

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Gary Giblen
Darien, CT,

Respondent.

DECISION

Complaint No. 2011025957702

Dated: December 10, 2014

Respondent engaged in undisclosed outside business activities. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Jessica Dennehy, Esq., Leo Orenstein, Esq., Vaishali Shetty, Esq.,
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Gary Giblen appeals a Hearing Panel decision issued on September 17, 2013. The Hearing Panel found that Giblen violated NASD Rule 3030 and FINRA Rule 2010 because he engaged in outside business activities without providing his firm with prompt written notice of the activities.¹ For the violation, the Hearing Panel suspended Giblen in all capacities for four months. After an independent review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Factual Background

A. Giblen

In June 1988, Giblen entered the securities industry. Between June 1988 and March 2011, Giblen registered with several FINRA firms in various capacities, which included

¹ The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

registrations as a general securities principal, general securities representative, and research analyst. Giblen has not associated with another FINRA firm since March 2011.

Giblen specializes in research and has extensive experience as a research analyst. The first FINRA firm to employ Giblen when he entered the securities industry hired him as a research analyst.² And many of the subsequent firms with which Giblen has associated employed him to work in their research departments. Throughout his years in the securities industry, Giblen has held positions as a research analyst, senior analyst, and even director of research. Giblen's research expertise is in the consumer and retail sectors. During the period relevant to the misconduct at issue in this case, October 2010 through November 2010, Giblen was employed with Quint, Miller & Co. ("QMC"), which operates as the New York branch office of FINRA firm, Petersen Investments, Inc. ("Petersen Investments"). It is the scope of Giblen's employment with QMC that is the subject of this appeal.

B. Giblen Joins QMC

In the summer of 2009, Giblen was searching for employment. He approached Alexander Quint, an individual that he had worked with at another FINRA firm, about joining Quint's firm, QMC. When Giblen spoke to Quint about the employment opportunity at QMC, Giblen asked whether QMC would hire him as a research analyst. Quint contacted Petersen Investments' Chief Compliance Officer, Barbara Vilella, about the prospect of hiring Giblen. Vilella told Quint that Petersen Investments' membership agreement with FINRA did not permit the firm to conduct research, and that Giblen could not be hired as a research analyst.³ Vilella stressed that, if Quint decided to hire Giblen, he must hire him only as a registered representative. Quint told Giblen about his conversation with Vilella, but noted that it may be possible for Giblen to work at QMC as a research analyst if the firm sought and obtained FINRA's authorization to conduct research.⁴ Quint testified that he told Giblen that the likelihood of QMC seeking or obtaining FINRA's permission to engage in research was "extremely remote."

² Giblen registered as a research analyst in 2005, after FINRA began requiring analysts to register through a qualification examination.

³ During the summer of 2009, QMC had about 12 registered representatives. QMC's business focused on providing investment services to high-net-worth individuals and selling retirement plans to corporate accounts.

⁴ The record contains an unsigned letter, dated July 8, 2008, that sets forth the terms of employment between Giblen and QMC. The letter states that Giblen's title at the time of hiring would be "Managing Director," and that Giblen would occupy the position of "Director of Research," if QMC established a research department. The letter, however, emphasizes, "[c]urrently, there is no Research Department. This will be subject to the legal ability and appropriateness to bestow this title. In the event this is not possible, a suitable alternative will be determined, i.e., 'Executive Director'."

After his conversations with Vilella and Giblen, Quint informed Vilella that he wanted to proceed with the hiring of Giblen as a registered representative.⁵ As part of the hiring process, Vilella reviewed Giblen's background and noted that Giblen had settled a FINRA disciplinary action in June 2008.⁶ Vilella reported her findings to Petersen Investments' Chairman and CEO, Bertram Riley, Sr., but recommended that the firm proceed with an offer of employment because Giblen's disciplinary event was "isolated" and related to activities that Giblen would not be performing at QMC, i.e., activities performed as a research analyst.

In July 2009, Vilella advised Quint that Riley approved Giblen's hiring. Vilella, however, emphasized that Giblen's employment with QMC was contingent upon the fact that "he [Giblen] is aware he is not functioning in any research capacity." Giblen registered with Petersen Investments as a general securities representative and principal in August 2009. Giblen's designated supervisor, Anthony DiPalma, was an employee of Petersen Investments who operated from another branch. Quint was responsible for Giblen's on-site supervision and day-to-day activities. QMC compensated Giblen by paying him commissions based on his sales of securities.

C. Giblen Writes a Report for PSI Corporation, and PSI Corporation Pays Giblen \$6,000

In the summer of 2010, Giblen asked Quint to join him in a meeting with a potential investment banking customer, PSI Corporation.⁷ Quint agreed, and on June 3, 2010, Giblen, Quint, and another employee of Petersen Investments named Charles Hansel met at QMC's offices with Eric Kash, PSI Corporation's CEO. At the first meeting, which lasted about 10 minutes, Kash described PSI Corporation's business model and asked whether QMC could assist PSI Corporation with a private placement offering. Quint responded that QMC did not handle private placements, and that QMC was not in a position to assist PSI Corporation with its capital-raising efforts. A second meeting of QMC's and PSI Corporation's representatives occurred on July 27, 2010. The meeting took place in QMC's offices. Giblen, Quint, Hansel, and Kash

⁵ Quint testified that he decided to hire Giblen because his work as a research analyst in the consumer and retail sectors had provided him with extensive contacts and knowledge in those markets. Quint planned to utilize Giblen's contacts and experience to generate sales of consumer and retail stocks among QMC's institutional customers and attract additional corporate benefits business to the firm.

⁶ In December 2007, FINRA initiated a disciplinary action against Giblen, alleging that he had violated FINRA's rules concerning certain restrictions on a research analyst's personal trading activities. *See* NASD Rule 2711(g)(3) (Restrictions on Personal Trading by Research Analysts). FINRA alleged that, while Giblen was employed and registered as a research analyst with a FINRA firm, he purchased options on a company in a manner that was inconsistent with his most recent research report on that company. Specifically, FINRA alleged that Giblen purchased options that reflected a negative short-term view of the company, inconsistent with his then-current recommendation to "accumulate" the company's shares. In June 2008, Giblen settled the matter and consented to a suspension of seven business days.

⁷ PSI Corporation places and manages coupon dispensers at supermarkets.

attended the meeting. The agenda for the second meeting was similar to the earlier one, so Quint attended the meeting for the first few minutes, then left.

According to Giblen and Kash, a third meeting took place at QMC's offices in September or October 2010. Giblen testified, and Kash declared, that Quint attended this meeting, and that the topic of the meeting turned from whether QMC could assist PSI Corporation with capital-raising to whether Giblen could engage in a consulting project for PSI Corporation. Kash declared, and Giblen affirmed, that Quint suggested that Giblen provide PSI Corporation with "internal investor relations consulting . . . as an outside activity, with the compensation going to [Giblen] directly." Kash stated that Quint made the recommendation because he "wanted to help [Giblen] utilize his background to earn money." Kash also noted that the "group," Giblen, Quint, and Kash, discussed an "internal-use consulting fee" of \$5,000 to \$10,000, but ultimately settled on \$6,000 as Giblen's payment for the project. Contrary to Giblen's and Kash's versions of this meeting, however, Quint testified that he did not attend the "third meeting."⁸

Giblen began working on the consulting project in October 2010, and completed the project by producing a nine-page written report (the "Report") in November 2010. The cover page of the Report reads, "ANALYSIS OF PSI CORP. by Gary M. Giblen." The following page of the Report is Giblen's biography. The biography identifies Giblen as an "Executive Vice President/Senior Analyst" and "a seasoned top-ranked analyst," lists the awards that Giblen received as a research analyst, and details his experience in "senior analyst and research management positions" at various FINRA firms.⁹

The remainder of the Report contains an analysis of PSI Corporation and explains why Giblen recommends the purchase of PSI Corporation's stock. The Report describes PSI Corporation's business model and notes that the company "is being strongly embraced by retailers and [consumer goods product marketers] at a rapid rate." The Report summarizes Giblen's methodology to arrive at his "target purchase price" of \$6.00 per share.¹⁰ The Report also projects that PSI Corporation's net income will increase from \$8.22 million in 2011 to \$102.13 million in 2013, and concludes that PSI Corporation has "[t]he potential to achieve big success and dramatic share appreciation." Finally, the Report stresses that Giblen's purchase recommendation and analysis are based on his unbiased view of the company, and not PSI Corporation's payment for his consulting services. The Report states,

⁸ Hansel testified that he could not recall whether he attended a third meeting with Giblen and Kash in September or October 2010.

⁹ The Report did not mention Giblen's registration with QMC or Petersen Investments.

¹⁰ When Giblen prepared the report, PSI Corporation was trading at \$0.05 per share.

While we do not normally cover sub-\$5 microcaps, the business model and appreciation potential are compelling enough in this case to command our attention. While full disclosure is that PSI chose to pay for our research, this is because our 22 years of analyst experience and prior years in CEO- and Board-level strategy consulting, focused in the food/drug/mass retailing and consumer products sectors, enable us to see the merits of PSI [Corporation's] emerging story. Our conclusions on PSI are purely our own and rigorously based on independent analysis.

PSI Corporation posted Giblen's Report to its website on November 23, 2010. Giblen requested that the company remove the Report, after he learned that FINRA had initiated an investigation of this matter. The Report was posted on PSI Corporation's website for approximately 10 days.

II. Procedural Background

FINRA's Department of Enforcement ("Enforcement") initiated an investigation of this matter after receiving a customer complaint concerning an investment in PSI Corporation's stock. During the course of the investigation, a FINRA examiner visited PSI Corporation's website and discovered the Report, noting that it had been prepared by Giblen who was then registered with Petersen Investments. The examiner contacted Giblen and Petersen Investments' Chief Compliance Officer, Vilella, as part of the investigation of the customer's complaint. Specifically, the examiner asked Giblen and the firm to provide FINRA with information concerning Giblen's preparation of the Report. After receiving the information and documents, Enforcement filed a one-cause complaint against Giblen in December 2012, alleging that Giblen failed to disclose an outside business activity to his firm.

A two-day hearing took place in New York in June 2013. Five witnesses testified at the hearing.¹¹ The Hearing Panel issued its amended decision in September 2013,¹² finding that Giblen violated FINRA's rules as alleged in the complaint. The Hearing Panel suspended Giblen in all capacities for four months for the violation. This appeal followed.

III. Discussion

A. NASD Rule 3030

NASD Rule 3030 prohibits associated persons from engaging in "any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt

¹¹ Giblen, Quint, Hansel, Vilella, and the FINRA examiner testified at the hearing. Kash's account of the meetings at QMC was entered into the record through his submission of a two-page written statement to the FINRA examiner.

¹² The Hearing Panel issued an amended decision to correct the dates of Giblen's suspension.

written notice to the member.”¹³ The purpose of NASD Rule 3030 is to ensure that firms “receive prompt notification of all outside business activities of their associated persons so that the member’s objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.” *Dep’t of Enforcement v. Houston*, Complaint No. 2006005318801, 2013 FINRA Discip. LEXIS 3, at *32 (FINRA NAC Feb. 22, 2013) (quoting *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26063, 1988 SEC LEXIS 1841, at *3 (Sept. 6, 1988)), *aff’d*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *1 (Feb. 20, 2014).

B. Giblen Engaged in Outside Business Activities Without Providing His Firm with Written Notice of the Activities

Giblen concedes many of the facts necessary to establish a violation of NASD Rule 3030. Giblen admits that he completed the consulting project for PSI Corporation, he received compensation from PSI Corporation for the project, and he failed to provide QMC or Petersen Investments with written notice of the project. On appeal, Giblen argues that he did not violate NASD Rule 3030 because the consulting project fell within the scope of his employment with QMC, and Quint had constructive notice of his activities with PSI Corporation. The record, however, belies each of these points.

1. Giblen’s Project with PSI Corporation Was Not Within the Scope of His Employment with QMC

Giblen argues that his consulting project with PSI Corporation and drafting of the Report were within the scope of his employment with QMC. That is simply not the case. It was PSI Corporation, not QMC or Petersen Investments, that paid Giblen for the consulting project and Report. Giblen communicated directly with Kash and PSI Corporation about the consulting project and Report.¹⁴ Giblen also presented his findings and Report to PSI Corporation, not Petersen Investments. As Giblen acknowledged at his on-the-record testimony in May 2011, “It was not a [QMC] thing. It was a separate – It was a personal consulting assignment”

Although Quint envisioned Giblen functioning as a research analyst if QMC developed a research department, Giblen knew that the firm did not have the current supervisory capabilities

¹³ A violation of NASD Rule 3030 constitutes conduct inconsistent with just and equitable principles of trade and violates FINRA Rule 2010. *See Dep’t of Enforcement v. Moore*, Complaint No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at *25 n.19 (FINRA NAC July 26, 2012). FINRA Rule 2010 states, “[A] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.” Associated persons are subject to the duties and obligations of FINRA Rule 2010 pursuant to FINRA Rule 0140.

¹⁴ The electronic communications contained in the record are between Giblen and Kash only, and were sent from, or received in, Giblen’s personal email account. Giblen testified that Quint instructed him to handle communications with Kash and PSI Corporation in this manner. The Hearing Panel, however, found that Giblen was not credible. *See infra* note 16.

or regulatory approval to maintain a research department or permit Giblen to function as a research analyst. Indeed, QMC and Petersen Investments repeatedly informed Giblen that, if he were hired, it would be as a general securities representative, not as a research analyst. When Giblen contacted Quint about the employment opportunity and asked whether he could join QMC as a research analyst, Quint spoke to Vilella and told Giblen that the answer was “no.” When questions about Giblen’s disciplinary history arose during the hiring process, Riley, Petersen Investments’ CEO, told Vilella that Quint could hire Giblen, but only if Giblen did not act in the capacity that gave rise to the disciplinary event, i.e., as a research analyst. When QMC hired Giblen in August 2009, Petersen Investments chose not to continue Giblen’s research analyst registrations, opting, instead, to register Giblen as a general securities representative and principal.¹⁵ Finally, when Giblen began his employment with QMC, Vilella held a conference call with Giblen and Quint and reiterated, among other things, that Giblen would not be permitted to function as a research analyst at the firm. As Quint testified at the hearing, “[t]here was absolutely no ambiguity about this whatsoever.”¹⁶

2. NASD Rule 3030 Requires Prompt Written Notice

Giblen also argues that Quint and QMC had constructive notice of his activities with PSI Corporation because Quint attended the meetings with Giblen and Kash, and Quint recommended that Giblen complete the consulting project on behalf of PSI Corporation. As an initial matter, even if Giblen provided constructive notice to Quint, that does not satisfy the requirements of NASD Rule 3030. NASD Rule 3030 requires actual, written notice of an associated person’s outside business activities, and the record demonstrates that Giblen did not provide the requisite written notice in this case. Moreover, the record establishes that Giblen did not provide constructive notice. The Hearing Panel found that Quint credibly testified that he

¹⁵ Charles Hansel, Giblen’s colleague at QMC, sent emails to potential customers, touting Giblen’s experience as a research analyst as an asset to review institutional customers’ securities holdings. Giblen states that these emails altered the scope of his employment with QMC. Neither Hansel’s emails, nor any other communications by Giblen or any other QMC employee, operated to change the scope of Giblen’s employment with the firm. The scope and terms of Giblen’s employment with QMC were precisely defined by agreement and the individuals responsible for Giblen’s hiring – Alexander Quint and Bertram Riley. *See generally supra* note 4.

¹⁶ Giblen suggests that we disregard Quint’s testimony concerning the scope of Giblen’s employment with QMC, in favor of Giblen’s own testimony and Kash’s written statement about Giblen’s work on the consulting project and Report. The Hearing Panel credited Quint’s testimony and determined that Giblen’s testimony and Kash’s written statement were not credible. The documentary evidence in the record reinforces the Hearing Panel’s credibility findings concerning Quint’s testimony, and we find that there is no basis to overturn the Hearing Panel’s credibility determinations in this case. *See Dep’t of Enforcement v. Davidofsky*, Complaint No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *22 (FINRA NAC April 26, 2013) (“[C]redibility determinations of an initial fact-finder, which are based on hearing the witnesses’ testimony and observing their demeanor, are entitled to considerable weight and deference and can be overcome only where the record contains substantial evidence for doing so.”).

had no notice of Giblen's work for PSI Corporation, and there is no evidence to overturn the Hearing Panel's credibility determination.¹⁷ See *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *22. We therefore conclude that Giblen engaged in undisclosed outside business activities, in violation of NASD Rule 3030 and FINRA Rule 2010.

C. Giblen's Procedural Arguments Have No Merit

Giblen raises several procedural arguments in this appeal. Each of Giblen's procedural arguments fails to absolve him of liability for his violation of NASD Rule 3030.

1. The Hearing Panelist Was Not "Prejudiced" Against Giblen's Witness

Giblen suggests that the Hearing Panel's decision must be reversed, and the case dismissed, because one of the Hearing Panelists "was prejudiced by private prior acquaintance with respondent's pivotal witness." Giblen's argument is without merit.

On the first day of the hearing, the Hearing Panel heard testimony from Charles Hansel. The following day, the Hearing Officer presiding over the hearing informed the parties that one of the Hearing Panelists realized, after Hansel had testified, that he had met Hansel 15 years earlier and had engaged in a 10-minute conversation with Hansel on a street in New York City.¹⁸ The Hearing Panelist stated that he had no further contact with Hansel since that brief encounter, and that he was "confident" that the meeting would not affect his ability to assess Hansel's testimony and credibility. The Hearing Officer invited the parties to ask the Hearing Panelist questions about the meeting, and Giblen asked one question, "What was your impression of [Hansel] from your meeting ten [sic] years ago?" The Hearing Panelist responded,

¹⁷ Even if Giblen had provided Quint with written notice about the outside activities – which he did not – that would not have satisfied his obligations under NASD Rule 3030. Although Quint was a principal and supervisor at QMC, he was not the individual at QMC or Petersen Investments who was responsible for the approval of outside business activities. According to Petersen Investments' Written Supervisory Procedures, the firm's Chairman and CEO, Bertram Riley, Sr., approved a registered representative's outside activities. As a general policy, Petersen Investments did not permit its employees to engage in outside business activities and prohibited its registered representatives from "holding any outside position, including that of an officer, director, or employee." If a representative wanted to engage in outside business activities, however, the representative had to obtain Petersen Investments' and Riley's approval by submitting a written request to Villella who would review the information and bring the request to Riley's attention.

¹⁸ The Hearing Panelist was talking to a potential customer on the street when Hansel approached. Hansel knew the potential customer and approached to greet him. The potential customer introduced Hansel to the Hearing Panelist.

I really didn't have an impression. I didn't stay with him long enough. It was just another person my client introduced me to. We never had any in-depth conversations, never had any business dealings. It was that meeting and that was it. So, I had no preconceived notion of him, at the time or now.

The Hearing Officer then asked the parties whether they objected to the Hearing Panelist's participation in the hearing, and Giblen and Enforcement each responded, "no."

On appeal, Giblen states that the Hearing Panel ignored Hansel's testimony and displayed an "*ad hominem* prejudice against Hansel's credibility."¹⁹ Giblen, however, has expressly waived any argument that he may have concerning the Hearing Panel's or Hearing Panelist's bias. Giblen was afforded the opportunity to file a motion to disqualify the Hearing Panelist and object to the Hearing Panelist's participation in the hearing, but he failed to do so.²⁰ Instead, Giblen affirmatively chose to proceed with the hearing before the Hearing Panel and belatedly raised his objection in this appeal proceeding. Giblen has waived his right to object to the Hearing Panelist's participation in the proceedings below. *Cf. J.W. Barclay & Co.*, Initial Decisions No. 239, 2003 SEC LEXIS 2529, at *86 (Oct. 23, 2003) (finding that respondents waived their right to object to an expert's testimony where they failed to challenge that testimony during the course of the proceedings).

The record in this case also does not provide any support for Giblen's argument that the Hearing Panelist was biased against him or Hansel. To the contrary, the evidence demonstrates that the Hearing Panelist formulated his opinion based on the record before him, and that he imposed liability against Giblen based on the evidence. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *62 (Jan. 30, 2009) ("[B]ias by a hearing officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case."), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Robert Fitzpatrick*, 55 S.E.C. 419, 431-32 (2001).

Finally, to the extent that any bias may have occurred, the NAC's de novo review of this case ensures that the overall disciplinary proceeding conducted against Giblen was fair and without bias. *See Dep't of Enforcement v. Dunbar*, Complaint No. C07050050, 2008 FINRA Discip. LEXIS 18, at *33 (FINRA NAC May 20, 2008) (holding that the NAC's de novo review cures alleged Hearing Panel prejudice).²¹

¹⁹ It is unclear how Hansel's testimony supports Giblen. Hansel testified that he, Giblen, and Quint attended at least two meetings with Kash, Quint attended "most" of the meetings, and the meetings concerned PSI Corporation's efforts to raise capital. Hansel did not know whether Quint played any role in Giblen's completion of the consulting project and Report for PSI Corporation, and he could not recall whether he had attended a meeting in which Quint suggested that Giblen complete work for PSI Corporation as an outside business activity.

²⁰ *See* FINRA Rule 9234(b) (explaining that a party may file a motion to disqualify a Hearing Panelist based on a "reasonable, good faith belief" that bias exists).

²¹ Giblen claims that the Hearing Officer had been at FINRA for less than 12 months when she presided over the case, and that her "inexperience" led to her mishandling of the matter. The

2. Enforcement Did Not Commit the Errors Claimed by Giblen

Giblen also suggests that Enforcement committed errors that impaired his rights.²² Specifically, Giblen states that Enforcement misrepresented its attorney staffing of the case, in violation of Federal Rule of Civil Procedure 16(e), and failed to inform him that they intended to use his disciplinary history against him, in violation of FINRA Rule 9241(a). Giblen's claims are baseless.

As an initial matter, Federal Rule of Civil Procedure 16(e) does not apply to FINRA disciplinary proceedings. *See Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *29 (May 4, 2007) ("Federal Rules of Civil Procedure do not apply to NASD procedures."). Even if it did, the rule only provides that final pretrial conferences "must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party." Giblen argues that Enforcement did not comply with the rule, but the argument is without merit. Two of the attorneys that represented Enforcement at the hearing attended the final pretrial conference.

Giblen's arguments concerning FINRA Rule 9241(a) similarly fail. FINRA Rule 9241(a) states that the purpose of a prehearing conference is to expedite the disposition of the proceeding, establish procedures to manage the proceeding efficiently, and improve the quality of the hearing through more thorough preparation. FINRA Rule 9241 does not even discuss Enforcement's use of disciplinary history against a respondent and imposes no affirmative obligation on Enforcement to raise the subject of a respondent's disciplinary history, or any other subject, during a prehearing conference.²³ Nothing in the record before us suggests that the goals of FINRA 9241(a) were not satisfied here.²⁴

[Cont'd]

record, however, demonstrates that the Hearing Officer conducted the proceeding in a competent, fair, and impartial manner, and there is no evidence in the record to support Giblen's claim. In addition, as explained above, "our de novo review of this case cures whatever procedural error existed below, if any." *Dep't of Mkt. Regulation v. Lane*, Complaint No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *79 (FINRA NAC Dec. 26, 2013), *appeal docketed*, SEC Admin. Proceeding No. 3-15701 (Jan. 22, 2014).

²² Giblen also sets out, without any explanation, 19 exceptions to the Hearing Panel's decision. Several of the exceptions that Giblen highlights in the Hearing Panel's decision quibble with the Hearing Panel's findings concerning the scope of his employment with QMC. Others are unfounded and unsupported assertions. As we reviewed Giblen's 19 exceptions, we determined that our findings of liability in this matter deemed the majority of them moot, and that the remaining exceptions are irrelevant to the misconduct alleged in the complaint.

²³ We also note that, prior to the hearing, Enforcement provided Giblen with exhibits, including Giblen's Composite Information Report in the Central Registration Depository ("CRD"®), that showed his disciplinary history.

²⁴ On appeal, Giblen sought to introduce two documents as new, additional evidence – a letter that Giblen had sent to FINRA's Executive Vice President of Enforcement and the

IV. Sanctions

For engaging in undisclosed outside business activities, the Sanction Guidelines (“Guidelines”) recommend a fine of \$2,500 to \$50,000.²⁵ The Guidelines also recommend a suspension of up to 30 business days, when the outside business activities do not include aggravating conduct.²⁶ Where there is aggravating conduct, however, the Guidelines suggest a suspension of up to one year.²⁷ In egregious cases, such as those involving a substantial volume of activity, the Guidelines recommend a longer suspension, or a bar.²⁸

In assessing sanctions for cases involving undisclosed outside business activities, the Guidelines advise adjudicators to consider: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to customers of the firm; (3) the duration of the outside activity, the number of customers, and the dollar volume of sales; (4) whether the respondent’s marketing and sale of the product or service could have created the impression that the firm had approved the product or service; and (5) whether the respondent misled the firm about the existence of the outside activity or otherwise concealed the activity from the firm.²⁹ As we review the record in this case, we find that Giblen’s misconduct is accompanied by evidence of aggravating and mitigating circumstances.

[Cont’d]

LinkedIn™ profile of the Hearing Officer. *See* FINRA Rule 9346(b) (explaining that leave to introduce new evidence on appeal may be granted if a party demonstrates that the evidence is material and there was good cause for failing to introduce the evidence previously). Giblen argued that the letter to Enforcement’s Executive Vice President of Enforcement demonstrated that Enforcement committed the errors discussed earlier in this decision, and the LinkedIn™ profile demonstrated that the Hearing Officer was inexperienced. We have reviewed Giblen’s “new” evidence, and we find that it is cumulative and immaterial, and that Giblen did not demonstrate good cause for failing to introduce the evidence in the proceedings below.

²⁵ *See FINRA Sanction Guidelines* 13 (2013) (Outside Business Activities), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*]. In assessing sanctions, we apply the applicable Guidelines in place at the time of this decision and consider the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions, which adjudicators consult in every disciplinary case. *See id.* at 2-7, 8.

²⁶ *See id.* at 13.

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.* (Principal Considerations in Determining Sanctions).

NASD Rule 3030 prevents harm to the investing public, and to FINRA firms, by allowing FINRA firms to monitor their registered representatives' outside business activities.³⁰ When adhered to, NASD Rule 3030 is prophylactic and allows FINRA firms to oversee their employees' outside business activities, or to prohibit the activities altogether. Giblen's undisclosed outside business activities circumvented NASD Rule 3030's prophylactic measures and prevented the rule's proper functioning in this case.

Giblen also has a relevant disciplinary history.³¹ In June 2008, Giblen consented to findings that he violated the express prohibitions of NASD Rule 2711 by purchasing options on a company in a manner that was inconsistent with his most recent research report on that company.³² Giblen consented to a seven-business-day suspension for the violation. Giblen's disciplinary history is an aggravating factor.

Finally, the record demonstrates that Giblen intentionally engaged in the outside business activities, and did so for his own monetary gain.³³ By the time Giblen joined QMC and Petersen Investments as a registered representative and principal, Giblen had more than 20 years of experience in the securities industry.³⁴ Indeed, when Giblen engaged in the consulting project, drafted the Report, and accepted payment for his services, he knew what NASD Rule 3030 required of him. NASD Rule 3030 itself informed Giblen of his reporting requirements under the rule. Giblen had read Petersen Investments' Written Supervisory Procedures "with reasonable care," signed annual certifications in November 2009 and October 2010, respectively, reiterating FINRA's rules and Petersen Investments' prohibition on "any and all outside business activities without specific written approval of Senior Management," and asserted on those certifications that he had no outside business activities.³⁵ Giblen also previously had notified

³⁰ See *Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons*, 1988 SEC LEXIS 1841, at *1 (explaining that proper disclosure of an associated person's outside business activities may prevent a FINRA firm's entanglement in legal difficulties).

³¹ *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2) (explaining that sanctions should be more severe for recidivists), 6 (Principal Considerations in Determining Sanctions, No. 1).

³² Giblen violated NASD Rule 2711(g)(3), which states, "No research analyst account may purchase or sell any security or any option on or derivative of such security in a manner inconsistent with the research analyst's recommendation as reflected in the most recent research report published by the member."

³³ See *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 13, 17) (considering whether respondent's misconduct was intentional or resulted in his monetary gain).

³⁴ See *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 (Nov. 8, 2006) (considering respondent's securities industry experience in determining sanctions).

³⁵ Giblen's failure to disclose his outside business activities on Petersen Investments' compliance forms is tantamount to concealment of the activities from the firm. See *Guidelines*,

Petersen Investments of his involvement in an outside business activity when he disclosed that he worked 30 minutes per month as a magazine columnist. Despite the many guideposts advising Giblen to disclose his outside business activities and his understanding of his compliance obligations, Giblen engaged in the outside business activities, and accepted \$6,000 for the activities, but failed to notify QMC or Petersen Investments that he was providing consulting services to PSI Corporation. As Giblen stated at the hearing, had he disclosed his work with PSI Corporation to QMC or Petersen Investments, he would have been instantly fired. The intentional and self-serving nature of Giblen's misconduct is an aggravating factor.

Although we are troubled with the evidence of aggravating circumstances surrounding Giblen's misconduct in this case, we are nevertheless mindful that our sanctions should be balanced, and we look to the record for evidence of mitigating circumstances.³⁶ Specifically, we note that Giblen's activities did not involve customers of QMC or Petersen Investments, and we find that Giblen's misconduct did not result in direct or indirect injury to customers of the firms.³⁷ In so finding, we stress that the Report did not mention that Giblen had any association with QMC or Petersen Investments.

We also highlight the fact that Giblen's outside business activities were of a relatively short duration, approximately eight weeks from when he began the consulting project to when Giblen, at FINRA's prompting, had PSI Corporation remove the Report from its website.³⁸ It is also unlikely, based on the circumstances presented here, that Giblen's preparation of the Report could have created the impression that QMC or Petersen Investments had approved the consulting project or Report, particularly as we acknowledge that the firms did not have research

[Cont'd]

at 13 (Principal Considerations in Determining Sanctions, No. 5) (considering whether the respondent concealed his outside business activities from the firm).

³⁶ Giblen asks us to consider the sanctions imposed in adjudicated and settled FINRA matters to inform our determination of sanctions in this case. It is well settled, however, that the "appropriate sanction[s] [in a FINRA disciplinary proceeding] depend on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the action taken in other proceedings." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *30-31 (Apr. 11, 2008).

³⁷ See *Guidelines*, at 13 (Principal Considerations in Determining Sanctions, Nos. 1, 2) (considering whether the outside business activities involved customers of the firm or resulted in injury to the firm's customers). There is no evidence in the record to support that the individual who filed the customer complaint with FINRA about PSI Corporation was a customer of QMC or Petersen Investments.

³⁸ See *Guidelines*, at 13 (Principal Considerations in Determining Sanctions, No. 3) (considering the duration of the outside business activities).

departments, the Report did not mention the firms, and the Report did not disclose Giblen's affiliation with the firms.³⁹

As we consider the appropriate sanctions for Giblen's misconduct in this case, we note that the Guidelines concerning outside business activities recommend a suspension of up to one year where the misconduct is accompanied by aggravating circumstances.⁴⁰ Our review of the evidence suggests that a suspension at the lower end of this recommended range is appropriate. Consequently, we have decided to affirm the sanctions that the Hearing Panel imposed and suspend Giblen in all capacities for four months.

V. Conclusion

Accordingly, Giblen engaged in undisclosed outside business activities, in violation of NASD Rule 3030 and FINRA Rule 2010. For this misconduct, we suspend him in all capacities for four months. We affirm the Hearing Panel's order for Giblen to pay costs of \$4,679.50, and we impose appeal costs of \$1,644.54.⁴¹

On behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

³⁹ See *id.* (Principal Considerations in Determining Sanctions, No. 4) (considering whether the outside business activities could have created the impression that the firm had sanctioned the activities).

⁴⁰ See *id.*

⁴¹ Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.