INITIAL DECISION RELEASE NO. 698
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15848

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of ARMAND R. FRANQUELIN	INITIAL DECISION ON DEFAULT October 22, 2014

APPEARANCES: Daniel J. Wadley for the Division of Enforcement, Securities and Exchange Commission

Before: Brenda P. Murray, Chief Administrative Law Judge

Background

On April 22, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative Proceedings (OIP), pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act), against Respondent Armand R. Franquelin (Franquelin). The OIP alleges that on April 18, 2014, a final judgment was entered by default against Franquelin, permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933 (Securities Act), Sections 10(b) and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5, in *SEC v. Franquelin*, No. 1:13-cv-96 (D. Utah) (*Franquelin*). OIP at 1.

Franquelin was required to file an answer within twenty days of service of the OIP, or by May 2, 2014. OIP at 2; 17 C.F.R. §§ 201.160(b), .220. He did not file an answer by that date and has failed to do so as of the date this Initial Decision was issued.

Franquelin did not attend the June 9, 2014, prehearing conference. At the prehearing conference, the Division of Enforcement (Division) stated that Franquelin had not communicated with the Division. Tr. 3-4.[1] I found Franquelin in default based on his failure to answer the allegations in the OIP, to participate in the prehearing conference, and to otherwise defend the proceeding. Tr. 4; 17 C.F.R. § 201.155(a). I directed the Division to file a motion for default, providing evidentiary support for the OIP's allegations and for the public interest factors laid out in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91

[1] Citation is to the prehearing transcript.

(1981). Tr. 4-5; *Armand R. Franquelin*, Admin. Proc. Rulings Release No. 1503, 2014 SEC LEXIS 1989 (June 10, 2014) (citing 17 C.F.R. §§ 201.155(a), .220(f), .221(f); *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012); *Alchemy Ventures, Inc.*, Exchange Act Release No. 70708, 2013 SEC LEXIS 3459 (Oct. 17, 2013)).

On July 8, 2014, the Division filed a Motion for Default and Memorandum of Law in Support (Motion), with exhibits A through H:

Exhibit A, the USPS return of service green card signed by Franquelin on May 2, 2014;

Exhibit B, the July 7, 2014, Declaration of Marie E. Iovino (Iovino Declaration) with three exhibits: Exhibit 1, The Elva Group, LLC (Elva Group) Banking Summary, 1/1/2006-7/3/2014, for its Wells Fargo Bank account; Exhibit 2, Addendum to Certificate of Authority, showing Franquelin as an authorized signer on the account; and Exhibit 3, funds issued to Franquelin or his company, Franquelin Enterprises, from the account from February 8, 2006, to August 6, 2010;

Exhibit C, the March 12, 2012, Declaration of Donald Ray Booth (Booth Declaration) with two exhibits: Exhibit 1, a form showing Donald Ray Booth's $30,000 investment in Elva Group on April 8, 2010; and Exhibit 2, a promissory note from Elva Group to Donald Booth dated April 8, 2010, but unsigned by Elva Group;

Exhibit D, excerpted portions of the sworn testimony of Terri L. Urquiaga given in a Commission investigation of Destiny Funding, LLC, on July 20, 2012;

Exhibit E, excerpted portions of the sworn testimony of Martin A. Pool (Pool) given in a Commission investigation of Destiny Funding, LLC, on October 24, 2012;

Exhibit F, a May 1, 2008, Notice of Default letter from J. Martin Tate, General Counsel of Harbor Real Asset Fund, LP, to Franquelin;

Exhibit G, a collection of correspondence between Thomas S. Tranovich and Elva Group; and

Exhibit H, default and final judgment order filed in *Franquelin*. *Franquelin* (Apr. 18, 2014), ECF No. 17 (Final Judgment).

The Division requests that its Motion be granted and that Franquelin, pursuant to Section 15(b) of the Exchange Act, receive an industry-wide bar from participation in the securities industry and a bar from participating in any offering of penny stock. Motion at 3-7.

Franquelin has not filed an opposition to the Motion. 17 C.F.R. § 201.154(b).

I admit the exhibits attached to the Motion into evidence, and I take official notice of the court filings in *Franquelin* and *United States v. Pool*, 2:14-cr-221 (D. Utah) (*Pool*), a related criminal case in which Franquelin was a defendant. *See* 17 C.F.R. § 201.323. As provided for in

a default situation such as this, I find the allegations in the OIP to be true. *See* 17 C.F.R. § 201.155(a).

Motion for Summary Disposition

I will grant the Motion because all the requisites for summary disposition are present: there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law inasmuch as Franquelin is in default. 17 C.F.R. § 201.250(b).

I have considered the entire record and reject all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision. I applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981).

Findings of Fact[2]

From at least January 2006 through November 2010, Franquelin, age 57 and a college graduate, was a co-owner and a control person of Elva Group, which issued promissory notes and raised investor capital. OIP at 1; *Pool*, Franquelin's Statement in Advance of Guilty Plea at 4, 8 (May 21, 2014), ECF No. 23 (Plea Statement). In connection with the offer and sale of promissory notes, Franquelin made material misrepresentations that the investments were secure and the returns he promised were guaranteed. OIP at 2; *see* Plea Statement at 4. As an example of his conduct during this time period, Franquelin represented to Donald R. Booth (Booth) that Elva Group was a successful real estate investor, Booth's funds would not be at risk, and he would be guaranteed a 12% annual return if he invested with Elva Group. Motion at 5, Ex. C. After hearing Franquelin discuss Destiny Funding as a vehicle for self-directed IRAs, Booth transferred his IRA to Destiny Funding, and in April 2010, at Franquelin's recommendation, Booth invested $30,000 with Elva Group. Motion at Ex. C. Booth received a promissory note but has not received any interest, and Franquelin has refused to return his $30,000. *Id.* In another example, four members of a Utah family invested $700,000 in 2008, based on false and misleading representations by Franquelin that their investments would be secured by a first lien on specific lots of a real estate development. Motion at Ex. G. Each person received a promissory note from Elva Group. *Id.* In November 2010, Franquelin acknowledged the debt to

[2] This administrative proceeding is based on the entry of an injunction as part of an order on default and final judgment. OIP at 1-2. The court made very limited findings on the allegations in the Complaint, thus the Complaint in the injunctive action cannot be the sole basis for factual findings. *See Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 SEC LEXIS 1010, at *12-14 (Feb. 4, 2010). I rely additionally on the Division's exhibits and facts underlying Franquelin's plea agreement and sentencing. *See Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 SEC LEXIS 3171, at *17 (June 26, 2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions"); *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *16-17 (Jan. 14, 2011) (considering a conviction that was not charged in the OIP when assessing sanctions to be imposed in the public interest).

the Utah investors and described repayment based on drawdowns received from a contract with South Africa. *Id.*

Franquelin is a defendant and his wife, Judith E. Franquelin, is a relief defendant in *Franquelin*, a civil action begun by the Commission on July 2, 2013. *Franquelin*, Complaint, ECF No. 2. On April 18, 2014, the district court entered an order of default and final judgment in *Franquelin*. OIP at 1; Final Judgment. The Final Judgment found that the clerk of the court entered a default certificate against Franquelin on January 3, 2014, and that Franquelin was barred from denying the allegations in the complaint, and it enjoined Franquelin from violating Sections 5 and 17(a) of the Securities Act, Sections 10b and 15(a) of the Exchange Act, and Exchange Act Rule 10b-5. Final Judgment at 3-6. The Final Judgment ordered Franquelin to disgorge $1,529,749.28 and prejudgment interest of $709,662.19. *Id.* at 6.

Franquelin filed an answer to the complaint in *Franquelin* on August 27, 2014, over four months after the entry of the Final Judgment. *See* Answer, *Franquelin*, ECF No. 18. In his answer, Franquelin represented that he made a Chapter 13 bankruptcy filing in March 2013, and in July 2013, he made a Chapter 7 filing in *Armand R. Franquelin*, Case No. 2:13-bk-22646 (D. Utah 2013). *Id.*

Pool is a related case filed on April 30, 2014, shortly before the OIP was issued, in which Franquelin pled guilty to securities fraud and money laundering. Felony Information, *Pool*, ECF No. 1. On May 21, 2014, Franquelin executed and filed in open court a statement in advance of plea in which he stated:

> During the period 2006-2010 I participated in persuading investors to convert their traditional IRAs to self-directed IRA accounts and invest their funds in a residential real estate project known as Haven Estates in Vernal, Utah. This was accomplished by inducing the investors to direct their funds to my company, The Elva Group, in return for promissory notes from Elva with a promise of monthly interest payments at annual rates between 8% and 20%. As part of the inducement I told investors their funds would be used to develop Haven Estates and promised to secure their loans with first lien positions in Haven Estates.
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> In reality, investors' funds were used for other purposes than the development of Haven Estates. Additionally, investors were not told of encumbrances already in place on Haven Estates. When Elva began defaulting on the mortgage loan for Haven Estates, investors were not immediately informed. Eventually, Haven Estates was foreclosed.
>
> These representations and omissions of material facts were made by me in connection with the investors' purchase of securities, namely the promissory notes and loan agreements. They constituted manipulative and deceptive devices, they were made for the purpose of defrauding the investors, and they operated as a fraud and deceit upon the investors.

> The investors' funds were used by me and my associates for our personal benefit and to pay interest to earlier investors. The payments to earlier investors were Ponzi payments and had the effect of lulling the earlier investors, persuading them to leave their funds in my company, inducing them to renew their promissory notes from time to time, and enticing new investors to invest.
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> Investor funds, including those referred to in Count 1 of the Felony Information, were sent to my company's bank account via wire transfers in interstate commerce.
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> Payments to me from this bank account, including the payment which is the subject of Count 3 of the Felony Information, were monetary transactions affecting interstate commerce and involved criminally derived property with a value in excess of $10,000. The property was derived from a specified unlawful activity, namely securities fraud, and I acted knowingly, that is, I knew the transaction involved the proceeds of a criminal offense.

Plea Statement at 4-5.

In connection with the count of securities fraud, Franquelin admitted that he used the mails or other means of interstate communication, acted to defraud buyers or sellers of promissory notes and loan agreements, and

> used a device or scheme to defraud someone, made an untrue statement of a material fact, failed to disclose a material fact that resulted in making [his] statements misleading, or engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

Id. at 1. Franquelin conceded that he knew the monetary transactions affecting interstate commerce involved proceeds of a criminal offense. *Id.* at 5.

It is the government's position in *Pool* that:

> Pool initiated the scheme and provided leadership, but in the vast majority of cases it was Mr. Franquelin who met with investors, pitched the investment opportunity, persuaded investors to move their funds from professionally managed IRA accounts to a self-directed retirement account, and persuaded them to move their funds from that account to Franquelin's and Pool's company, Destiny Funding.

Pool, Government's Position Statement with Respect to Sentencing Factors (Sept. 30, 2014), ECF No. 41.

Franquelin was sentenced to fifty-seven months of incarceration followed by three years of supervised release, and ordered to pay jointly and severally $6,566,596.85 in restitution to the

victims, which Franquelin stipulated was the amount of the loss.[3] *Pool*, Judgment (Oct. 2, 2014), ECF No. 45; *Pool*, Franquelin's Position with Respect to Sentencing (Sept. 26, 2014), ECF No. 40.

Legal Conclusions

Exchange Act Section 15(b)(6) mandates that the Commission, after notice and opportunity for a hearing, restrict a person's participation in the securities industry where it is in the public interest to do so and the person has been enjoined from violating the securities statutes or has been criminally convicted of certain crimes within the last ten years.[4] 15 U.S.C. § 78*o*(b)(6). Section 15(b)(6) also requires that at the time of the misconduct, the person was associated, or seeking to become associated, with a broker-dealer. *Id.* This requirement is satisfied because Franquelin sold unregistered securities while acting as a person associated with Elva Group, which operated as an unregistered broker-dealer from at least January 2006 through November 2010. OIP at 1-2; *see Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 SEC LEXIS 3125, at *20 (Dec. 2, 2005) ("It is well established, however, that Exchange Act Section 15(b) . . . applies to natural persons who are, like Zubkis, acting as a broker or dealer or associated with a broker or dealer . . . .").

Sanctions

The Division recommends the imposition of a collateral bar and a bar from participating in an offering of penny stock. Motion at 3-7. The Commission has directed that the Administrative Law Judge's analysis in ordering an industry-wide bar "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct."[5] *Ross Mandell*, Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *8 (Mar. 7, 2014) (internal quotations omitted).

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[3] Franquelin and the government had agreed that his restitution should be in the approximate amount of $9,031,336.83. Plea Statement at 7.

[4] Section 15(b)(6) allows the Commission to censure, place limitations on the activities or functions or operations, suspend for a period not exceeding twelve months, or bar from association with a broker or dealer. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) signed into law July 21, 2010, expanded the bar to association with a "broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization" (collateral or industry-wide bar). 15 U.S.C. § 78*o*(b)(6). Imposition of a collateral bar based on pre-Dodd-Frank conduct is allowed because bars are prospective remedies meant to protect the investing public from future harm. *See John W. Lawton*, Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *38 (Dec. 13, 2012).

[5] *Ross Mandell* makes no exception for a situation like this one where Franquelin is in default in the administrative proceeding, has been enjoined in an order entered on default from violations of multiple provisions of the securities statutes and ordered to disgorge over $1.5 million in ill-

The generally accepted criteria for making a public interest determination are:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations. (*Steadman* factors)

Steadman v. SEC, 603 F.2d at 1140; *see Donald T. Sheldon*, Exchange Act Release No. 31475, 1992 SEC LEXIS 3052, at *68-69 (Nov. 18, 1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995); *Joseph J. Barbato*, Securities Act Release No. 7638, 1999 SEC LEXIS 276, at *49 n.31 (Feb. 10, 1999).

Franquelin's Conduct Was Egregious and Recurrent

Franquelin's conduct was both egregious and recurrent as shown by the extent of the injunction, his guilty plea to criminal charges, and his resulting incarceration. Franquelin acknowledges that he knew at some point that new investor funds were being used to pay old investors, and that he forged an investor's signature to transfer funds into Elva Group. *Pool*, Franquelin's Position with Respect to Sentencing at 3-4 (Sept. 26, 2014), ECF No. 40. For almost five years, Franquelin engaged in a Ponzi scheme involving retirement funds in which he sold unregistered securities and acted as a person associated with an unregistered broker-dealer. The results of the illegal scheme were significant: approximately 130 persons invested $12 million with Franquelin or his company receiving at least $1,529,749.28 of investor funds. Motion at Ex. B. The court in *Franquelin* found Franquelin liable to disgorge over $1.5 million. Final Judgment at 6-7. The court in *Pool* ordered Franquelin, jointly and severally, to make restitution of over $6.5 million and to serve fifty-seven months of incarceration followed by three years of supervised release. *Pool*, Judgment (Oct. 2, 2014), ECF No. 45.

Franquelin Had a High Degree of Scienter

The district court enjoined Franquelin from violations of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5, all of which are antifraud provisions requiring scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *See Aaron v. SEC*, 446 U.S. 680, 686 n.5, 691, 697 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

Franquelin was convicted of securities fraud in *Pool*, which requires a finding that the defendant "acted for the purpose of defrauding buyers or sellers of the promissory notes and loan agreements" and of money laundering, which requires a finding that the defendant "acted knowingly." Plea Statement at 2, 4-5; *see* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; 18 U.S.C. § 1957. Franquelin admitted that he acted to defraud, knew that the transactions he engaged in

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gotten gains, and sentenced following a guilty plea to fifty-seven months of incarceration and given other penalties.

involved proceeds from criminal offenses, and pleaded guilty to violations that required a showing of scienter. *See Aaron v. SEC*, 446 U.S. at 686 n.5; Plea Statement at 1-2.

Violations involving the antifraud provisions of the federal securities laws are especially serious and merit the severest of sanctions. *Marshall E. Melton*, Investment Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *713 (July 25, 2003); *Vladimir Boris Burgarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 (Apr. 20, 2012); *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013); *see Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976) ("When the past misconduct involves fraud, fidelity to the public interest requires us to be mindful of the fact that the securities business is one in which opportunities for dishonesty recur constantly and that this necessitates specialized legal treatment.") (internal footnote omitted).

Sincerity of Assurances Against Future Violations, Recognition of Wrongful Conduct, and Likelihood for Future Violations

Franquelin's guilty plea in *Pool* could be taken as an acknowledgment of wrongdoing and recognition of wrongful conduct. However, by not participating in this proceeding, Franquelin forfeited his opportunity to reinforce that recognition and to provide assurances that he would not continue illegal activity if allowed to participate in the securities industry. There is nothing in the record that provides any assurance that Franquelin would not repeat his prior conduct if given an opportunity to do so. As has been noted often, the securities industry presents many opportunities for abuse and overreaching and depends heavily on the integrity of it participants. *C.E. Carlson, Inc.*, Exchange Act Release No. 23610, 1986 SEC LEXIS 808 (Sept. 11, 1986); *Richard C. Spangler, Inc*., 1976 SEC LEXIS 2418, at *34.

These facts and consideration of the *Steadman* factors show that it is in the interest of protecting the investing public to impose a collateral bar.

Order

I GRANT the Division of Enforcement's Motion for Summary Disposition and pursuant to Section 15(b) of the Securities Exchange Act of 1934, I BAR Armand R. Franquelin from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice. 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party,

then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to that party.

In addition, a respondent has the right to file a motion to set aside a default within a reasonable time, stating the reasons for the failure to appear or defend, and specifying the nature of the proposed defense. 17 C.F.R. § 201.155(b). The Commission can set aside a default at any time for good cause. *Id.*; *see Alchemy Ventures, Inc.*, Exchange Act Release No. 70708, 2013 SEC LEXIS 3459, at *13-14 (Oct. 17, 2013).

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Brenda P. Murray
Chief Administrative Law Judge