BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order Issued Against:

DOC File No. ALPHA

OAH No. L2001070345

JIM FRANKLIN,

Respondent,

And

BOONE DOME JOINT VENTURE,

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated August 28, 2001, is hereby adopted by the **D**epartment of Corporations as its Decision in the above-entitled matter with the following corrections pursuant to Section 11517(c)(2)(C) of the Government Code:

(1) The word "DEPARTMENT" is substituted for the word "COMMISSIONER" in line 2 of the heading on top of page 1 of the Proposed **D**ecision.

(2) The second paragraph of footnote No. 1 of Paragraph No. 1 of Preliminary Matters on page 2 of the Proposed Decision is revised to read:

Insofar as this matter is concerned, a security is an "interest in a limited liability company and any class or series of those interests (including any fractional or other interest in that interest), except a membership interest in a limited liability company in which the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company;...certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under that title or lease" or "in general, any interest or instrument commonly known as a 'security.'"

(3) Lines 4 and 5 of the third paragraph of footnote No. 1 of Paragraph No. 1 of Preliminary Matters on page 2 of the Proposed **D**ecision are revised to read:

purpose of the Corporate Securities Law, which is "to protect the public against spurious schemes, however ingeniously devised, to attract risk capital." *Moreland v. Department of Corporations* (1987) 194 Cal.App.3d

(4) The phrase "section 25112) or the security" is substituted for the phrase "section 25111), if the security" in line 4 of Paragraph No. 4 of Preliminary Matters on page 3 of the Proposed Decision.

(5) The word "Franklin" is substituted for the word "Franklin's" in line 1 of the first paragraph of Paragraph No. 10 of Factual Findings on page 5 of the Proposed Decision.

(6) The word "detects" is substituted for the word "detect" in line 4 of the quoted paragraph contained in the second paragraph of Paragraph No. 13 of Factual Findings on page 6 of the Proposed Decision.

(7) The phrase "two other sales organizations" is substituted for the phrase "two sales other organizations" in line 2 of Paragraph No. 18 of Factual Findings on page 6 of the Proposed Decision.

(8) The word "Bialy" is substituted for the word "Baily" in the heading between Paragraphs No. 19 and No. 20 of Factual Findings on page 7 and in Paragraphs Nos. 20, 21, 24, 25, and 39 of Factual Findings on pages 7, 8, and 11 of the Proposed Decision.

(9) The word "Corporations" is substituted for the word "Corporation" in line 2 of the first paragraph of Paragraph No. 34 of Factual Findings on page 9 of the Proposed Decision.

(10) The word "July" is substituted for the word "June" in line 1 of the first paragraph of Paragraph No. 38 of Factual Findings on page 10 of the Proposed Decision.

(11) The word "August" is substituted for the word "April" in line 1 of the second paragraph of footnote No. 7 of Paragraph No. 38 of Factual Findings on page 10 of the Proposed Decision.

(12) Paragraph No. 4 of Legal Conclusions on page 13 of the Proposed Decision is revised to read:

4. Corporations Code section 25532 provides in pertinent part:

> "(a) If, in the opinion of the commissioner, (1) the sale of a security is subject to qualification under this law and it is being or has been offered or sold without first being qualified, the commissioner may order the issuer or offeror of the security to desist and refrain from the further offer or sale of the security until qualification has been made under this law or (2) the sale of a security is subject to the requirements of Section 25100.1, 25101.1, or 25102.1 and the security is being or has been offered or sold without first meeting the requirements of those sections, the commissioner may order the issuer or offerer of that security to desist and refrain from the further offer or sale of the security until those requirements have been met.

(d) If, after an order has been made under subdivision (a), (b), or (c), a request for hearing is filed in writing within one year of the date of service of the order by the person to whom the order was directed, a hearing shall be held in accordance with provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the commissioner shall have all of the powers granted under that chapter. Unless the hearing is commenced within 15 business days after the request is filed (or the person affected consents to a later date), the order is rescinded.

If that person fails to file a written request for a hearing within one year from the date of service of the order, the order shall be deemed a final order of the commissioner and is not subject to review by any court or agency..."

(13) The word "unqualified" is substituted for the word "unregistered" in line 3 of Paragraph No. 5 of Legal Conclusions on page 14 of the Proposed Decision.

This Decision shall become effective on 11/07, 2001.

IT IS SO ORDERED.

Date: 11/07/01

DEMETRIOS A. BOUTRIS
California Corporations Commissioner

BEFORE THE
COMMISSIONER OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order Issued Against:

JIM FRANKLIN,

Respondent,

And

BOONE DOME JOINT VENTURE,

Respondent.

DOC File No. ALPHA

OAH No. L2001070345

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 6 and 13, 2001, in San Diego, California.

Eric Benink, Corporations Counsel, represented Demetrios A. Boutris, Commissioner of Corporations, Department of Corporations, State of California.

Oliver F. Moench, Attorney at Law, represented respondent Jim Franklin, who was present throughout the proceedings.

No appearance was made by or on behalf of Boone Dome Joint Venture.

On August 13, 2001, the matter was submitted.

ISSUES

Was Jim Franklin a partner in or a principal of Boone Dome Joint Venture to the extent that a Desist and Refrain Order issued under Corporations Code section 25532 should be affirmed?

Was Jim Franklin involved in the offer or sale of partnership interests in Boone Dome Joint Venture to the extent that a Desist and Refrain Order issued under Corporations Code section 25532 should be affirmed?

PRELIMINARY MATTERS

1. The sale of an interest in a business often involves the sale of a "security."[1] Offers and sales of securities – whether stock, certain promissory notes and loans, various types of partnership interests and other investment opportunities – may be subject to the Securities Act of 1934, a federal law, and may also be subject to various state laws commonly referred to as "Blue Sky" laws.[2]

The Securities and Exchange Commission (SEC) directly enforces the federal security laws through the Securities Act of 1934 and it indirectly enforces those laws through its oversight of the National Association of Securities Dealers (NASD) and its oversight of the various stock exchanges.

California Corporations Code section 25019 sets forth an exhaustive but not all-inclusive definition of what constitutes a "security" subject to registration.

Insofar as this matter is concerned, a security is an "interest in limited liability company and any class or series of such interests (including fractional or other interest in such interest) except membership interest in limited liability company in which persons claiming this exemption can prove that all members are actively engaged in management of limited liability company; certificate of interest or participation in oil, gas or mining title or lease in payments out of product under such title or lease" or "in general, any interest or instrument commonly known as a 'security.'"

What constitutes a security is a question of fact to be decided on a case-by-case basis. Corporations Code section 25019 is not read or applied literally. Instead, the determination of whether an instrument is a security is made only after reviewing the facts and circumstances surrounding the transactions and considering the regulatory purpose of the Corporate Securities Law, which is "to protect the public against spurious themes, however ingeniously devised, to attract risk capital. *Westmoreland v. Department of Corporations* (1987) 194 Cal.App.3d 506. As was noted in *People v. Keating* (1993) 21 Cal.App.4th 145, "The main objective of the securities law is to protect the public against the imposition of insubstantial, unlawful and fraudulent stock and investment schemes and to promote full disclosure of all information that is necessary to make informed and intelligent investment decisions."

The origin of the term "Blue Sky" laws is somewhat unclear, but the term appears to have first been used by Justice McKenna in the United States Supreme Court's decision in *Hall v. Geiger-Jones Co.* (1917) 242 U.S. 539, which involved the constitutionality of state securities regulations. In his opinion, Justice McKenna wrote:

> "The name that is given to the law indicates the evil at which it is aimed, that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of blue sky,' or, as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations.'"

2. California's Blue Sky law is known as the Corporate Securities Law of 1968. It is set forth at California Corporations Code section 25000 *et seq.* The Corporate Securities Law of 1968 regulates the offer and sale of securities in California. It also requires the registration of broker-dealers and stockbrokers doing business here.

Recent federal legislation limits the authority of California and other states to review, regulate or otherwise restrict the sale of most securities registered with the SEC. The recent federal legislation was designed to eliminate duplicative federal and state securities laws.

3. Before a security is sold in California, it must be qualified with the Department of Corporations unless an exemption exists.

Many securities and many security transactions are exempt from state registration or are preempted from state regulation by federal law.

For example, Regulation D private offerings are exempt from registration if there has been full compliance with SEC Rules 501-503. "Covered securities" listed or approved for listing on the New York Stock Exchange, AMEX and the NASDAQ/National Market, and securities of the same issuer which are equal in rank or senior to such listed securities are preempted from state regulation by Section 18 of the Securities Act of 1933.

4. Qualification in California may be accomplished by coordination of a security for which a registration statement was filed under the Securities Act of 1933 (Corporations Code section 25111), by notification that the security is registered under Section 12 of the Securities Exchange Act of 1934 (Corporations Code section 25111), if the security was issued by an investment company registered under the Investment Company Act of 1940 (Corporations Code section 25112) or if the security was issued by permit (Corporations Code section 25113).

5. The California Corporations Commissioner has several legal remedies to enforce the Corporate Securities Law of 1968.

Proscribed conduct may be enjoined by a civil action brought under Corporations Code section 25530, it may be summarily enjoined by a Desist and Refrain Order issued directly by the Commissioner (which is subject to review on appeal in an administrative action before the Office of Administrative Hearings) under Corporations Code section 25532, civil penalties may be sought under Corporations Code section 25535 and/or a criminal prosecution may be initiated under Corporations Code section 25540.

6. This matter involves the appeal of a Desist and Refrain Order issued under Corporations Code section 25532.

FACTUAL FINDINGS

Jim Franklin & IPO Consultants

7. Respondent James E. (Jim) Franklin (Franklin) is a 37-year-old entrepreneur who lives part-time in New Mexico and part-time in San Diego.

In the early 1990s, following a career as an investment broker, Franklin founded IPO Consultants, Inc. (IPO), a Nevada Corporation. IPO assisted fledgling enterprises in locating private financing and venture capital.

In 1995, IPO assisted Amalgamated Explorations, Inc. (Amalgamated), a Colorado corporation, in becoming a publicly traded company. At all times relevant to this matter, Franklin held 100,000 shares of Amalgamated and was deeply involved in its operations.

In addition to serving as a consultant to Amalgamated, Franklin also provided consulting services to about two dozen other businesses.

Franklin, Hudson and the Oil & Gas Technology Fund Inc.

8. In May 1998, Franklin met Kenneth Hudson (Hudson) at a restaurant in La Jolla. Franklin learned that Hudson was involved in oil and gas drilling operations. Franklin introduced Hudson to persons at Amalgamated to discuss and pursue the formation of an oil and gas drilling project in Wyoming.

Hudson became the President and CEO of Oil & Gas Technology Fund Inc., a Nevada corporation that was in existence before Hudson met Franklin. Franklin's role in the formation of Oil & Gas Technology Fund Inc., if any, was not established.[3]

9. Franklin had several offices at 6665 Greenwich Drive, Suite 250, San Diego, CA 92122, one of which was vacant. On June 6, 1998, Franklin rented the vacant office to Oil & Gas Technology Fund Inc. Hudson signed the sublease in his capacity as President of Oil & Gas Technology Fund Inc. and formally designated the office as "Suite 250C," although that office shared Franklin's reception area and receptionist.

[3] It was not established when Hudson actually became the President and CEO of Oil & Gas Technology Fund Inc., although Hudson represented that he was its President by June 6, 1998.

Franklin's Role in the Formation of Boone Dome Joint Venture

10. Franklin's enjoyed a substantial role in the formation of Boone Dome Joint Venture (Boone Dome), a Wyoming partnership. He introduced Oil & Gas Technology Fund Inc., the managing partner, to Amalgamated, the "operator" and holder of oil and gas leases in Wyoming. Amalgamated also owned an "electotelluric survey technology" used in the exploration for oil and gas deposits.

Franklin was a consultant to Amalgamated. Oil & Gas Technology Fund Inc.'s office was in Franklin's suite. It was a cozy arrangement.

11. According to at least one Boone Dome Offering Memorandum, Franklin and IPO "have entered into an agreement with the Joint Venture to render its services as a Consultant for the Joint Venture." That Offering Memorandum stated that "IPO Consultants, Inc. and James E. Franklin may be deemed to be promoters of the Joint Venture and shall be compensated for services rendered on an hourly basis at a rate of $100 per hour on an accrual basis. The fee for services shall not exceed $10,000 per month and all fees shall be due and payable upon the successful completion of the drilling of the first well."[4]

12. While Franklin was involved in the founding of the Boone Dome Joint Venture, while he knew all of the principals in that venture and while he leased office space to the managing partner, it was not established that Franklin had an ownership interest in the venture, that he was a *de facto* partner or that he actually exercised any decision-making in Boone Dome's operations.

The Boone Dome Investment

13. According to Boone Dome's Offering Memorandum, the joint venture was formed "to enable investors to participate in the exploration, development, production and completion of the oil and gas interest under Federal Lease No. W-60013...in Natrona County, Wyoming."[5]

The Offering Memorandum also stated:

Two Offering Memorandum were admitted in evidence. Exhibit 14 was identified as having been provided to offeree "Cox" and bears Memorandum No. 423. Exhibit 14 made reference to IPO and to Franklin at page 35. Exhibit 22 was identified as having been provided to offeree "S. Deutsch" and bears Memorandum No. 712. It contained no reference to either IPO or Franklin. Other differences in the Offering Memorandum exist as well.

It was stipulated that the offer and sale of Boone Dome partnership units involved the offer and sale of a "security" within the meaning of the California Corporations Code.

"The Joint Venture combines technology of MSP Technologies with the exploration talents of Amalgamated Explorations, Inc. in providing the most probable method of detecting commercially productive viable hydrocarbon deposits. Using patented 'Electrotelluric' surveys, which accurately detect hydrocarbon (oil & gas) deposits down to 17,000 feet in minutes without drilling . . . an unconventional proven technique, along with conventional geology and seismic techniques, thereby reducing the percentage of dry holes. Oil & Gas Technology Fund Inc., a Nevada Corporation ('Managing Joint Venture Partner') will serve as the managing joint venture partner of the Joint Venture and will be responsible for all Joint Venture decisions."

14. Equity Programs Corporation was a registered broker-dealer in good standing with NASD. Equity Programs Corporation maintained offices at 8555 Aero Drive, Suite 110, San Diego, CA 92123. Barton B. Switzer (Switzer) was President.

15. According to the Offering Memorandum, Equity Programs Corporation was the "placement agent" and agreed to use its best efforts to maintain registration and qualification through the term of the Boone Dome offering.

According to the Offering Memorandum, Equity Programs Corporation would offer to sell, sell or otherwise dispose of the partnership shares only to "Accredited Investors."[6]

Equity Programs Corporation had the right to employ others as non-exclusive agents to sell partnership units on a best effort basis until all the partnership units were sold or until April 1, 1999.

16. On August 7, 1998, Bill Baker of Equity Programs Corporation sent a fax to Hudson and Franklin regarding a meeting held the previous day, asking that his concerns about "your current offering" be addressed as soon as possible.

17. In a fax to attorney Marc R. Tow sent on August 14, 1998, Franklin advised that Equity Programs, Inc. and Calles Investments, Inc. were interested in becoming broker-dealers and were "expected to sign placement agreements with Boone Dome Oil and Gas within the near future." Franklin then wrote, "We will update and advise both Amalgamated and yourself of any and all activities related to the project."

18. During 1998 and 1999, Boone Dome offered and sold numerous partnership units in the joint venture. At least two sales other organizations – First Liberty Financial and

[6] An "Accredited Investor" is a person who comes within one of the categories of an "accredited investor" in Rule 501(a) of Regulation D (17 CFR section 230.501(a)) adopted by the United States Securities and Exchange Commission. Income in excess of $200,000 in each of the two years preceding an investment or having a net worth of $1,000,000 qualifies a person as an accredited investor. See, 17 CFR section 230.501(a)(5) and (6).

Global Conduit, Inc. – also offered and sold partnership units. Solicitations were made by telephone, through brochures and by personal referrals, all of which constituted a general solicitation.

19. Salespersons represented to potential investors that Boone Dome had been successful on 18 consecutive occasions in locating and developing oil and gas reservoirs and that Boone Dome's success was based on specialized proprietary technology. Prospective investors were told that funds were being raised through the sale of partnership units to develop a 19th gas well in Wyoming.

The salespersons often told prospective investors that time was of the essence.

The Mora, Baily and Deutsch Transactions

20. Investors in the Boone Dome Joint Venture included Alvaro Mora (Mora), a Los Angeles longshoreman, Sonja Baily (Baily), a Huntington Beach legal secretary, and Steven Deutsch (Deutsch), a San Diego schoolteacher.

Neither Mora, Baily nor Deutsch had a pre-existing relationship with Boone Dome or with Oil & Gas Technology Fund Inc.

Deutsch had a pre-existing relationship with Amalgamated. Mora and Baily did not.

21. Mora and Baily first became aware of Boone Dome through Danny Rayburn (Rayburn), an acquaintance of Jackie Cox, Baily's significant other. Rayburn provided Mora and Baily with a brochure containing other documents, all extolling the virtues of the Boone Dome investment. Rayburn said that Boone Dome was an excellent investment and that investors should move quickly.

22. The brochure, like the Offering Memorandum, indicated that the "minimum subscription" was $25,000 per partnership unit. Payment for a partnership unit wss to be $15,677 on execution of the subscription agreement and $9,323 on completion of the well.

23. On November 6, 1998, Rayburn sold Mora a fractional share of a partnership unit. Rayburn induced Mora to certify falsely that Mora's net worth exceeded $1,000,000. Mora gave Rayburn a check in the amount of $3,919.25 payable to Boone Dome Joint Venture. On March 29, 1999, Mora provided a second check in the amount of $2,330.75, also payable to Boone Dome Joint Venture.

24. On November 6, 1998, Rayburn sold Baily a fractional share of a partnership unit. In doing so, Rayburn induced Baily to certify falsely that Baily's net worth exceeded

$1,000,000. Baily gave Rayburn two checks, each in the amount of $3,919.25 payable to Boone Dome Joint Venture on November 6, 1998.

25. Neither Mora nor Baily had direct contact with Franklin.

26. In May 1998, Franklin met with Deutsch at Franklin's offices at 6265 Greenwich Drive, San Diego, to discuss the electrotelluric technology used by Boone Dome. Deutsch knew Franklin as a result of Deutsch's investment in Amalgamated and through a mutual friend, Stephen Soden (Soden), an attorney who had done some legal work for Franklin.

27. In a November 1998 meeting, Deutsch told Franklin that he was seriously thinking of investing in Boone Dome, but he had some additional questions. Franklin caused Deutsch to be provided with a brochure and with an Offering Memorandum as a result of that conversation.

28. After reviewing the pamphlet, Deutsch expressed concern to Franklin that his financial condition might not permit him to participate in the joint venture. Franklin told Deutsch not to worry. Franklin did not ask Deutsch about his net worth, annual income or investing experience. At this meeting Deutsch told Franklin that he was thinking about investing in the joint venture in partnership with Soden.

29. In December 1998, Deutsch and Soden invested in one partnership unit. Although Deutsch paid for his one-half share by giving a check to Soden, and Soden paid for the full share out of his own checking account, Franklin knew that Deutsch and Soden were in partnership.

Hudson's Resignation and the Failure of Boone Dome

30. On January 5, 1999, Hudson resigned as Director of Oil & Gas Technology Fund Inc.

Following Hudson's resignation, Richard McGill, who was unknown to Franklin, became President of Oil & Gas Technology Fund Inc.

Don Ryan and Jon Vaux were appointed to the Oil & Gas Technology Fund Inc.'s Board of Directors, appointments that Franklin recommended. However, it was not established that Franklin's recommendation was critical or even important in their appointments.

31. Before Hudson's resignation, Franklin responded from time to time to urgent telephone messages left by Boone Dome investors.

32. Approximately 100 investors participated in the joint venture, investing between $4,000 and $56,000 each. These investors received a certificate of partnership interest in the Boone Dome joint venture.

The investors exercised absolutely no control over any managerial or business decisions which were made in the operation of Boone Dome Joint Venture. The investors were completely passive and they relied solely on Boone Dome principals and others.

33. Boone Dome did not locate any oil or gas reservoirs. Every investor lost his or her funds.

Oil & Gas Technology Fund Inc. went out of business.

34. Franklin retained four boxes of records left by Hudson at 6265 Greenwich Drive, San Diego. He produced those records in response to a Department of Corporation subpoena addressed to Oil & Gas Technology Fund Inc.'s "custodian of record."

In addition to storing some corporate records, Franklin also maintained and continues to maintain a telephone number for Oil & Gas Technology Fund Inc.

35. The Department of Corporations investigated complaints arising out of the failed joint venture.

Jurisdictional Matters

36. On June 18, 2001, a Desist and Refrain Order was signed by Alan S. Weinger, Supervising Counsel, on behalf of Demetrios A. Boutris, Commissioner of Corporations.

The Desist and Refrain Order was directed to and served on Jim Franklin, Richard McGill, Boone Dome Joint Venture, Oil & Gas Technology Fund, Inc. at 6265 Greenwich Drive, Suite 250C, San Diego, CA 92122.

The Desist and Refrain Order was also directed to and served on Dan Rayburn and First Liberty Financial at 19800 MacArthur Blvd., Suite 300, Irvine, CA 92612.

37. The Desist and Refrain Order stated:

> "Pursuant to Section 25532 of the California Corporate Securities Law of 1968, you are hereby ordered to desist and refrain from the further offer or sale in the State of California of securities, including but not limited to general partnership interests in Boone Dome Joint Venture, or any other security listed in Corporations

Code section 25019, unless and until qualification has been made under said law or unless exempt. This order is issued for the reason that, in the opinion of the California Corporations Commissioner, the sale of such securities is subject to qualification under said law and such securities are being or have been offered for sale without first being so qualified. The California Corporations Commissioner finds that this Order is necessary, in the public interest, for the protection of investors and consistent with the purposes, policies and provisions of the Corporate Securities Law of 1968."

38. On June 16, 2001, after being served with the Desist and Refrain Order, Jim Franklin, through counsel, requested a hearing.

On July 20, 2001, a one-day hearing was set for August 6, 2001.

On or about July 23, 2001, Donald Ryan, an individual associated with First Liberty Financial, was served by mail with a subpoena requiring his appearance and testimony at the August 6, 2001 hearing.

On August 6, 2001, the administrative record was opened. Jurisdictional documents were presented. The parties stipulated to the truth of several factual matters alleged in the Complaint in Support of Desist and Refrain Order. Sworn testimony and documentary evidence was received.

Donald Ryan did not appear on August 6, 2001, notwithstanding having been served with a subpoena compelling his attendance. Complainant's offer of proof regarding the materiality and necessity of Donald Ryan's expected testimony[7] constituted good cause to grant the motion for a brief continuance. The hearing was continued to August 13, 2001.

On August 13, 2001, the record was reopened, additional sworn testimony and documentary evidence was received, closing arguments were given and the matter was submitted.

[7] Ryan was expected to testify that Franklin was a principal of Boone Dome at all relevant times or was otherwise sufficiently associated with the solicitation, offer and sale of Boone Dome partnership units to support the issuance of the Desist and Refrain Order against Franklin.

When Ryan appeared on April 13, he appeared with counsel and asserted his right under the Fifth Amendment. Ryan refused to answer any question involving his relationship with Franklin or his involvement in the sale of partnership interests in Boone Dome.

Franklin's Defenses

39. Franklin denied that he was an owner of or a principal in Oil & Gas Technology Fund Inc. and he denied that he was an owner of or a principal in Boone Dome Joint Venture.

Franklin testified that insofar as any sale of securities was concerned, he simply acted as the middleman between Oil & Gas Technology Fund Inc. and Equity Programs Corporation, its broker-dealer.

Franklin testified that his infrequent communication with Boone Dome investors was nothing more than a result of his having offices in a suite where Oil & Gas Technology Fund Inc. also had offices, and in his role as corporate consultant to Amalgamated reasonably required him to have such communications.

Franklin testified that he retained Oil & Gas Technology Fund Inc.'s records after Hudson abandoned them because it was the prudent thing to do. He denied he was Oil & Gas Technology Fund's custodian of record, and he testified that he turned the fund's records over to the Department of Corporations because he wanted to be cooperative.

Franklin was familiar with the Baily transaction, but was not involved in it.

Franklin testified he was unfamiliar with the Mora transaction.

Franklin testified that he once spoke with Switzer, the President of Equity Programs Corporation, about Baily being an accredited investor to make sure there were no problems which might affect Amalgamated. He testified that he recommended that Don Ryan and Jon Vaux be appointed to the fund's Board of Directors to protect Amalgamated's interest in the joint venture.

40. With regard to the Deutsch transaction, Franklin testified that Deutsch was mistaken in his recollection that Franklin solicited Deutsch's purchase of a fractional share of a partnership unit, arguing that Soden must have actually been responsible for that sale.

To support his argument, Franklin testified that Soden was "an expert in securities law" and it was argued that Deutsch and Soden would never have let Franklin do the thinking for the both of them. Franklin acknowledged that he spoke with Deutsch at his office about the electrotelluric technology; however, Franklin claimed that he "was acting as an agent of Amalgamated" and that he never recommended Deutsch invest in Boone Dome.

41. Franklin's testimony concerning the Deutsch transaction was not as credible as Deutsch's testimony to the contrary. Deutsch had an excellent recollection of his several

visits with Franklin, where they took place and what was said. Deutsch produced a pamphlet provided at or shortly after a meeting with Franklin. Deutsch came into possession of an Offering Memorandum shortly after a meeting with Franklin. Deutsch admitted a friendship with Soden and was genuinely surprised when it was suggested that his testimony was false because he was trying to assist a friend.

Franklin's testimony, by contrast, was vague and conclusionary concerning his meetings with Deutsch.

Franklin's argument that Soden was responsible for Deutsch's purchase of one-half of a Boone Dome partnership unit was not supported by the evidence. Deutsch denied that was the case. Franklin was in no position to know what Soden and Deutsch discussed out of Franklin's presence. Soden did not testify. The credible evidence on the issue rested on Deutsch's testimony.

42. The circumstantial evidence suggested that Franklin may have been directly engaged in the sale of Boone Dome partnership units and that evidence was consistent with Franklin's sale of a fractional Boone Dome partnership unit to Deutsch.

43. Reference was made to the sale of a .75 partnership unit interest to "James E. Franklin." Franklin testified that the "James E. Franklin" referred to in that transaction and in several other documents was his father, a Doctor of Osteopathy residing in New Mexico. Franklin's testimony in this regard was accepted as being true.

Any violation of California's Blue Sky law as it may have related to "James E. Franklin" was *de minimis* given Franklin's relationship with his father.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. The Department of Corporations has the burden of proof to establish the Desist and Refrain order was properly issued and should remain in effect.[8]

The standard of proof is a preponderance of the evidence.[9]

[8] Evidence Code section 500 provides, in pertinent part, "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . "

[9] Evidence Code section 115 provides in pertinent part, "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

Relevant Statutory Authority

2. At all times pertinent to this matter, Corporations Code section 25110 provided in pertinent part:

> "It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112 or 25113 or unless such security or transaction is exempted or not subject to qualification "

3. At all times pertinent to this matter, Corporations Code section 25017 provided:

> "(a) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. "Sale" or "sell" includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities.
>
> (b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. . ."

4. Corporations Code section 29542 provides in pertinent part:

> "(a) If, in the opinion of the commissioner, any person is engaging in any activity in violation of any provision of this law, or rule or order under this law, the commissoner may order the person to desist and refrain from the activity unless and until the activity will not be in violation of any provision of this law or any rule or order under this law.
>
> (b) If after an order has been made under subdivision (a), a request for hearing is filed in writing within one year of the date of service of the order by the person to whom the order was directed, a hearing shall be held in accordance with the Administrative Procedure Act (Chapter 5, (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and the commissioner shall have all of the powers granted under the Administrative Procedure Act. Unless the hearing is commenced within 15 business days after the request is filed (or the person affected consents to a later date), the order is rescinded.
>
> If that person fails to file a written request for a hearing within one year from the date of service of the order, the order shall be deemed a final order of the commissioner and shall not be subject to review by any court or agency. . ."

Pertinent Appellate Authority

5. *People v. Miller* (1987) 192 Cal.App.3d 1505 stands for the proposition that the direct solicitation and sale by another of an unqualified, unexempt security does *not* insulate an individual from liability for issuing his *own* unregistered securities.

6. *People v. Corey* (1995) 35 Cal.App.4th 717 stands for the proposition, *inter alia*, that in a criminal prosecution for selling an unqualified, unexempt security in violation of Corporations Code section 25110, the element of scienter need not be established.

7. *People v. Graham* (1985) 163 Cal.App.3d 1159 involved an appeal by a defendant who was convicted of violating the Corporate Securities Law of 1968. On a single occasion, a district attorney investigator posed as an interested investor and surreptitiously taped a meeting with the defendant. During the meeting, the defendant gave the investigator a copy of a brochure and showed the investigator a copy of a limited partnership agreement. He provided a description of the technical and business aspects of the venture. The conviction was affirmed.

Franklin's interactions with Deutsch were very similar to the criminal conduct described in *People v. Graham.*

Cause Exists to Affirm the Desist and Refrain Order

8. The preponderance of the evidence established good cause to affirm the Desist and Refrain Order issued against Jim Franklin under Corporations Code section 25532 insofar as he was involved in the solicitation and sale of the fractional partnership unit to Steven Deutsch.

This conclusion is based on Factual Findings 7-11, 20, 26-29, 36-38 and 41-42 and on Legal Conclusions 1-7.

ORDER

The Desist and Refrain Order signed on June 18, 2001, directed to Jim Franklin is affirmed.

DATED: 8/28/01

JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings