition, electrification and de-carbonization infrastructure assets (each, a “Portfolio Company”). ECP advises multiple private equity funds, including Fund III. Fund III’s Limited Partners include pension funds, foundations and endowments, other institutional investors, and high net worth individuals. The objective of each Flagship Fund is to generate capital appreciation by making investments in Portfolio Companies. In connection with the acquisition of certain Portfolio Companies, after ECP determines the appropriate size of a prospective investment by its Fund (or Funds), ECP may, under the Funds’ Organizational Documents, permit co-investors or other third-parties to provide additional capital to invest in the deal. A set of three documents primarily governs investments in each of ECP’s Funds: a Private Placement Memorandum, a Limited Partnership Agreement (“LPA”), and an Investment Advisory Agreement (collectively, the “Organizational Documents”). In addition, each of ECP’s Funds has a Limited Partner Advisory Committee (“Advisory Committee”) established to, among other things, approve or disapprove conflicts of interest between a Fund and the general partner of such Fund, an affiliate of ECP.

8. ECP launched Fund III in July 2013, and closed it to further fundraising in April 2014 after accumulating approximately \$5.05 billion in investor capital commitments. By June 2017, the Fund had deployed over \$3 billion in capital to invest in various Portfolio Companies, including a toehold stake in December 2016 of approximately 5% in what was then a publicly traded independent power producer, Target Portfolio Company A.

9. In May 2017, ECP entered into negotiations to acquire Target Portfolio Company A through its Funds via a take private transaction. After Fund III made an initial bid for 100% ownership of Target Portfolio Company A in May 2017, Target Portfolio Company A granted ECP an exclusivity period to run through mid-August 2017, during which Target Portfolio Company A agreed not to negotiate its merger or acquisition opportunities with any other parties. In August 2017, before the exclusivity period expired, ECP and Target Portfolio Company A agreed to a deal for Fund III to take Target Portfolio Company A private.

10. As a condition of the purchase agreement signed in August 2017, and in order to maintain exclusivity rights during the negotiations, Fund III was required to provide proof of funding for the equity component of the proposed transaction, at the time contemplated to be approximately \$5.5 billion. ECP directed that \$1.95 billion of Fund III’s available capital be allocated toward funding its equity commitment in the deal; the remaining \$3.5 billion was

to be raised through a combination of commitments by the Pre-Deal Co-Investors and a credit facility that could temporarily bridge the remaining equity needed to close the transaction (the “Bridge Facility”).

11. ECP successfully obtained \$2.55 billion in equity investments from the Pre-Deal Co-Investors during the exclusivity period for a purchase of Target Portfolio Company A. ECP’s negotiations with the Pre-Deal Co-Investors concerning the terms of their equity commitments were arms-length. Fund III was able to cover the remaining approximately \$1 billion of the equity commitment through the Bridge Facility. ECP anticipated eliminating this Bridge Facility through capital commitments secured from Fund IV and from additional third-party investors to be solicited after the signing and public announcement of the merger agreement for Target Portfolio Company A.

12. Following the signing of the purchase agreement in August 2017, ECP raised additional investments from its newly-launched Fund IV and the Post-Deal Co-Investors. The take private transaction closed in March 2018, and ECP allocated the \$5.5 billion equity investment in the following manner: (a) Fund III invested approximately \$1.4 billion;² (b) Pre-Deal Co-Investors invested approximately \$2.55 billion; (c) Post-Deal Co-Investors invested approximately \$1 billion; and (d) Fund IV invested approximately \$450 million.

13. The Bridge Facility Fund III entered into in connection with the signing of the purchase agreement carried with it certain commitment fees, ultimately amounting to approximately \$27 million. Although ECP initially requested that the Pre-Deal Co-Investors bear their pro rata share of the Bridge Facility commitment fees, the Pre-Deal Co-Investors objected to any payment of such fees. Certain Pre-Deal Co-Investors took the position that because they were providing firm commitments up-front to support the investment, they should not bear costs associated with a loan commitment aimed at facilitating subsequent capital raises from other, non-affiliated parties.

14. Given the Pre-Deal Co-Investors’ objections, ECP agreed not to allocate Pre-Deal Co-Investors their share of the Bridge Facility commitment fees. Instead, it allocated Fund III more than its pro rata share of the expenses based on the fund’s equity commitment to the transaction. Although Fund III was allocated approximately 27% of the Target Portfolio Company A equity investment, it was allocated approximately 39% of the Bridge Facility commitment fees.³

15. ECP did not disclose in its Fund III Organizational Documents that Fund III would not be allocated its proportional share of such deal-related expenses. Rather, the Fund’s Organizational Documents disclosed that the Fund would, to the extent applicable,

² ECP reduced Fund III’s investment allocation in the take private transaction from the \$1.95 billion committed at the time of the August 2017 purchase agreement to \$1.4 billion as a result of the post-merger agreement fundraising from Post-Deal Co-Investors and Fund IV.

³ The remaining 61% of the fees were allocated between Fund IV and Post-Deal Co-Investors, who received disclosure from ECP regarding the Bridge Facility commitment fees.

allocate Fund expenses “based on the relative investments and/or benefits derived among the ECP III Funds” and/or “in any manner determined equitable, in the good faith judgment” of ECP. ECP also did not disclose to Fund III’s Limited Partner Advisory Committee that Fund III would be allocated more than its proportionate share (based on ownership) of the Bridge Facility commitment fees.

16. Absent disclosure in the Organizational Documents, to the Advisory Committee or otherwise to Fund III, that Fund III would be allocated more than its proportional share of commitment fee expenses, ECP should not have allocated to Fund III more than its proportional share of such expenses. The determination to allocate a disproportionate share of expenses to Fund III resulted in Fund III paying approximately \$3.3 million more in expenses than it would have paid had it been allocated its pro rata share based on ownership of Target Portfolio Company A.

17. ECP failed to implement written policies and procedures reasonably designed to prevent violations of the Advisers Act or its rules in connection with how it allocated deal expenses. ECP’s policies regarding expense allocations stated only that ECP “will allocate expenses charged to its private funds on a fair and equitable basis in accordance with the relevant fund partnership agreements.” As noted above, Fund III’s Organizational Documents did not disclose that Fund III might be allocated a disproportionate share of commitment fee expenses and ECP did not otherwise disclose that fact to Fund III or its Limited Partnership Advisory Committee.

Violations

18. As a result of the conduct described above, ECP willfully⁴ violated Section 206(2) of the Advisers Act, which prohibits investment advisers from directly or indirectly engaging “in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.” Scienter is not required to establish a violation of Section 206(2), but rather a violation may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95) (1963)).

19. As a result of the conduct described above, ECP willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which make it unlawful for any investment adviser to a pooled investment vehicle to “make any untrue statement of a

⁴ “Willfully,” for purposes of imposing relief under Section 203(e) of the Advisers Act, “means no more than that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965) The decision in *The Robare Group, Ltd. v. SEC*, which construed the term “willfully” for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has “willfully omit[ted]” material information from a required disclosure in violation of Section 207 of the Advisers Act).

material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading to any investor or prospective investor in the pooled investment vehicle” or “engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.” Scierter is not required to establish a violation of Section 206(4) of the Advisers Act or the rules thereunder. *Steadman*, 967 F.2d at 647.

20. As a result of the conduct described above, ECP willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

ECP’s Remedial Efforts

21. In determining to accept the Offer, the Commission considered remedial acts undertaken by Respondent, including ECP’s payment to Fund III Limited Partners of the \$3.318 million (plus interest) more in deal-related expenses than Fund III would have paid had it been allocated its pro rata share.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent’s Offer.

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, it is hereby ORDERED that:

- A. Respondent 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 Rules 206(4)-7 and 206(4)-8 thereunder.
- B. Respondent ECP is censured.
- C. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$1,000,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable
Branch HQ Bldg., Room
181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying ECP as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Adam Aderton, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary