

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

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 4253 / November 3, 2015**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-16938**

**In the Matter of**

**Fenway Partners, LLC, Peter  
Lamm, William Gregory  
Smart, Timothy Mayhew, Jr.,  
and Walter Wiacek, CPA,**

**Respondents.**

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS  
PURSUANT TO SECTIONS 203(e), 203(f)  
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), 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Fenway Partners, LLC, Peter Lamm, William Gregory Smart, Timothy Mayhew, Jr. and Walter Wiacek, CPA (collectively, “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) 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 Respondents' Offers, the Commission finds<sup>1</sup> that:

#### SUMMARY

1. These proceedings concern the failure by a registered investment adviser, its principals and a senior executive to disclose conflicts of interest to a private equity fund client, as well as material omissions to investors in the fund about payments to affiliates. Respondent Fenway Partners, LLC ("Fenway Partners"), is a private equity fund adviser that was owned and controlled by respondents Peter Lamm ("Lamm") and William Gregory Smart ("Smart") between January 1, 2011 and December 31, 2013 ("Relevant Period"), and Timothy Mayhew, Jr. ("Mayhew") between January 1, 2011 and May 31, 2012. Respondent Walter Wiacek, CPA ("Wiacek") was the firm's Vice President, Chief Financial Officer and Chief Compliance Officer during the Relevant Period.

2. Fenway Partners served as the investment adviser to Fenway Partners Capital Fund III, L.P. ("Fund III"), a private equity fund, during the Relevant Period. Fund III's portfolio was comprised primarily of investments in branded consumer products and transportation/logistics industry companies (each, a "Portfolio Company").

3. Fenway Partners entered into Management Services Agreements (each, an "MSA") with certain Portfolio Companies pursuant to which Fenway Partners received periodic fees for providing management and other services to the Portfolio Company ("monitoring fees"). In accordance with the terms of Fund III's organizational documents, the monitoring fees were offset against the advisory fee paid by Fund III to Fenway Partners.

4. Beginning in December 2011, Fenway Partners, Lamm, Smart, Mayhew and Wiacek (collectively, "Respondents") caused certain Portfolio Companies to terminate their payment obligations to Fenway Partners under their MSAs and enter into agreements (each, a "Consulting Agreement") with Fenway Consulting Partners, LLC ("Fenway Consulting"), an entity affiliated with Fenway Partners and principally owned and operated by Lamm, Smart and Mayhew. Under the Consulting Agreements, Fenway Consulting provided similar services to the Portfolio Companies, often through the same employees as Fenway Partners had under the MSAs. Mayhew was involved solely with respect to one Portfolio Company.

5. Fenway Consulting ultimately received an aggregate of \$5.74 million from the Portfolio Companies during the Relevant Period. However, in contrast to the monitoring fees paid pursuant to the MSAs, the \$5.74 million in Portfolio Company fees paid to Fenway Consulting were not offset against the Fund III advisory fee, resulting in a larger advisory fee to Fenway Partners. The Respondents did not disclose the conflict of interest presented by the termination of

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<sup>1</sup> The findings herein are made pursuant to the Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

monitoring fees pursuant to the MSAs and collection of fees pursuant to the Consulting Agreements. Respondents Fenway Partners, Lamm and Smart also made, and Wiacek caused to be made, material omissions to fund investors concerning the Consulting Agreements.

6. In addition, in January 2012, Fenway Partners, Lamm and Smart asked Fund III investors to provide \$4 million in connection with a potential investment in the equity securities of a Portfolio Company (“Portfolio Company A”), without disclosing that \$1 million of the requested amount would be used to pay an affiliate, Fenway Consulting. Wiacek signed and sent the letter to investors making this request.

7. In June 2012, Fund III sold its equity interest in a second Portfolio Company (“Portfolio Company B”). As part of the transaction, Mayhew and two former Fenway Partners employees were included in Portfolio Company B’s cash incentive plan (“CIP”) and ultimately received an aggregate of \$15 million from the proceeds of the sale, thereby reducing Fund III’s return on its investment in Portfolio Company B. Mayhew and the two former Fenway Partners employees (collectively, the “Fenway CIP Participants”) were employees of Fenway Consulting, an affiliated entity, at the time the payments were made, and received the payments as compensation for services almost entirely performed while they were Fenway Partners employees. The Respondents did not disclose the conflict of interest presented by the payments to the Fenway CIP Participants. Respondents Fenway Partners, Lamm and Smart also made, and Wiacek made or caused to be made, material omissions to investors concerning the CIP payments.

8. By virtue of this conduct, Fenway Partners, Lamm, Smart, and Mayhew willfully violated, and Wiacek caused violations of, Section 206(2) of the Advisers Act. In addition, Fenway Partners, Lamm and Smart willfully violated, and Wiacek caused violations of, Section 206(4) of the Advisers Act, and Rule 206(4)-8 promulgated thereunder.

### **RESPONDENTS**

9. **Fenway Partners, LLC** is a Delaware limited liability company with its principal place of business in New York, New York. It is an investment adviser registered with the Commission since March 30, 2012. According to its initial filing on Form ADV in February 2012, Fenway Partners had \$756 million in assets under management (“AUM”), and its AUM was \$445 million as stated in its most recent amendment as of April 29, 2015. Fenway Partners has served as the investment adviser to three private equity funds, including Fund III.

10. **Peter Lamm** is 64 years old and resides in New York, New York. Lamm has been a Managing Director and member of Fenway Partners since its inception in 1994. During the Relevant Period, Lamm owned at least 25% of Fenway Partners and was a control person of the entity.

11. **William Gregory Smart** is 55 years old and resides in Chatham, New Jersey. Smart has been a Managing Director and member of Fenway Partners since 1999. During the Relevant Period, Smart owned at least 25% of Fenway Partners and was a control person of the

entity. Smart and Lamm constituted the Operating Committee of Fenway Partners during the Relevant Period and, as such, typically made the day-to-day decisions on behalf of the entity.

12. **Timothy Mayhew, Jr.** is 47 years old and resides in New York, New York. Mayhew became a Managing Director and member of Fenway Partners in 2007. Mayhew owned between 25-50% of the firm and was a control person of Fenway Partners during the Relevant Period until his resignation on May 31, 2012, at which point he immediately joined Fenway Consulting.

13. **Walter Wiacek** is 61 years old and resides in Norwalk, Connecticut. Wiacek joined Fenway Partners in 2007 and was the Vice President, Chief Financial Officer and Chief Compliance Officer of Fenway Partners during the Relevant Period. Wiacek received a certificate in public accounting from the State of Connecticut in 1982 and his current status as a CPA with the State of Connecticut is “qualified.”

### **RELEVANT ENTITIES**

14. **Fenway Consulting Partners, LLC** is a Delaware limited liability company with its principal place of business in New York, New York. It was formed on July 13, 2011. During the Relevant Period, Lamm, Smart and Mayhew owned 84% of Fenway Consulting.

15. **Fenway Partners Capital Fund III, L.P.** is a Delaware limited partnership and private equity investment fund that was formed in 2006. Fenway Partners III, LLC (“Fund III GP”), a Delaware limited partnership owned by Lamm, Smart, Mayhew and other Fenway Partners employees, served as the general partner of the fund, and Fenway Partners served as the fund’s investment adviser during the Relevant Period. As of February 2006, Fund III had \$680 million in committed capital. During the Relevant Period, Fund III’s portfolio was comprised primarily of branded consumer products and transportation/logistics industry Portfolio Companies.

### **FACTS**

#### **A. Background**

16. The investors in Fund III (each, a “Limited Partner”) include pension funds, life insurance companies and large institutional investors. Each Limited Partner committed to contribute a specified amount of capital to Fund III – to be drawn pursuant to periodic capital calls issued by Fenway Partners, on behalf of Fund III – to invest in Portfolio Companies during the fund’s investment period, which began in 2006 and lasted six years. Investments in Fund III (in the form of limited partnership interests) are primarily governed by three documents: a Private Placement Memorandum, an Agreement of Limited Partnership and an Investment and Advisory Agreement (collectively, the “Organizational Documents”).

17. The Organizational Documents require Fund III to establish an Advisory Board consisting of Limited Partner representatives who are independent from the Fund III GP and its

affiliates, including Fenway Partners. The Fund III Advisory Board has the “authority and responsibility to approve or disapprove” of certain matters, including actions with a “direct and material conflict of interest or risk of such conflict of interest involving [Fund III] or any of the Partners [including Limited Partners,]” as well as Fenway Partners’ proposed valuations of Portfolio Company securities owned by the fund. During the Relevant Period, nine Limited Partner representatives served on the Fund III Advisory Board. The Advisory Board typically met at least quarterly.

18. Under the Organizational Documents, Fenway Partners, the Fund III GP and their affiliates were entitled to certain enumerated compensation from Fund III and the Portfolio Companies, including carried interest and an advisory fee, as well as certain other fees that were required to be offset against the advisory fee.

**B. Failure to Disclose Conflicts of Interest to the Advisory Board Concerning Agreements with Fenway Consulting**

19. Prior to the Relevant Period, Fenway Partners had entered into MSAs with certain Portfolio Companies pursuant to which Fenway Partners received periodic fees for providing management and other services to the Portfolio Company, known as monitoring fees.

20. Pursuant to the Organizational Documents, Fenway Partners offset 80% of monitoring fees received from a Portfolio Company pursuant to an MSA against its advisory fee from Fund III. Thus, for example, when Fenway Partners received \$1 million of monitoring fees from Portfolio Company B in 2010 pursuant to an MSA between Fenway Partners and Portfolio Company B, Fenway Partners reduced the advisory fee payable by Fund III to Fenway Partners by \$800,000.

21. Beginning in December 2011, the Respondents caused four Fund III Portfolio Companies to terminate their payment obligations under existing MSAs with Fenway Partners and, at the same time, enter into Consulting Agreements with Fenway Consulting, an affiliate of Fenway Partners. Wiacek helped ensure that the Portfolio Companies executed the required documentation, including by personally executing the four Consulting Agreements on behalf of Fenway Consulting. Mayhew was involved solely with respect to Portfolio Company B. Under the Consulting Agreements, Fenway Consulting received periodic fees for agreeing to provide services to a Portfolio Company that were similar to the services that Fenway Partners had provided to the Portfolio Company pursuant to the MSAs. In addition, Fenway Consulting often utilized both the same employees (some of whom had moved to Fenway Consulting in the interim) and the same fee structure that Fenway Partners had used under the MSAs.

22. Fenway Partners did not offset the Portfolio Company payments to its affiliate, Fenway Consulting, against Fenway Partners’ advisory fee from Fund III. For example, in December 2011, Mayhew caused Portfolio Company B to terminate its payment obligations pursuant to an MSA with Fenway Partners and enter into a Consulting Agreement with Fenway Consulting. The Consulting Agreement was to be effective as of January 1, 2011, and Mayhew

directed Portfolio Company B personnel to pay Fenway Consulting \$1 million for services provided in 2011. Fenway Partners did not offset the \$1 million paid to Fenway Consulting against Fenway Partners' advisory fee from Fund III.

23. In addition, in December 2012, Fenway Consulting entered into an MSA with another Portfolio Company. Fenway Partners did not offset the Portfolio Company monitoring fee payments to Fenway Consulting against Fenway Partners' advisory fee from Fund III.

24. The Respondents did not disclose the conflict of interest presented by the agreements between the Fund III Portfolio Companies and Fenway Consulting, an affiliate of Fenway Partners owned by its principals, to the Fund III Advisory Board as required by the Organizational Documents and in breach of their fiduciary obligations to their client, Fund III.

25. In addition, the Respondents did not disclose the conflict of interest presented by the fact that the Portfolio Companies had terminated their payment obligations under the MSAs and replaced them with Consulting Agreements – and that, as a result, the Limited Partners would not receive the benefit of an advisory fee offset for such Portfolio Company payments – to the Fund III Advisory Board as required by the Organizational Documents and in breach of their fiduciary obligations to their client, Fund III.

26. The inherent conflict of interest associated with these payments to Fenway Consulting was not disclosed in or otherwise authorized by the Organizational Documents. Fenway Partners could not effectively consent to these payments on behalf of Fund III because it was conflicted as the recipient of the fees was an affiliate of Fenway Partners and Fenway Partners received the benefit of the decision not to offset the Portfolio Company fees paid pursuant to the Consulting Agreements.

27. Fenway Consulting received an aggregate of \$5.74 million under these agreements during the Relevant Period, none of which was offset against Fenway Partners' advisory fee from Fund III.

C. **Material Omissions to Limited Partners Concerning the Agreements with Fenway Consulting**

28. Fenway Partners conducted a meeting of Fund III's Advisory Board on November 7, 2012. Nine Limited Partner representatives attended.

29. Lamm and Smart, in their capacities as the sole members of Fenway Partners' Operating Committee, prepared the message to be delivered to the Limited Partner representatives, and were the only speakers on behalf of Fenway Partners at the meeting.

30. Lamm noted that Mayhew and certain other Fenway Partners employees had been transferred to Fenway Consulting to provide operational and consulting expertise to certain Portfolio Companies. He explained that Fenway Consulting was retained directly by the Portfolio

Companies and that the Portfolio Companies would pay Fenway Consulting's fees and expenses. Lamm and Smart did not, however, disclose that Fenway Partners had terminated the payment obligations under the existing MSAs with the Portfolio Companies; that Fenway Consulting had entered into Consulting Agreements with the same Portfolio Companies and that the same employees were often providing similar services under these agreements; and that Fenway Partners had not and would not offset the Portfolio Company payments to its affiliate, Fenway Consulting, against Fenway Partners' advisory fee from Fund III.

31. Wiacek, on behalf of Fenway Partners, prepared financial statements for Fund III that, pursuant to the Organizational Documents, were required to be prepared in accordance with U.S. generally accepted accounting principles and provided to the Limited Partners. Fenway Partners and Wiacek failed to consider the Portfolio Company payments to Fenway Consulting as related party transactions and therefore did not include them in the related party transaction disclosures in the 2011 and 2012 financial statements that Fenway Partners provided to the Limited Partners. Because Fenway Consulting is an affiliate of Fenway Partners and Fund III, both Fenway Consulting's relationship with the entities and the payments from the Portfolio Companies to Fenway Consulting should have been disclosed as related party transactions in Fund III's financial statements. In 2013, when the Fund III's independent auditor ("Auditor") learned of the Portfolio Company payments to Fenway Consulting, it required Fenway Partners to disclose the relationship with and the payments to Fenway Consulting in its subsequent audited financial statements.

**D. Material Omission to Limited Partners Concerning the Proceeds of the January 6, 2012 Capital Call**

32. In January 2012, Fenway Partners sent a capital call notice ("Notice") to the Limited Partners with respect to Portfolio Company A. The Notice requested that the Limited Partners provide \$4 million to invest in Portfolio Company A securities to be used for capital improvements in the Portfolio Company. In fact, Fund III used \$3 million of the \$4 million to purchase Portfolio Company A securities, and \$1 million to pay Fenway Consulting pursuant to a Consulting Agreement that was executed simultaneously with Fund III's receipt of the capital call proceeds from the Limited Partners.

33. Lamm and Smart reviewed drafts of the Notice and approved the final communication to be sent, on behalf of Fenway Partners, to the Limited Partners.

34. On January 6, 2012, Wiacek signed the Notice and sent it, on Fenway Partners letterhead, to the Fund III Limited Partners.

35. Fenway Partners, Lamm and Smart did not disclose to the Limited Partners in the Notice or otherwise that \$1 million of the January 6, 2012 capital call was used to pay Fenway Consulting.

**E. Failure to Disclose Conflict of Interest to the Advisory Board and Material Omissions to Limited Partners Concerning Cash Incentive Plan Payments to Mayhew and Others**

**i. Background**

36. Mayhew sourced Portfolio Company B as a potential Fund III investment and recommended that the fund acquire an interest in the company. Mayhew and Lamm negotiated on behalf of Fund III to purchase Portfolio Company B securities. Fund III acquired a controlling interest in Portfolio Company B in 2007. After its acquisition, Mayhew and Lamm remained actively involved in Fund III's investment in Portfolio Company B, including by serving on Portfolio Company B's board of directors, with Lamm serving on the compensation committee. In addition, Mayhew served as Chairman of Portfolio Company B and worked with the company's management.

37. In April 2008, Portfolio Company B established a CIP that, according to the authorizing document, was designed to incentivize "members of management and directors who[m] the Board consider[ed] to be in a position to enhance the success" of Portfolio Company B. The Board awarded Units representing potential cash awards upon a sale of the company. From the inception of the plan until June 2012, the participants were almost entirely Portfolio Company B employees; indeed, no Fenway Partners employee or affiliate had been a recipient of a CIP grant prior to June 2012.

38. In 2011, Mayhew and Lamm, on behalf of Fund III, decided to explore the potential sale of Portfolio Company B, and the process accelerated in early 2012.

**ii. Failure to Disclose Conflict of Interest to the Advisory Board**

39. As the likelihood of a sale increased in May 2012, Mayhew advocated to Lamm that he receive compensation for services that he had provided to Portfolio Company B in addition to the compensation that he expected to receive as a member of Fenway Partners or Fund III GP.

40. Lamm relayed Mayhew's request to Smart and advised that he was considering including Mayhew in the CIP to be paid from the proceeds of the sale of the company. Smart agreed, and Lamm informed Mayhew that he would seek to include him in the CIP.

41. Fenway Partners, Lamm, and Mayhew recommended to members of the Portfolio Company B board of directors that Mayhew and two former Fenway Partners employees – who had each resigned from Fenway Partners six months earlier and joined Fenway Consulting – be awarded Units pursuant to the CIP as compensation for services almost entirely performed while they were Fenway Partners employees. As there were not sufficient authorized Units at the time for the Fenway CIP Participants, Fenway Partners, Lamm and Mayhew recommended that Portfolio Company B issue additional CIP Units. This expansion of the CIP reduced Fund III's return from the sale of its Portfolio Company B investment.

42. On June 3, 2012, the board of directors of Portfolio Company B met. Mayhew and Lamm played a prominent role in preparing for the meeting. The board approved the sale and, as part of the transaction, expanded the CIP to issue Units to include the Fenway CIP Participants. Lamm and Mayhew abstained on the vote to award the CIP Units to the Fenway CIP Participants.

43. The Fenway CIP Participants ultimately received \$15 million of the Portfolio Company B CIP, with Mayhew receiving approximately \$13.8 million of this amount. Fenway Partners did not offset the payments to the Fenway CIP Participants against Fenway Partners' advisory fee from Fund III.

44. Fenway Partners, Lamm, Smart and Mayhew did not disclose to the Fund III Advisory Board or Limited Partners the conflict of interest presented by the proposed CIP payments to the Fenway CIP Participants and the effect on Fund III's return on its investment, as was required by the Organizational Documents and in breach of their fiduciary obligations to their client, Fund III.

45. The inherent conflict of interest associated with the payments to the Fenway CIP Participants was not disclosed in or otherwise authorized by the Organizational Documents. Fenway Partners could not effectively consent to these payments on behalf of Fund III because it was conflicted as the recipients of the CIP payments were affiliates of Fenway Partners.

### **iii. Material Omissions to Limited Partners Concerning the CIP Payments**

46. On June 28, 2012, Fenway Partners sent a letter ("Letter") to the Limited Partners informing them of Fund III's and their respective proceeds from the Portfolio Company B sale. Lamm and Smart, in their capacities as the sole members of Fenway Partners' Operating Committee, approved the Letter. Wiacek signed the Letter on behalf of Fenway Partners.

47. The Letter did not disclose the payments to the Fenway CIP Participants. Fenway Partners, Lamm, Smart and Wiacek knew of the CIP payments to the Fenway CIP Participants and that such payments had not been disclosed to the Limited Partners.

48. At the November 7, 2012 meeting of the Fund III Advisory Board, Lamm discussed the sale of Portfolio Company B and noted that it had been one of Fenway Partners' notable achievements in 2012. Lamm praised the work that Mayhew and one other Fenway CIP Participant had done for Portfolio Company B.

49. Lamm and Smart did not, however, disclose that the Fenway CIP Participants had received \$15 million from the Portfolio Company B CIP; that these payments had reduced the fund's return; and that Fenway Partners had not offset such payments against its advisory fee from Fund III.

50. Fenway Partners and Wiacek failed to consider the CIP payments to the Fenway CIP Participants as related party transactions and therefore did not include them in the related party transaction disclosures in the 2012 Fund III financial statements that Fenway Partners provided to the Limited Partners. The CIP payments to the Fenway CIP Participants should have been disclosed in Fund III's financial statements as related party transactions because the payments were made to Mayhew and the other Fenway CIP Participants for services performed while they were employed by Fenway Partners and granted to them while they were employees of an affiliate, Fenway Consulting. When the Auditor subsequently learned of the CIP payments to the Fenway CIP Participants, it withdrew its opinion for the 2012 audited financial statements for Fund III. Fenway Partners subsequently restated the 2012 audited financial statements for Fund III, and included the CIP payments to the Fenway CIP Participants in the related party transaction disclosures.

### **VIOLATIONS**

51. As a result of the conduct described above, Fenway Partners, Lamm, Smart and Mayhew willfully<sup>2</sup> violated, and Wiacek caused the violations of, Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." A violation of Section 206(2) may rest on a finding of simple negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1999) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)). Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. *Id.*

52. As a result of the conduct described above, Fenway Partners, Lamm and Smart willfully violated, and Wiacek caused the violations of, Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibits any fraudulent, deceptive or manipulative act, practice, or course of business by an investment adviser to an investor or prospective investor in a pooled investment vehicle. A violation of Section 206(4) and the rules thereunder does not require scienter. *Steadman*, 967 F.2d at 647.

### **IV.**

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

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

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<sup>2</sup> A willful violation of the securities laws means merely "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)).

**A.** Respondent Fenway Partners 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.** Respondent Fenway Partners is censured.

**C.** Respondent Lamm 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.

**D.** Respondent Lamm is censured.

**E.** Respondent Smart 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.

**F.** Respondent Smart is censured.

**G.** Respondent Mayhew cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

**H.** Respondent Mayhew is censured.

**I.** Respondent Wiacek 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.

**J.** Respondents Fenway Partners, Lamm, Smart and Mayhew shall pay disgorgement and prejudgment interest, on a joint and several basis, and civil money penalties as follows:

- (1) Respondents Fenway Partners, Lamm, Smart and Mayhew shall pay a total of \$8,716,471.10, consisting of \$7,892,000 of disgorgement, and \$824,471.10 of prejudgment interest pursuant to the provisions of this Subsection J.
- (2) Respondents shall pay a total of \$1,525,000 of civil money penalties pursuant to the provisions of this Subsection J. Payment shall be made as follows:
  - a. \$1,000,000 by Respondent Fenway Partners;
  - b. \$150,000 by Respondent Lamm;
  - c. \$150,000 by Respondent Smart;

- d. \$150,000 by Respondent Mayhew; and
  - e. \$75,000 by Respondent Wiacek.
- (3) Within ten (10) days of entry of this Order, Respondents Fenway Partners, Lamm, Smart, Mayhew and Wiacek shall deposit the full amount of the disgorgement, prejudgment interest and civil money penalties, as described in Paragraphs 1 and 2 of this Subsection J (collectively, the “Distribution Fund”) into an escrow account acceptable to the Commission staff and shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. If timely deposit of the disgorgement and prejudgment interest is not made by the required payment date, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely deposit of the civil penalties is not made by the required payment date, additional interest shall accrue pursuant to 31 U.S.C. 3717;
- (4) Respondents Fenway Partners, Lamm and Smart (collectively, the “Distribution Respondents”) shall be responsible for administering the Distribution Fund. The Distribution Fund represents a reasonable approximation of the harm to the Limited Partners as a result of (a) the payments that Fenway Consulting received from the Portfolio Companies (including, without limitation, Portfolio Company A); and (b) the payments to the Fenway CIP Participants received as a result of the sale of Portfolio Company B. The Distribution Respondents shall distribute the Distribution Fund to the Limited Partners based on each Limited Partner’s pro rata interest in Fund III during the Relevant Period pursuant to a disbursement calculation (the “Calculation”) that has been submitted to, reviewed, and approved by the Commission staff in accordance with this Subsection J. Within thirty (30) days of the entry of this Order, the Distribution Respondents shall submit a proposed Calculation to the staff for review and approval. The proposed Calculation will include the names of the Limited Partners and payment amounts. The Distribution Respondents also shall provide to the Commission staff such additional information and supporting documentation as the Commission staff may request for its review. In the event of one or more objections by the Commission staff to the proposed Calculation or any of its information or supporting documentation, the Distribution Respondents shall submit a revised Calculation for the review and approval of the Commission staff or additional information or supporting documentation within ten (10) days of the date that the Distribution Respondents are notified of the objection, which revised calculation shall be subject to all of the provisions of Subsection J;

- (5) The distribution of the Distribution Fund shall be made in the next fiscal quarter immediately following the entry of this Order but no later than within ninety (90) days of the date of the Order, unless such time period is extended as provided in Paragraph 10 of this Subsection J. No portion of the Distribution Fund shall be paid to any affected Limited Partner directly or indirectly in the name of or for the benefit of any Respondent in this proceeding;
- (6) If the Distribution Respondents do not distribute any portion of the Disgorgement Fund for any reason, including factors beyond their control, the Distribution Respondents shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Section 21F(g)(3) of the Securities Exchange Act of 1934 after the final accounting provided for in Paragraph 8 of this Subsection J is submitted to the Commission staff. Any such payment shall be made in one of the following ways: (1) electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or (3) 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 the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Marshall Sprung, Co-Chief Asset Management Unit, Division of Enforcement, Los Angeles Regional Office, Securities and Exchange Commission, 444 South Flower Street, Suite 900, Los Angeles, CA 90071;

- (7) The Distribution Respondents agree to be responsible for all tax compliance responsibilities associated with distribution of the Distribution Fund and may retain any professional services necessary. The costs and expenses of any such professional services shall not be paid out of the Distribution Fund;
- (8) Within 180 days after the date of the entry of the Order, the Distribution Respondents shall submit to the Commission staff a final accounting and certification of the disposition of the Distribution Fund not unacceptable to

the staff, which shall be in a format to be provided by the Commission staff. The final accounting and certification shall include: (i) the amount paid or credited to each Limited Partner; (ii) the date of each payment or credit; (iii) the check number or other identifier of money transferred or credited to the Limited Partner; and (iv) any amounts not distributed to be forwarded to the Commission for transfer to the United States Treasury. The Distribution Respondents shall submit the final accounting and certification, together with proof and supporting documentation of such payments and credits in a form acceptable to Commission staff, under a cover letter that identifies Respondents in these proceedings and the file number of these proceedings, to Panayiota K. Bougiamas, Assistant Regional Director, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, New York, 10281, or such other address the Commission staff may provide. Any and all supporting documentation for the accounting and certification shall be provided to the Commission staff upon request;

- (9) After the Distribution Respondents have submitted the final accounting to the Commission staff, the staff shall submit the final accounting to the Commission for approval and shall request Commission approval to send any remaining amount to the United States Treasury; and
- (10) The Commission staff may extend any of the procedural dates set forth in this Subsection J for good cause shown. Deadlines for dates related to the Distribution Fund shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall considered to be the last day.

**K.** Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for disgorgement, prejudgment interest and civil money penalties referenced in Paragraph Nos. 1 and 2 of Subsection J. Regardless whether any such Fair Fund distribution is made, 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, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they 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, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission staff and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. 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 one or more Respondents by or on behalf of investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields  
Secretary