

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 6104 / September 2, 2022**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-21029**

**In the Matter of**

**ENERGY  
INNOVATION  
CAPITAL  
MANAGEMENT,  
LLC,**

**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 Innovation Capital Management, LLC (“EIC” 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 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 (“Order”), as set forth below.

### **III.**

On the basis of this Order and Respondent’s Offer, the Commission finds that:

#### **Summary**

1. This matter concerns excess management fees charged by Energy Innovation Capital Management, LLC, an exempt reporting adviser. EIC provides investment advisory services to EIC Fund I, LP (“Fund I”) and EIC Parallel Fund, LP (“Parallel Fund”) (collectively, the “Funds”). The Limited Partnership Agreements (“LPAs”) for the Funds provide that EIC may charge Fund I and the Parallel Fund management fees during the Funds’ post-commitment periods equal to two percent (2%) per annum for Fund I and one and one-half percent (1.5%) per annum for the Parallel Fund of the total invested capital contributions, but that the basis of the Funds’ respective management fees shall be reduced for investments that have been the subject of a “Disposition” during the post-commitment periods (beginning January 16, 2020). The LPAs define a Disposition to include, among other things, any write-down in value of individual portfolio company securities. From January 16, 2020 through March 31, 2022 (the “Relevant Period”), EIC made four errors in calculating the management fee resulting in EIC charging the Funds fees in excess of what was provided for in their respective LPAs. In particular, EIC (1) failed to make adjustments to its management fee calculations to account for portfolio company securities subject to certain Dispositions as defined by the LPA; (2) calculated its management fee based on aggregated invested capital at the portfolio company level instead of at the individual portfolio company security level; (3) incorrectly included accrued, but unpaid interest as part of the basis of the management fee calculation; and (4) did not begin calculating the Funds’ post-commitment period management fees on January 16, 2020. EIC’s failures caused the Funds and, ultimately, their LPs to pay \$678,681 more in management fees than they should have paid. As a result and as detailed below, EIC violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

#### **Respondent**

2. Energy Innovation Capital Management, LLC (SEC File No. 802-107483) is a Delaware limited liability company with its primary place of business in Orinda, California. It advises venture capital funds, including Energy Innovation Capital I, LP and EIC Parallel Fund, LP (described below). It has filed reports with the Commission as an exempt reporting adviser since March 16, 2016, relying on the exemption from registration for venture capital fund advisers in Section 203(l) of the Advisers Act. In its March 29, 2022 Form ADV, EIC reported managing \$231 million in venture capital fund assets.

### **Other Relevant Entities**

3. Energy Innovation Capital I, LP, is a venture capital fund organized as a Delaware limited partnership. During all times relevant to the findings herein, EIC advised and served as manager of the Fund.

4. EIC Parallel Fund, LP, is a venture capital fund organized as a Delaware limited partnership. During all times relevant to the findings herein, EIC advised and served as manager of the Fund.

### **Facts**

5. EIC formed Fund I and the Parallel Fund in 2016. The Limited Partners (“LPs”) of the Funds contributed capital to the Funds for their use to make certain investments. The Funds are governed by their respective LPAs.

6. The Funds’ LPAs contain the operative language for calculating the management fees that EIC was to charge the Funds. There are two distinct periods for calculating the management fees: 1) the “Commitment Period” (January 15, 2016 – January 15, 2020), when the LPs’ committed capital would be used as the basis for calculating management fees; and 2) the “Post-Commitment Period” (beginning January 16, 2020), when invested capital reduced by Dispositions, as defined in the LPA, would be used as the basis for calculating management fees.

7. During the Post-Commitment Period, the LPAs provide that EIC may charge Fund I and the Parallel Fund, on a quarterly basis, management fees equal to two percent (2%) per annum of the total invested capital for Fund I and one and one-half percent (1.5%) per annum of the total invested capital for the Parallel Fund, but that the basis of the Funds’ respective management fees be reduced for investments that have been subject to a Disposition. The LPAs define a Disposition to include write-downs of individual portfolio company securities. The LPAs, therefore, require EIC to reduce its invested capital by any write-downs of individual portfolio company securities as the basis for calculating the Funds’ management fees.

8. During the Post-Commitment Period, EIC repeatedly made errors in its calculation of management fees resulting in EIC assessing the Funds larger management fees than provided for in the LPAs.

9. First, during the Relevant Period, EIC wrote down individual portfolio company securities held by the Funds, and wrote off certain others. The write-downs should have been treated as Dispositions under the terms of the LPAs. EIC, however, did not incorporate any of these write-downs into its Post-Commitment Period management fee calculations.

10. Second, EIC incorrectly aggregated invested capital at the portfolio company level in the assessment of its Post-Commitment Period management fees, instead of at the

individual portfolio company security level. The LPAs did not permit EIC to aggregate the invested capital at the portfolio company level.

11. Third, EIC incorrectly included accrued, but unpaid, interest attributed to certain individual portfolio company securities in the basis of its Post-Commitment Period management fee calculation. The LPAs did not permit EIC to include accrued, but unpaid, interest for determining the basis of the Post-Commitment Period management fees.

12. Fourth, EIC failed to begin the Post-Commitment Period management fee calculations at the correct date. EIC incorrectly based the Funds' management fees for the entire first quarter of 2020 (January 1, 2020 – March 31, 2020) on LPs' committed capital. Under the terms of the LPAs, EIC should instead have calculated the management fees for the Post-Commitment Period beginning January 16, 2020 based on invested capital less Dispositions, which includes write-downs, of the individual portfolio company securities.

13. EIC's quarterly capital calls to the Funds' LPs contained inaccurate and inflated management fee assessments due to the errors described in paragraphs 9-12 above.

14. EIC's failures in these regards caused the Funds, and ultimately their LPs, to pay \$678,861 in excess management fees. After being contacted by Commission staff, EIC returned this amount to the Funds, with interest, and in turn, to their LPs for the conduct described in paragraphs 5-13.

### **Violations**

15. As a result of the conduct described above, Respondent willfully<sup>1</sup> violated Section 206(2) of the Advisers Act, which makes it unlawful for any investment adviser, directly or indirectly, to “engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.” Scierter 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)).

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<sup>1</sup> “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).

16. As a result of the conduct described above, Respondent 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 material fact... to any investor or prospective investor in the pooled investment vehicle” or to “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.” Scinter is not required to establish a violation of Section 206(4) or the rules thereunder. *Steadman*, 967 F.2d at 647.

### **EIC’s Remedial Acts**

17. In determining to accept Respondent EIC’s Offer, the Commission considered remedial acts promptly undertaken by EIC.

### **Undertakings**

18. EIC shall notify past and current investors in the Funds of the settlement terms of this Order by sending a copy of this Order to each investor via mail, email, or such other method not unacceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff, within 30 days of entry of this Order.

19. EIC shall certify, in writing, compliance with the undertaking set forth above. The certification shall provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to David A. Becker, Assistant Director, Division of Enforcement, 100 F Street, Washington, DC 20549, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street, NE Washington, DC 20549, no later than 60 days from the date of the completion of the undertaking.

## **IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest 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. EIC 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)-8 promulgated thereunder.

B. EIC is censured.

C. EIC shall comply with its undertakings as enumerated in Section III, above.

D. Respondent shall pay civil penalties of \$175,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments: (i) \$87,500.00 within 10 days of the entry of this Order and (ii) \$87,500.00 within six months from entry of this Order. Payments shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

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 EIC 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 David A. Becker, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549, or such other address as the Commission staff may provide.

E. 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