FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. GARY MARK GIBLEN (CRD No. 1819311), Respondent.	Disciplinary Proceeding No. 2011025957702 Hearing Officer – RLP **AMENDED[1] HEARING PANEL DECISION** September 17, 2013

For violating NASD Conduct Rule 3030 and FINRA Rule 2010, by engaging in an outside business activity without providing prompt written notice to his firm, Respondent is suspended from associating in any capacity with any FINRA-registered firm for four months. Respondent is also ordered to pay costs.

Appearances

Jessica Dennehy, Esq., and Vaishali Shetty, Esq., Jericho, NY, for the Department of Enforcement.

Gary M. Giblen, *pro se*.

DECISION

I. Introduction

Concerns raised by the posting of a research report for PSI Corporation ("PSI Report" or "Report") on PSI's website led FINRA staff to investigate and, ultimately, initiate this disciplinary proceeding against the Report's author, Respondent Gary M. Giblen. The complaint filed December 14, 2012, by FINRA's Department of Enforcement ("Enforcement"), charged Giblen with violating NASD Conduct Rule 3030 and FINRA Rule 2010 by accepting

[1] This amended decision is issued to correct the end date of Respondent's suspension.

compensation from PSI Corporation for writing the Report.[2] The complaint alleged that, although formulating the Report was outside the scope of his relationship with his firm, Petersen Investments, Giblen failed to notify the firm in writing as required by Rule 3030 or seek prior approval from the firm as required by the firm's procedures. Giblen filed an answer on February 15, 2013, denying the bulk of the allegations in the complaint.

After a two-day hearing,[3] the Hearing Panel finds that Giblen violated NASD Conduct Rule 3030 and FINRA Rule 2010 and concludes that a suspension of four months appropriately remedies his violations.

II. Findings of Fact

A. In August 2009, Giblen Joins Petersen as a General Securities Representative and Not as a Research Analyst.

Giblen entered the securities industry in 1988 and became registered as a General Securities Representative with FINRA in 1996. As the years progressed, Giblen acquired extensive experience as a research analyst, first registering with FINRA in that capacity in 2005.[4] Thereafter, he held senior analyst and research management positions, including director of research, at several firms. According to his resume and biography, Giblen has a special expertise in the consumer and retailing sectors.[5]

In the summer of 2009, Giblen joined a Petersen branch in New York, New York that did business as Quint, Miller & Co. Alexander Quint was one of the business' founders and

[2] Although Giblen is not currently registered with any FINRA member firm, FINRA has jurisdiction over this proceeding because the complaint was filed within two years of the termination of his registration with his last employer firm and the complaint charges Giblen with misconduct committed while he was registered with a FINRA member.

[3] The hearing was held in New York, New York on June 27 and 28, 2013.

[4] Complainant's Exhibit ("CX")-1, at 3-4, 6-8, 10; *see* Hearing Transcript ("Tr.") 32-35 (Gerena).

[5] CX-3, at 2; CX-7, at 3.

principals.[6] The office worked with high net-worth clients and with companies seeking assistance with the administration of 401(k) plans. Giblen was hired to share his insights into consumer and retailing stocks with institutional clients in order to generate sales, and to use his existing relationships with managers of companies to help attract corporate benefits business.[7] As a general securities representative, he was to be paid commissions on the sales he generated.[8] His designated supervisor was Anthony DiPalma, a Petersen employee who operated from another branch. Quint was responsible for on-site supervision of Giblen's day-to-day activities.[9]

Although Quint envisioned Giblen functioning as a research analyst if Petersen grew to have a research department,[10] Giblen was aware that he would not be writing research reports for Petersen in the near term. First, as Giblen knew, the firm could not support research analysts. It lacked the supervisory capabilities and the regulatory approvals required to maintain a research department.[11] It did not and could not offer research services consistent with FINRA rules, and it was not contemplating seeking approval to do so.[12]

Second, as Giblen was repeatedly informed, his employment was dependent on the fact that he would not be working as a research analyst. Petersen's Chairman and CEO, Bertram J. Riley, Sr., not Quint, was the person responsible for deciding whether Giblen would be hired and

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[6] Tr. 53 (Gerena), 108-109 (Villella), 212-213, 217 (Quint); CX-1, at 5; CX-14, at 2 (Giblen on-the-record testimony).

[7] Tr. 55-56 (Gerena), 219 (Quint), 399 (Giblen); CX-9; CX-14, at 5-8.

[8] Tr. 111 (Villella), 221, 226 (Quint).

[9] Tr. 174, 183-184 (Villella), 213 (Quint).

[10] Tr. 116-117, 161 (Villella), 218-219 (Quint). A draft employment agreement between Giblen and Quint contemplated that in the future Giblen might function as director of analysis. Respondent's Exhibit ("RX")-2, at 2. But, when Quint asked if Giblen could have that title, the firm's CCO said "no." Tr. 160 (Villella). Similarly, although one of Giblen's colleagues, Charles Hansel, proposed an institutional sales/marketing platform for Quint Miller with Giblen as "Director, Research," there is no evidence that the proposal was accepted or implemented. *See* RX-22; Tr. 261-262, 289-290, 294-296 (Hansel).

[11] Tr. 44 (Gerena), 112, 116 (Villella), 218, 245 (Quint), 399 (Giblen); CX-14, at 6, 55.

[12] Tr. 116 (Villella).

on what terms and conditions.[13] Recounting her pre-hire review of Giblen's CRD information, Bonnie Villella, Petersen's Chief Compliance Officer ("CCO"), informed Riley that, in 2007, Giblen, then a registered research analyst, had been disciplined for purchasing a company's put options at the same time as he had recommended that potential purchasers "accumulate" the company's securities—a violation of NASD Rule 2711.[14] Villella recommended, nevertheless, that Petersen proceed with an offer of employment, "as Mr. Giblen will not be performing in a Research Analyst capacity . . . ."[15] Riley agreed. Thereafter, Villella emailed Quint, informing him that Riley had approved Giblen's employment "provided that [Giblen] is aware he is not functioning in any research capacity."[16] Villella followed up by, among other things, participating in a conference call with Quint and Giblen in which she reiterated that Giblen was not hired to function as a research analyst.[17] Quint too discussed this limitation with Giblen and, according to Quint, "there was absolutely no ambiguity" about it.[18]

Third, his Uniform Application for Securities Industry Registration or Transfer (Form U4) filings indicated that Giblen would not function in a research analyst capacity at Petersen. Consistent with Giblen's employment as a general securities representative and not as a research analyst, Villella did not continue Giblen's Series 86 and 87 registrations as a research analyst when she made the initial Form U4 filing with FINRA on Giblen's behalf.[19] Giblen registered

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[13] Tr. 105, 110-115, 181 (Villella), 217-218 (Quint); *see* CX-7; CX-26.

[14] Tr. 104, 113-115 (Villella); CX-7, at 1-2; *see* Tr. 396-398 (Giblen); CX-1, at 17.

[15] CX-7, at 2; *see* Tr. 115 (Villella).

[16] CX-26; Tr. 117-118 (Villella), 222 (Quint).

[17] Tr. 117 (Villella).

[18] Tr. 252 (Quint), 54 (Gerena), 112 (Villella), 217-218, 222 (Quint); CX-8; CX-18, at 16 (Quint on-the-record testimony).

[19] CX-1, at 31; Tr. 45 (Gerena), 122 (Villella), 399 (Giblen).

only as a general securities representative and a general securities principal.[20] His registrations remained the same throughout his time at Petersen.[21]

Giblen understood the limitations on the scope of his employment. In a December 2010 letter, for example, he described his job as providing to institutional clients his perspectives on stocks in the consumer/retail sector and leveraging his relationships with company managements to bring business to the firm.[22] He made no mention of functioning as a research analyst. Similarly, during his May 24, 2011 on-the-record testimony ("OTR"), when asked what his job duties and responsibilities were at Petersen, Giblen stated: "[T]hey just thought that I had good insight on consumer/retailing stocks. So . . . it was not research. They didn't have FINRA research clearance. It was perfectly clear. That was fine."[23]

The Hearing Panel credits Giblen's 2010 letter and 2011 testimony about his job duties and rejects his more recent statements, made in the course of these proceedings, that he was hired to perform research analyst duties. The Hearing Panel does so because Giblen's earlier descriptions of his duties are consistent with other evidence about his relationship with Petersen—including the Villella email and pre-hire review memorandum, Giblen's Forms U4, and the testimony of Quint and Villella. Additionally, as we explain in more detail below, Giblen has engaged in a pattern of changing his accounts of matters pivotal to the resolution of this proceeding, including his account of the nature of his employment. These shifting and often contradictory positions establish a pattern of deceit that seriously undermines Giblen's credibility.

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[20] CX-1, at 5, 30-32; Tr. 34, 38 (Gerena), 115, 121 (Villella), 399 (Giblen).

[21] During Giblen's association with Petersen, his U4 was amended twice. Neither of these amendments changed Giblen's registrations. CX-24, at 2-4; CX-25, at 2-4; Tr. 39-41 (Gerena), 124-126 (Villella). Although Giblen was registered as a general securities principal with Petersen, he did not function as such. Tr. 121-122 (Villella).

[22] CX-9.

[23] CX-14, at 6.

The restrictions on the scope of his employment did not bar Giblen from relying on his experience in assessing companies and reviewing their performance with customers. Instead, the record reflects that he, like other persons engaged in institutional sales, provided clients with insights into stocks they might consider purchasing or selling, and that he did this with Quint's knowledge and encouragement.[24] Thus, for example, Quint and others at the firm (i) praised Giblen for providing information about stocks to potential clients and encouraged him to continue to do so, and (ii) urged Giblen to identify stocks for others to recommend, along with bullet points concerning each stock.[25] Giblen himself has characterized what he supplied to clients as "research ideas" as distinct from research reports.[26] In all events, consistent with the limitations on his employment, Giblen did not write research reports as part of his association with Petersen.

B. In the Fall of 2009, Giblen Writes a Report for, and Receives Compensation from, PSI Corporation.

In the summer of 2009, Giblen, Quint, and Charles Hansel, another Petersen employee, met at least twice with PSI's CEO, Eric Kash, at the Quint Miller office.[27] PSI specializes in the placement and management of self-service kiosks that provide on-demand, in-store coupons to supermarket patrons. At all relevant times, the company's stock traded as a pink sheet penny stock with little volume.[28] At the meetings, Kash described PSI's activities and its attempts to raise capital through private offerings. Although Quint told Kash that Petersen could not

[24] *See, e.g.*, Tr. 324-327 (Quint), 464-465 (Giblen).

[25] *E.g.*, RX-3-RX-9; RX-11; RX-19; RX-21. RX-11 and RX-21, emails from one of Giblen's colleagues, Charles Hansel, to potential clients, hold Giblen out as an analyst and market the firm using Giblen's analyst credentials. Neither of these emails nor any other communications by Giblen or any other Quint Miller employee holding Giblen out as an analyst or otherwise suggesting that Giblen was performing "research" operated to change the scope of Giblen's employment with Petersen, Giblen's arguments notwithstanding.

[26] Tr. 387-388 (Giblen).

[27] Tr. 53 (Gerena), 230-233 (Quint), 263-265 (Hansel); CX-8; CX-13.

[28] Tr. 27, 44 (Gerena); CX-3, at 3.

participate in any private offering, he provided his thoughts on how to position PSI and recommended potential supermarket customers to PSI.[29]

Giblen stayed in contact with Kash and, according to Kash's written account (which Giblen has endorsed throughout this proceeding), Quint met with the two of them in October 2010. Kash reported that, during the meeting, discussion turned to having Giblen engage in an "internal investor relations consulting" project for PSI, involving "writing an outline [*i.e.*, the Report] by which the company could tell its story effectively to the investment community." According to Kash, Quint suggested that Giblen do the work "as an outside activity, with the compensation going to Mr. Giblen directly" because Quint "wanted to help Mr. Giblen utilize his background to earn money."[30] It was then agreed that PSI would pay Giblen $6,000 for the Report.[31]

Giblen began work on the Report in October 2010, and a version dated November 20, 2010, was posted to the PSI website for approximately ten days in late November and early December.[32] The Report identified Giblen as its author and included: biographical information on Giblen; the statement, "We are initiating coverage of PSI"; a summary of the company's business; stock price assumptions and targets; earnings estimates; an analysis of the company's

[29] CX-13, at 2; *see* Tr. 53-54, 64-65 (Gerena), 232-237 (Quint); CX-8; CX-21.

[30] CX-13, at 2-3; *see* Tr. 379 (Giblen).

[31] CX-13, at 2-3.

[32] CX-3; Tr. 63 (Gerena), 448-450, 470 (Giblen). After FINRA contacted him about the Report, Giblen had the Report removed from the website as set forth below.

business and prospects, as well downside potential and risks; and a purchase recommendation.[33] Giblen received $6,000 directly from PSI for writing the Report.[34]

During the investigation and hearing in this matter, Quint consistently denied being aware of or approving Giblen's work for PSI.[35] Specifically, he denied participating in any meetings or conversations with Giblen about Giblen providing a report for PSI.[36] In addition, he consistently stated that although he knew Giblen was in contact with Kash, he believed Giblen was attempting to provide PSI with more traditional products and services, such as 401(k) plans, health plans, and personal investment services for Kash.[37] In large part, Quint's testimony was corroborated by Hansel, another participant in Giblen's meetings with Kash. Hansel testified that: there were more than two meetings with Kash; Quint attended "most" of the meetings; the meetings concerned PSI's desire to raise money; he did not know whether Quint played any role in formulating the work Giblen did for PSI; and he could not remember attending a meeting in which Quint suggested that Giblen work for PSI as an outside business activity.[38]

Although Giblen urges the Hearing Panel to resolve the inconsistencies between Kash's and Quint's accounts by rejecting Quint's, the Hearing Panel credits Quint's version of events for two primary reasons. First, Giblen raises nothing that causes us to question Quint's

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[33] CX-3. Giblen argues that the PSI Report was not a research report within the meaning of NASD Rule 2711(a)(9) or otherwise. However, whether the Report can be technically referred to as a research report as defined by NASD Rule 2711 is beside the point. The Report consists of research-related information and bears many of the traditional hallmarks of a research report. *See* Tr. 27 (Gerena), 240 (Quint), 407-409, 458-460, 462 (Giblen). Indeed, Giblen himself conceded during his OTR that he had produced "a draft of ideally what a research report could be . . ." and referred to the Report as a "model" research report. Tr. 410 (Giblen). Therefore, regardless of whether the PSI Report can be characterized as a typical research report or contained all proper formats, we conclude that it bears sufficient indicia of a research report that it is appropriately characterized as such.

[34] CX-9; CX-11, at 3, 5, 6; CX-13, at 4, 5; Tr. 56, 60-61 (Gerena).

[35] *E.g.*, Tr. 230 (Quint); CX-8; CX-18, at 8-10.

[36] *E.g.*, Tr. 235, 237-238, 249-250 (Quint); CX-8.

[37] *E.g.*, Tr. 235 (Quint); CX-8.

[38] Tr. 263-265, 293 (Hansel).

consistent statements.[39] By contrast, the accuracy of Kash's letter is called into question by, among other things, the conflict between its repeated insistence that the PSI Report was not a "research report" and was for internal use only on one hand, and, on the other, the letter's acknowledgment that the Report would be used to help PSI "convey its story to the investment community" and the fact that the material was posted to the company website.[40]

Second, no other evidence supports Giblen's testimony and argument that any relationship with PSI was so important to Quint that he would not only recommend that Giblen draft a report for PSI as an outside business activity but also confederate with Giblen (or, as Giblen claims, direct Giblen) to ensure that Petersen was kept in the dark about that activity.[41] To the contrary, Quint's uncontradicted testimony establishes that he met with PSI at Giblen's request, that the meetings were short, and that, although Kash wanted assistance raising money, Quint made clear that Petersen could not provide that assistance.[42]

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[39] According to Giblen, Quint's credibility is subject to doubt because Quint: sent business-related emails from his personal email account; answered questions posed at his OTR imprecisely; was the subject of a "customer dispute disclosure incident"; and remains in the brokerage business. Respondent's pre-hearing brief ("Br.") at 5-6. None of these grounds causes us to question Quint's testimony about the PSI work. Giblen also alleges (Br. at 5) that Quint's firm had "massive violations in supervision"—but he refers to a matter having nothing to do with Quint or Quint Miller. *See infra* n. 76.

[40] *See* CX-13. Although Kash claimed that the posting was done mistakenly, that claim was dubious at best.

[41] As explained below, when Quint Miller employees sought permission to engage in outside business activities, their requests were made through Quint to Petersen's senior management. If Quint knew about the PSI Report then he necessarily knowingly participated in a cover-up of that activity insofar as Petersen was concerned. The record—including Giblen's unsupported assertions (*e.g.*, Tr. 270 (Hansel); Br. at 7) that Quint had a generally negative view of Petersen as "the department of business prevention"—does not support a conclusion that Quint knowingly concealed Giblen's activities from Petersen.

[42] Tr. 230-237 (Quint).

C. Giblen Purposefully Fails to Notify Petersen of His PSI Work.

Giblen's work on the PSI Report implicated Petersen's policies on outside business activities.[43] The firm's procedures, dated May 1, 2010, stated that the general policy was not to permit registered representatives to hold outside positions and that prior approval from Riley (referred to as RSR in the manual) was necessary before entering into any such association.[44] To obtain approval, an associated person was required to submit a written request to Villella describing the outside business activity, including: the name of the business; the position and compensation expected; the hours per week that the person would devote to the activity; and whether the activity was industry related.[45] Once Villella reviewed the information, she would bring the request to Riley's attention and they would determine whether to approve or deny the activity.[46] Giblen neither sought nor obtained prior written approval from Riley (through Villella or anyone else) to write the PSI Report, and he failed to notify the firm in writing or otherwise that he would write the Report and accept compensation for doing so.[47]

We conclude that Giblen purposefully failed to notify Petersen of his outside business activity. First, as Giblen himself admitted, he understood at the time he was registered with Petersen that he needed to disclose outside business activities.[48] As Giblen further admitted, he

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[43] We would arrive at the same conclusion even if we were to view the Report as an "internal-use-consulting project" for PSI and not a research report, as Giblen asserts. Given that Giblen was a general securities representative who was to earn commissions on sales, a consulting project for a non-client corporation constituted a business activity outside the scope of his relationship with Petersen, particularly considering that he was compensated by PSI, and not Petersen, for his work on the project. *See* Tr. 193 (Villella).

[44] CX-6, at 2; Tr. 48-49 (Gerena), 133 (Villella).

[45] Tr. 134 (Villella). Brokers at the Quint Miller branch submitted the request through Quint. Tr. 228-229 (Quint), 288, 290-291 (Hansel).

[46] Tr. 134-135, 184 (Villella), 228-230 (Quint).

[47] CX-14, at 45; Tr. 67-68 (Gerena), 135-136 (Villella), 243 (Quint), 426, 429 (Giblen). Villella stated that had Giblen sought approval to write the PSI Report, she would not have recommended that it be granted due to a concern that customers could perceive Giblen's opinion to be Petersen's. Tr. 136 (Villella).

[48] Tr. 400 (Giblen).

had access to the firm's policies shortly after he was hired (including the policy concerning outside business) and, according to Giblen, he read them.[49] Thereafter, Giblen completed annual attestations on November 6, 2009, and October 3, 2010, which stated that employees were prohibited from engaging in outside business activities without specific written approval by senior management. The attestations also asked if Giblen was involved in an outside activity and, if he was, to disclose the activity on an attached page. Each time he completed the attestations, he represented that he was not engaged in an outside business.[50] Moreover, Giblen was aware of his obligation to report outside business activities on his Form U4, as evidenced by his previous reporting of an outside business activity during his employment with Petersen. On the Forms U4 Petersen filed on his behalf, Giblen disclosed that he worked approximately 30 minutes per month as a magazine columnist.[51] Thus, despite having been notified multiple times about the need to seek firm approval for outside business activities and having previously reported an outside business activity on his Form U4, Giblen neither sought Petersen's[52] approval of, nor filed a Form U4 amendment concerning, his work on the PSI Report.[53] Finally,

[49] Tr. 403-404, 443 (Giblen); *see* Tr. 137-138 (Villella).

[50] CX-22; CX-23; Tr. 143, 145 (Villella), 401-403 (Giblen). Each time he completed the attestations, Giblen received an updated manual. Tr. 228 (Quint).

[51] CX-1, at 35; Tr. 40-42 (Gerena), 122-123 (Villella), 400 (Giblen); *see* CX-24, at 7; CX-25, at 8.

[52] Giblen claims to have not known that "RSR" meant Riley, but he never sought any clarification. Tr. 404-405 (Giblen). In any event, in light of the multiple sources that notified Giblen that he needed to request Petersen's senior management's approval of outside business activities, we conclude that Giblen knew who he needed to notify.

[53] As Villella testified, there was no indication during a November 2010 onsite audit of the Quint Miller branch that Giblen was engaged in any sort of "consulting work" for PSI. Tr. 120. The first time Villella heard about PSI and saw the PSI Report was during the FINRA investigation into this matter. Tr. 127.

Giblen communicated with PSI via his personal email address, ggiblen@optonline.net, which the firm could not access or supervise.[54]

D. After a FINRA Examiner Discovered the PSI Report on the Company's Website, an Examination Ensued, Culminating in This Proceeding.

While investigating a customer complaint concerning PSI, a FINRA examiner noticed the PSI Report posted on the PSI website. He contacted Giblen, who confirmed that he wrote the Report and, thereafter, Giblen contacted Kash and had the Report removed from the website.[55] In the meantime, FINRA opened an examination, which, ultimately, resulted in this proceeding being instituted.[56]

Petersen's CCO Villella first learned of the PSI Report during the examination. She was surprised and concerned. She wanted to know why the Report was prepared and, to that end, she initiated an internal investigation.[57] As a result of the investigation, Villella asked Giblen to resign because, without notifying her, he had received payment for writing a research report.[58]

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[54] *E.g.*, CX-15-CX-17; Tr. 70-75 (Gerena), 137 (Villella), 425 (Giblen). On his 2009 and 2010 annual attestations, Giblen certified that he would "use only the Petersen email system for all business-related correspondence." CX-22; CX-23; Tr. 77, 79 (Gerena), 141-142, 144-145 (Villella). Although Quint may have been aware that Giblen used his personal email for business purposes, Petersen did not countenance or encourage Giblen's use of personal email. On the contrary, after discovering that, on two occasions, Giblen sent a business-related email from his personal email address (and copied a firm employee at a Petersen email address), Petersen sent two emails to Giblen (and Villella spoke to Giblen) reminding him of his obligation to use only the firm's email system for such communications. CX-19; CX-20; Tr. 146-147, 151 (Villella).

[55] Tr. 26-28 (Gerena), 448-449 (Giblen).

[56] Tr. 27-28 (Gerena).

[57] Tr. 128-130 (Villella).

[58] Tr. 131 (Villella).

III. Conclusions of Law

A. Giblen's Failure to Provide Written Notice to Petersen of His Compensated Work for PSI Violated NASD Conduct Rule 3030 and FINRA Rule 2010.

NASD Conduct Rule 3030 states that "[n]o person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member."[59] The rule further specifies that the notice must be in the form required by the member. The rule is designed to protect investors and employer firms. It gives firms the opportunity to review their representatives' activities and raise objections at a meaningful time (or determine the extent to which they should supervise the activities) so as to prevent customer harm and avoid the firms' unwitting entanglements in legal difficulties.[60]

Giblen violated Rule 3030. Without notifying Petersen in writing, he accepted compensation from PSI for writing the Report, an activity outside the scope of his relationship with the firm. Giblen's violation of Rule 3030 is also a violation of FINRA Rule 2010.[61]

Giblen's arguments against liability are unavailing. First, he argues that he did not violate Rule 3030 because research analyst duties were within the scope of his relationship with Petersen. Second, he asserts that because Quint was aware that he was writing the Report and

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[59] On December 15, 2010, NASD Rule 3030 was superseded by FINRA Rule 3270. Because Giblen engaged in the outside business activity and received compensation for that activity in October and November 2010, Rule 3030 governs this proceeding.

[60] *See Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *46 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006); *Dep't of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at *12-13 (Dec. 7, 2005) (quoting NASD Notice to Members 88-86); *see also* Proposed Rule Change Relating to Outside Business Activities of Associated Persons, Exchange Act Rel. No. 26063, 1988 SEC LEXIS 1841, at *3 (Sept. 6, 1988).

[61] *See Schneider*, 2005 NASD Discip. LEXIS 6, at *17 & n.7 (citing *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999) (stating that violation of other NASD rules also violated Rule 2010's predecessor)).

actively encouraged him to do so, he provided the requisite notice to the firm. Both assertions are contrary to our factual findings, and the second assertion, even if it had been established, would not satisfy the requirements of Rule 3030 as a matter of law.

1. Giblen Wrote the PSI Report Outside the Scope of His Relationship with Petersen.

Giblen's position on whether the PSI Report was within the scope of his relationship with Petersen has changed multiple times during the course of the investigation and this proceeding. At his OTR, Giblen testified that the Report "was not a Quint Miller thing. It was a separate—It was a personal consulting assignment."[62] In his pre-hearing brief, he took the opposite position: that writing the Report was within the scope of his relationship with the firm. He asserted that he was hired partially to be a research analyst, that he performed analyst duties while at the firm, that Quint encouraged him to write the PSI Report, and that the work and relationship with PSI were "central to [Quint Miller] and its business strategy."[63] Then, at the hearing, he stated a third position—that because he had such "extremely broad and nebulous job responsibilities,"[64] "it really wasn't reasonable to see hardly anything as an outside business activity . . . that was intended to bring business into Quint Miller."[65] Shortly thereafter, he reverted to his original position that the PSI work was "a personal project so I could earn some compensation" and admitted that the PSI work was not done as part of his employment with Petersen.[66] Not content with that position, however, Giblen immediately changed course again and described the Report

[62] CX-14, at 57; *see* CX-14, at 37.

[63] Br. at 3-4.

[64] Tr. 375 (Giblen).

[65] Tr. 388 (Giblen).

[66] Tr. 414 (Giblen).

as both inside and outside the scope of his employment, because the goal of writing the Report was to bring PSI's business to Quint Miller.[67]

The Hearing Panel rejects Giblen's assertions that he acted within the scope of his relationship with Petersen in writing the Report and receiving compensation directly from PSI.[68] First, Giblen's assertions that he was hired to and did function as a research analyst at the firm are contrary to the weight of the evidence, including Giblen's own statements. As we have found, the firm was neither approved to, nor structured in such a way that it could, produce research reports, and Giblen was not registered in such a way that he could write them. Although Quint may have envisioned that Giblen could function as an analyst sometime in the future, Giblen was not hired in that capacity and it was understood that he would not be performing that function in the near term. Second, the fact that Giblen may have provided customers with information about issuers while he was employed at Petersen does not mean, as Giblen argues, that he was hired to or did function as an analyst for the firm. Supplying information to clients, such as bullet points about particular stocks, or giving clients recommendations undergirded by careful inquiry, is not the same thing as writing a research

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[67] Tr. 423 (Giblen).

[68] Another example of Giblen's prevarication was his series of answers to questions involving his previous testimony about whether he showed drafts of the Report to anyone either at Quint Miller/Petersen or PSI. After reading his previous testimony, in which he stated that he did not show drafts to Quint Miller/Petersen and added that "Quint Miller[/Petersen] didn't do research and you can't show . . . anything to the company because that's against the rules," Giblen testified that "company" referred to PSI and "a standard rule of research . . . is that you can't show drafts of . . . a report to the company." Tr. 414-415. Given that this testimony gave rise to a strong inference that Giblen understood he was writing a research report, he was then asked whether he was referring to Rule 2711. In response, Giblen backtracked and testified that "company" referred to Quint Miller/Petersen and stated that "rules" referred to Petersen not being registered for research. Tr. 416-417. Then, when asked whether that meant that he knew he was writing a research report and that was why he could not show the draft to Quint Miller/Petersen, Giblen answered "no" and stated that he was referring to the outside business rules. Tr. 419-422. Thereafter, he acknowledged that whether it was the research rules or the outside business rules he was referring to, he had admitted in his previous testimony that he knew what he was doing was against the rules. Tr. 422. After a break, however, Giblen asked to revise his testimony yet again and stated that, although by "company" he meant Petersen, the rules he was referring to were Quint Miller's rules about not talking to Petersen and further that, when he was working on the PSI assignment, he did not know whether it would be against Petersen's rules to do so. Tr. 436-437.

report or otherwise functioning as an analyst. Salespersons commonly read research reports and other information sources, distill the information, and relay it to their customers. But that does not transform them into research analysts, as Giblen recognized.[69]

As for Giblen's further assertions that the work was both within and outside the scope of his relationship with the firm, as well as his assertion that his job was so broad as to encompass myriad functions, the fact remains that he was employed by the firm to attract 401(k) business and generate institutional sales, and he was to be paid commissions by the firm on the trades he generated. He was not employed to write research reports or to undertake "internal-use consulting projects" for potential clients and receive compensation directly from those entities for doing so.

2. Giblen Did Not Provide Proper Notification of the PSI Work to Petersen.

Giblen's second argument against liability is equally unavailing. Giblen asserts that because Quint was aware of and encouraged the PSI work, Quint's knowledge, in effect, substituted for the written notification Giblen should have supplied to Villella, and, ultimately, Riley. Even if this argument were consistent with the facts, which it is not, it would be unavailing as a matter of law.

Rule 3030 requires prompt written notice to the member in the form required by the member. A supervisor's knowledge of the outside activity is not a substitute for written notice to

[69] Tr. 464-467 (Giblen).

the firm in the format required by the firm.[70] Accordingly, even if Quint knew about the PSI work, his knowledge satisfied neither the firm's requirement that representatives seek prior written approval from Petersen senior management for outside activities nor Rule 3030's requirement of prompt written notification of such activities.

And this holds true no matter the extent of Petersen's supervision. Even if Petersen had a hands-off management style that devolved compliance responsibility onto Quint, the record is clear that Riley and Villella, and not Quint, were ultimately responsible for managing Quint Miller's employees and overseeing their compliance with laws, regulations, and firm policies.[71] Under the terms of Rule 3030, Giblen was required to notify Riley and Villella in writing of his outside business activity, and Riley and Villella were the persons who would decide whether to authorize the activity.[72]

IV. Sanctions

The FINRA Sanction Guideline for a Rule 3030 violation recommends a fine between $2,500 and $50,000 and a suspension of up to 30 business days when the misconduct does not involve aggravating factors. When aggravating factors are involved, the Guideline recommends

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[70] *E.g.*, *Dist. Bus. Conduct Comm. v. Merz*, No. C8A960094, 1998 NASD Discip. LEXIS 40, at *33, n.13 (NAC Nov. 11, 1998) (prompt written notice must be made to member, not simply to any registered securities principal of the member); *Dep't of Enforcement v. Dahmer*, No. C8A030086, 2005 NASD Discip. LEXIS 16, at *13-14 (OHO Feb. 17, 2005) (division and branch managers' knowledge of outside business activities did not satisfy Rule 3030's requirements that the firm receive prompt written notice in the form required by the member); *Dep't of Enforcement v. Barrick*, No. C8A030034, 2004 NASD Discip. LEXIS 22, at *7 (OHO Apr. 26, 2004) (Rule 3030 "requires prompt written, not oral, notification" of outside business activity and "[t]here is no exception for verbal statements to supervisors.").

[71] Giblen was fully aware of his duty to report his outside business activities to Petersen senior management, by virtue of reading the firm's compliance manual and completing annual attestations, among other things. But even if, as he asserts, he was not aware of that duty, his ignorance would not negate liability.

[72] Giblen has asserted that it was reasonable to think that Quint alone had the authority to approve outside business activities and that any Petersen involvement in the approval process would have been invisible to Quint Miller associates. Tr. 380. The problem with this line of reasoning is that Hansel testified that he sought and received approval for an outside business activity from Villella, as well as Quint, and that he did so by supplying written information to Villella. Tr. 290-291 (Hansel).

that adjudicators consider a longer suspension of up to one year.[73] Principal considerations set forth in the Guideline are: (i) whether the outside activity involved firm customers; (ii) the nature and extent of injury to customers; (iii) the duration of the outside activity, number of customers, and dollar volume of sales; (iv) whether the respondent's marketing and sale of the service created the impression that the firm approved the service; and (v) whether the respondent misled his firm about the existence of the activity or concealed it from the firm.[74] Here, the absence of customer involvement or injury to customers is not mitigating,[75] but the short duration of Giblen's outside activity is mitigating.[76] Although the Report may have given the impression to persons who knew of Giblen's association with Petersen that Petersen approved the Report, there is no evidence that, in fact, anyone with that knowledge accessed the Report. Finally, Giblen purposefully concealed his outside activity from the firm by failing to disclose it and using an outside email address. Indeed, Giblen was specifically prohibited by the firm from engaging in the type of conduct at issue. This aggravates the severity of the violation.

Turning to other principles that affect our sanctions analysis, we consider first that Giblen is a recidivist. Under the Guidelines, any sanction we assess should be more severe because Giblen's past misconduct, although not similar to the misconduct involved in this proceeding, "evidences disregard for regulatory requirements . . . or commercial integrity."[77] Second, Giblen does not accept responsibility for his misconduct. Instead, he blames Quint and attempts to cast

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[73] FINRA Sanction Guidelines 13 (2011), available at www.finra.org/Industry/Enforcement/SanctionGuidelines/.

[74] *Id*.

[75] *Howard Braff*, Exchange Act Rel. No. 66467, 2012 SEC LEXIS 620, at *26 (Feb. 24, 2012).

[76] Giblen asserts that we also should find it mitigating that he helped FINRA discover the violations of others. He claims that his "OTR of May 2011 proved evidently instrumental in the discovery of and January 2012 sanctions for the massive supervisory violations at Quint-Miller and Petersen." Br. at 9. Even if such "assistance" could be mitigating in the context of this case, Petersen's January 2012 settlement with FINRA had nothing to do with Giblen's testimony. The settlement concerned a Petersen location other than Quint Miller and involved procedures in place between 2003 and 2008 that were considered inadequate to supervise for suitability. Tr. 153-154 (Villella).

[77] Sanction Guidelines 2.

responsibility for his own misconduct onto Quint. Indeed, his ever-changing accounts of matters material to this proceeding demonstrate that, while he has focused intently on his attempt to outwit Enforcement, he has failed to consider whether and why what he did was wrong. In addition, Giblen's shifting positions on material matters in and of themselves significantly aggravate the severity of his misconduct because they amount to a pattern of prevarication.[78]

Accordingly, the aggravating factors present here far outweigh any mitigating factors and call for a significant sanction. Although Giblen asserts that "case precedents point to a minimal sanction" and cites a number of settled cases in which respondents have consented to suspensions of 30 days or less, as the Securities and Exchange Commission has repeatedly stated, "the determination of appropriate remedial action 'depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings.'"[79] That is particularly true when comparisons are made, as here, to outcomes in settled cases.[80]

We conclude that a suspension of four months will appropriately remedy Giblen's misconduct. We believe that a relatively lengthy suspension is warranted so that Giblen has an adequate opportunity to consider why what he did was wrong and adequately appreciate the importance of complying with regulatory responsibilities.

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[78] *See* Sanction Guidelines 6 (Principal Consideration 10).

[79] *Robert D. Tucker*, Exchange Act Rel. No. 68210, 2012 SEC LEXIS 3496, at *66, n.92 (Nov. 9, 2012) (quoting *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *30-31 (Apr. 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009)); *see also Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (declining to "compare this sanction to those imposed in previous cases").

[80] *Joseph John VanCook*, Exchange Act Rel. No. 61039A, 2009 SEC LEXIS 3872, at *79-80 (Nov. 20, 2009), *petition denied*, 653 F.3d 130 (2d Cir. 2011).

V. Conclusion

For violating NASD Conduct Rule 3030 and FINRA Rule 2010, Giblen is suspended from associating with any member firm in any capacity for four months. In addition, Giblen is ordered to pay costs in the amount of $4,679.50, which includes the hearing transcript costs and an administrative fee of $750. These costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

If this decision becomes FINRA's final disciplinary action, the suspension shall begin on November 4, 2013, and end at the close of business on March 3, 2014.

HEARING PANEL.

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Rada Lynn Potts
Hearing Officer

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