

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 56579 / September 28, 2007**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12860**

**In the Matter of**

**MCL FINANCIAL GROUP, INC., and**  
**GARY L. FLATER,**

**Respondents.**

**ORDER INSTITUTING**  
**ADMINISTRATIVE AND CEASE-AND-**  
**DESIST PROCEEDINGS, MAKING**  
**FINDINGS, AND IMPOSING REMEDIAL**  
**SANCTIONS AND A CEASE-AND-**  
**DESIST ORDER PURSUANT TO**  
**SECTIONS 15(b) AND 21C OF THE**  
**SECURITIES EXCHANGE ACT OF 1934**

**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 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against MCL Financial Group, Inc. (“MCL”) and Gary L. Flater (“Flater”) (collectively, “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer 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, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondents' Offers, the Commission finds<sup>1</sup> that:

#### Summary

1. MCL and Flater failed reasonably to supervise Michael B. Upton ("Upton"), a registered representative with a view to preventing and/or detecting Upton's violations within the meaning of Sections 15(b)(4) and 15(b)(6) of the Exchange Act. From August 2003 through March 2005, at the time of his actions, Upton, a registered representative at MCL's office in Santa Ana, California, made materially false and misleading statements to investors and received \$287,496 in undisclosed commissions in connection with 27 securities offerings sponsored by Triple Net Properties, LLC ("Triple Net"). Upton's conduct violated the antifraud provisions of the federal securities laws. Among other things, Flater and MCL failed to develop a reasonable system to implement firm procedures for review of Upton's correspondence, which contained the materially false and misleading statement sent to his customers, and Flater failed to follow-up or investigate whether Upton was disclosing the commissions to his customers. In addition, Flater and MCL failed to establish special supervisory procedures and related systems to monitor Upton's conduct, despite knowing that Upton had a previous disciplinary history for committing similar violations of the federal securities laws.

2. Until August 2004, MCL failed to preserve, and Flater did not ensure that MCL preserved, copies of the majority of the electronic mail communications ("e-mails") related to its business as such for its Colorado offices. Accordingly, MCL willfully violated, and Flater caused MCL's violation of, Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.<sup>2</sup>

#### Respondents

3. MCL Financial Group, Inc. is a registered broker-dealer (File No. 8-49325) based in Littleton, Colorado, and a wholly-owned subsidiary of MCL Holding, Inc.

4. Gary L. Flater, age 49, resides in Littleton, Colorado. Flater is the CEO and president of MCL and 50% owner of MCL through his ownership in MCL Holding, Inc. Flater currently holds Series 3, 7, 24, 27, 63, and 65 licenses. In 1993, the NASD censured and fined Flater \$3,500 for violations regarding net capital requirements. In 1997, the North Dakota Securities Commissioner ordered Flater and other respondents to pay \$80,000 in restitution for

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

<sup>2</sup> "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

selling securities without a valid securities registration in the state, for making false statements in connection with sales of securities, and for his lack of cooperation in the state's investigation.

### **Other Relevant Parties**

5. Michael B. Upton<sup>3</sup> age 60, resides in Santa Ana, California. Upton worked at MCL as a registered representative from July 2003 until his retirement in February 2006. Upton holds Series 6, 7, 22, 63, and 65 licenses. In 1999, the NASD censured Upton and assessed a \$5,000 fine against him for using, without his supervisor's approval, marketing materials containing false and misleading claims in a private placement of securities.

6. Triple Net Properties, LLC is a privately-held company based in Santa Ana, California. It is the promoter and property manager (through its subsidiary) of over 100 companies. MCL sells securities sponsored by Triple Net.

7. G REIT, Inc. is a real estate investment trust promoted and managed by Triple Net. From 2002 to 2004, G REIT conducted two public offerings of common stock through a Form S-11 registration statement, raising \$470 million. G REIT is a reporting company; however, its shares are not traded on an exchange or through an over-the-counter market. MCL sold shares of G REIT to its retail customers. G REIT is currently in the process of liquidation.

8. NNN 2003 Value Fund, LLC was formed as a vehicle to invest in commercial real estate. In 2003 and 2004, the Value Fund conducted a private placement offering of its units, raising \$50 million. The Value Fund is a reporting company; however, its shares are not traded on an exchange or through an over-the-counter market. MCL sold shares of Value Fund to its retail customers.

### **Facts**

#### **Background**

9. In July 2003, MCL contracted with Upton to open MCL's Santa Ana office. Flater supervised Upton and the Santa Ana office from approximately 1,000 miles away in Littleton, Colorado. Flater was responsible for the day-to-day supervision of Upton. Further, Flater knew that in 1999, Upton had been censured and fined \$5,000 by the NASD for providing to customers sales materials in connection with a private placement of securities that made exaggerated and unwarranted claims and were not approved by a principal of the broker-dealer.

10. From August 2003 through March 2005, MCL and Upton sold securities in Triple Net-sponsored offerings, including G REIT, the Value Fund, and 25 other limited liability companies. During 2004, Upton was in the top 10% of all registered representatives at MCL

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<sup>3</sup> The Commission is filing an injunctive action against Upton and an administrative proceeding against him.

selling G REIT's securities, as measured by gross sales. In 2003 and 2004, Upton was the top selling registered representative of the Value Fund's securities.

### **Upton's Violations of the Federal Securities Laws**

11. In connection with the Triple Net related offerings, Upton violated the antifraud provisions of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by making materially false and misleading statements to investors.

12. In March and April 2004, Upton sent letters to hundreds of prospective investors that misrepresented that the G REIT shares would soon be publicly traded. These letters stated, in part:

- The Board of Directors [of G REIT] plans [to list G REIT's shares on a national securities exchange] soon thereafter. . . . The attach[ed newspaper article] supports that similar IPOs have enjoyed a 30% 'pop.'
- "I sent you a notice that G REIT is *closing* to new funds on April 30, 2004 to prepare for [listing on an exchange] later this year . . . I gave this opportunity my highest recommendation . . . It is rare that individual investors get a shot at pre-[exchange listed] shares." (emphasis in original)
- I give G REIT my highest recommendation . . . with the lowest real estate risk and, after the [exchange listing], liquidity."

Upton made these fraudulent statements even though he knew from G REIT's prospectus, and from having been specifically advised by G REIT's officers, that it was uncertain if or when G REIT shares would become publicly traded. Upton never provided the letters to Flater for his review and approval. Nor did Flater seek to review Upton's correspondence file.

13. From August 2003 through April 2004, Upton sent letters to up to a thousand prospective investors that misrepresented the risks of an investment in G REIT and Value Fund securities. These letters stated, in part:

- Whether for an IRA or conservative, hard-asset investment for both income and growth, I know of nothing better.
- Risk of '3' . . . on a scale of 1 = low to 10 = high.
- On a risk scale from 1 (low) to 10 (high) G REIT is viewed as being a '3'.
- GREIT IS IDEAL FOR RETIREMENT PLANS. It is also attractive for investors looking for low-risk [investments]. (emphasis in original)
- GREIT IS IDEAL FOR IRAS, ETC. (emphasis in original)

- I give GREIT my highest recommendation . . . with the lowest real estate risk.
- On a scale of 1 (low risk)-to-10, I regard . . . the Value Fund a '4'.
- Risk of '4' = Value Fund, LLC.

Upton made these fraudulent statements despite knowing from G REIT's prospectus and the Value Fund's private placement memorandum that G REIT and Value Fund were risky investments. Upton never provided the letters to Flater for his review and approval. Nor did Flater review or approve the letters before they were sent to the customers.

14. From August 2003 through March 2005, Upton failed to disclose to investors that he would receive an additional .8% override commission on sales in the G REIT offering, Value Fund offering, and 25 other Triple Net sponsored offerings. As a result, Upton received \$287,496 in undisclosed commissions in connection with 27 securities offerings sponsored by Triple Net.

### **MCL's and Flater's Supervision of Upton**

15. Flater, as MCL's CEO and President, was responsible for ensuring that MCL established supervisory procedures and a system for applying such procedures that reasonably could detect and prevent violations of the federal securities laws. Flater did not delegate the responsibility for establishing such procedures and system; rather, he retained that authority.

16. During the relevant period, MCL and Flater had established a written supervisory procedure that required Flater to review and approve any sales materials or correspondence to more than 25 addressees before the sales materials were used or the correspondence was sent to investors. MCL and Flater, however, had not established a reasonable system to implement this procedure. Moreover, despite knowing that Upton had been previously sanctioned for sending false and misleading sales materials that had not been approved by a supervisor, MCL and Flater did not establish special supervisory procedures and systems to monitor Upton's preparation and distribution of sales materials and correspondence.

17. Flater also failed to discharge his supervisory duties in that he failed to follow the firm procedure that did exist; he never requested that Upton provide him with Upton's correspondence file for his review. Flater knew that Upton's correspondence file was readily accessible at MCL's Santa Ana office. Additionally, Flater spent very little time in the Santa Ana office on supervisory matters and, in his absence, improperly delegated to Upton supervision of all registered representatives at the office, including supervision of Upton himself.

18. Flater also knew that Upton was receiving additional and undisclosed compensation. Yet, Flater never investigated whether Upton was otherwise disclosing the override commissions to his customers.

19. Flater also failed to respond adequately to "red flags" or indications of irregularities. Flater reviewed and approved correspondence sent by other Santa Ana office

registered representatives. Yet, Flater never questioned Upton whether he was sending correspondence or why Upton had not submitted it for his review.

### **Failure to Preserve E-mails**

20. MCL's policy requires that it maintain copies of inter-office communications, including e-mails, for a period of three years. Until August 2004, MCL did not maintain copies of the majority of its e-mails related to its business as such for the Colorado offices. Flater was aware that MCL was required to maintain copies of all e-mails related to its business as such and, as MCL's President and CEO, was primarily responsible for ensuring compliance with the federal securities laws.

### **Legal Discussion**

21. Sections 15(b)(4) and 15(b)(6) of the Exchange Act authorize the Commission to impose sanctions on broker-dealers and their supervisory personnel who fail reasonably to supervise with a view to preventing violations of the federal securities laws by a person subject to their supervision. A defense exists under Sections 15(b)(4) and 15(b)(6) of the Exchange Act, which precludes a finding of failing reasonably to supervise if (1) procedures, and a system for applying such procedures, have been established that would be reasonably expected to prevent and detect, insofar as practicable, violations by such other persons; and (2) the supervisor has reasonably discharged his or her duties without reasonable cause to believe that the system and procedures were not being complied with.

22. Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder require every broker-dealer to preserve, for a period of not less than three years, copies of all communications relating to its business as such. Rule 17a-4 is not by its terms limited to physical documents. The Commission has stated that electronic mail communications fall within the purview of Rule 17a-4 and that for the purposes of Rule 17a-4, "the content of the electronic communication is determinative" as to whether that communication is required to be retained and accessible.

23. As a result of the conduct described above, MCL and Flater failed reasonably to supervise Upton with a view to detecting and/or preventing Upton's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

24. As a result of the conduct described above, MCL willfully violated, and Flater caused MCL's violation of, Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.

### **Undertakings**

25. MCL has undertaken to retain an Independent Consultant as follows:

- a. MCL shall retain, within 30 days of the date of entry of this Order, at its expense, the services of an Independent Consultant not unacceptable to the staff of the Commission to conduct a review of MCL's supervisory, compliance, and other policies and procedures designed to detect and

prevent violations of the federal securities laws related to (1) sales material; (2) correspondence to customers; (3) payments of undisclosed compensation to registered representatives; and (4) preservation of e-mail. MCL shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant access to its files, books, records, and personnel as reasonably requested for review.

- b. At the end of that review, which shall be no more than three months after the date of the issuance of this Order, MCL shall require the Independent Consultant to submit to MCL and to the Commission's Los Angeles Regional Office an Initial Report. The Initial Report shall include a description of the review performed, the conclusions reached, any recommendations deemed necessary to make the policies and procedures adequate.
- c. Within 6 months of the date of this Order, MCL shall, in writing, advise the Independent Consultant and the Commission's Los Angeles Regional Office of the recommendations it is adopting. MCL may suggest an alternative procedure designed to achieve the same objective or purpose as that of the recommendation of the Independent Consultant. The Independent Consultant shall evaluate MCL's proposed alternative procedure. MCL, however, shall abide by the Independent Consultant's final recommendation.
- d. Within 12 months of the date of this Order, MCL shall require that the Independent Consultant submit a final written report of its findings to it and the Commission's Los Angeles Regional Office. The Final Report shall include a description of the review performed and the conclusions and recommendations made; and a description of how MCL is implementing those recommendations.
- e. MCL shall take all necessary and appropriate steps to adopt and implement all recommendations contained in the Independent Consultant's Final Report.
- f. Within 15 months after the date of this Order, MCL shall submit to the Commission's Los Angeles Regional Office an affidavit setting forth the details of its efforts to implement the Independent Consultant's recommendations as set forth in the Final Report and its compliance with them.
- g. For good cause shown and upon timely application by the Independent Consultant or MCL, the Commission's staff may extend any of the deadlines set forth above.

- h. Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with MCL, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Commission's Los Angeles Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with MCL, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

#### IV.

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

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

- A. MCL and Flater are hereby censured.
- B. MCL shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$60,000 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies MCL as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michele Wein Layne, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Fl., Los Angeles, CA 90036.
- C. Flater shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$60,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3,

Alexandria, VA 22312; and (D) submitted under cover letter that identifies Flater as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michele Wein Layne, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Fl., Los Angeles, CA 90036.

- D. Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Flater be, and hereby is, barred from association in a supervisory capacity with any broker or dealer for a period of three (3) years with the right to reapply for association in a supervisory capacity after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.
- E. Any reapplication for association by Respondent Flater will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.
- F. MCL shall cease and desist from committing or causing, and Flater shall cease and desist from causing, any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.
- G. Respondent MCL shall comply with the undertakings enumerated in Paragraph 25 above.

By the Commission.

Nancy M. Morris  
Secretary