MONUMENT GROUP

Electronic Submission

August 30, 2023

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington DC 20006-1506

Re: Regulatory Notice 23-09 – Request for Comments on Suggested Amendments to FINRA Rules and Processes to Further Promote Capital Formation

Dear Ms. Mitchell:

This letter is submitted in response to the request for public comments by the Financial Industry Regulatory Authority, Inc. ("**FINRA**") in Regulatory Notice 23-09 ("**Notice**") on modifications to FINRA rules, operations or administrative processes that impact the capital-raising process in order to further foster capital formation.

We appreciate the opportunity to comment on the various amendment proposals provided by FINRA in its effort to benefit the capital-raising process without reducing the protections afforded by the rules. This comment will focus on the proposed amendment to FINRA Rule 2210 related to performance projections.

To summarize, we strongly advocate for FINRA to permit Monument Group Inc. ("Monument Group") and other FINRA-regulated independent third-party placement agents for private funds to use key projections and estimates in marketing material provided to institutional investors and qualified purchasers.

1. Background on Monument Group/Third Party Placement Agents

Monument Group is an independent broker-dealer registered with the Securities and Exchange Commission ("SEC") and a member of FINRA. Our principal business is to act as placement agent in primary offerings and secondary sales of interests in private funds, such as private equity, venture capital, real estate and energy funds. We raise capital solely from institutional investors services and provide our placement services *only* for issuers of private funds – *i.e.*, for funds that are exempt from registration under 3(c)(7) of the Investment Company Act of 1940 (the "Company Act"). As such, all institutional investors we approach must be both "accredited investors" ***and*** "qualified purchasers" for purpose of the Company Act exemptions.

The help that Monument Group, as an independent placement agent, provides to private fund advisers includes: (i) providing advice on building a compelling investment case to prospective investors; (ii) preparing presentation and offering materials as well as detailed due diligence information; (iii) identifying and targeting potential investors based on Monument Group's knowledge of their investment allocations, preferences and anticipated investment activity levels; (iv) introducing private investment funds managed by investment adviser clients to investors; (v) arranging roadshows of investor meetings; (vi) coordinating follow-up meetings between investment advisers and investors; (vii) coordinating investors' due diligence requests; (viii) intermediating in terms negotiations; and (ix) providing post-closing updates to clients and to investors.

Independent placement agents such as Monument Group not only help private fund advisers find the market for their funds, but also provide significant benefits to investors in these private funds, including: (i) "quality screening" of funds prior to their introduction to investors (investors have come to value Monument Group's expertise and successful track record in identifying good investment opportunities); (ii) the compilation and provision of extensive due diligence packages — e.g., references, historical track record analysis, models for testing market variables (leverage, P/E or EBITDA multiples, etc.) and independent macroeconomic data useful to provide context to the market opportunity (to often understaffed and overwhelmed in-house investment staffs); and (iii) providing a conduit for feedback — i.e., experienced and knowledgeable placement agents such as Monument Group assist both large and smaller institutional investors in getting their voices heard by investment advisers on topics ranging from strategy to fees and governance terms.

While some of the better-known placement agents are departments of major Wall Street firms, the vast majority of independent placement agents are smaller businesses. They operate with a focused staff and with no revenues from other lines of business such as trading, mergers and acquisitions, or other banking/brokerage services. Accordingly, of utmost importance to independent placement agents is the ability to successfully market their clients' funds – and, in doing so, to be able to use the same relevant and material information in their marketing materials that their own clients would be able to use under applicable SEC rules.

2. Justification for Our Position

(i) The prohibition on the use of projections by FINRA-registered placement agents is highly anticompetitive.

The prohibition on the use of forecasts and projections, including but not limited to targeted returns, (to the extent that FINRA considers such targets to be projections/forecasts (*see,* Section 2(iii), below), inhibits the ability of placement agents to prepare and distribute the most effective marketing materials on behalf of their clients (private fund managers). These projections and forecasts constitute highly material information that is key to any decision by an institutional investor to invest in a particular private fund. Institutional investors expect to receive the key forecasts and projections for a private fund and, accordingly, fund managers consider it essential for inclusion in any compelling marketing piece. A fund manager who uses a member firm as its placement agent may accordingly be using marketing material that it may consider to be less effective than marketing material such manager itself can employ, simply due to the intermediation of that FINRA-registered placement agent.

The relatively recent implementation of the SEC's Marketing Rule underscores the detrimental impact of FINRA's projection prohibition on placement agents. While the use of projected performance in member firm communications is generally prohibited by Rule 2210, the Marketing Rule expressly permits registered investment advisers to use key projections and estimates in their marketing materials. As noted, the mere hiring of a placement agent by a manager may result in the production of less effective marketing communications (or the use of different versions by the manager and placement agent respectively). Accordingly, even in a situation where the use of a placement agent may be beneficial to a private fund manager, the complications created by FINRA's broad prohibition on projected performance – and, perhaps more importantly, the perceived detriment such a prohibition may pose to a successful fundraise – may cause a manager to opt *not* to hire an agent that is a member firm in the first instance.

Furthermore, projected returns in marketing material prepared by *fund managers* is market standard for certain private fund asset classes and strategies – *e.g.*, certain development-oriented real estate strategies. Due to FINRA's broad prohibition on use of projections, FINRA member placement agents are essentially precluded from marketing such types of funds or from marketing those funds at least as effectively as its clients would be able to – also providing a disincentive for a manager to hire a FINRA-registered placement agent in the first instance.

(ii) ***FINRA has previously acknowledged that use by members of projected performance may be acceptable in connection with marketing to institutional/sophisticated investors.***

In Regulatory Notice 17-06 (RN 17-06), FINRA stated that "the general prohibition against performance projections is largely intended to protect *retail investors* from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading." (Emphasis added.) FINRA has recognized in a number of contexts, such as FINRA Rule 2111 (Suitability), the filing and supervision provisions of FINRA Rule 2210 (Communications) and, more recently, in the Capital Acquisition Broker (CAB) Rules, that institutional customers do not require the same protections as retail customers.

CAB Rule 221, governing communications with the public, does not prohibit a CAB from using forecasts or projections. One justification for this difference between the CAB rules and the rules applicable to other FINRA members is that a CAB may sell securities in private placements only to institutional investors as defined in Rule 016(i). That definition includes familiar categories of institutional investors, like banks, insurance companies, investment companies and employee benefit plans. It also includes any person (individual or entity) that has total assets of at least $50 million and any "qualified purchaser" as defined in Section 2(a)(51) of the Investment Company Act of 1940.

We are aware that, while FINRA permits the use of some related performance information in offerings to institutional customers only, FINRA has not permitted information prohibited for use with retail customers to be provided to institutional customers in offerings to both institutional and retail customers.[1] If FINRA is concerned about the use of projected performance in sales material prepared by brokers (as distinguished from material prepared by issuers) in offerings in which retail customers may participate, FINRA should, at a minimum, permit the use of reasonable-basis projected performance in broker material distributed in securities offerings made exclusively to Rule 016(i) institutional investors. This would include all offerings of private funds exempt under Section 3(c)(7) of the Investment Company Act.[2]

(iii) Targeted Returns should not be viewed as a type of "projection" or "forecast" that FINRA Rule 2210 should prohibit.

In section D.7.1 of FINRA's Frequently Asked Questions about Advertising (the "Advertising FAQ"), FINRA states that the Rule 2210(d)(1)(F) prohibition on the use of predictions or projections of performance by member firms "extends to *retail* communications that include target returns to investors." (Emphasis added.) In light of the highly material and uniquely important information that targeted returns

1 Letter to Collins/Bay Island Securities (Sept. 14, 2004).

2 Monument Group appreciates the intent behind the CAB Rules to lessen the compliance burden of the many retail-focused FINRA rules for members marketing solely to institutional investors – including the easing of the prohibition against the use of certain projections. However, Monument Group (and likely a number of other placement agents for private funds) considers the CAB Rules to be overall only slightly less burdensome than the original FINRA rules, and – especially in light of the failure of the CAB Rules to (i) permit the sale of secondary interests by CAB brokers, and (ii) allow for an expedited FINRA re-registration process in the event that a firm's business evolved to later require the full FINRA registration. – has opted to forego reregistration as a CAB.

actually provide to potential fund investors, we ask FINRA to consider removing this prohibition from communications with institutional investors (at a minimum).

A targeted return for a blind pool fund is a metric defined by a fund manager prior to, *and in the absence of*, any pre-specified investments or portfolios for the fund. Rather, targeted performance refers to the level of return a private fund manager expects to be able to generate based on the type of investments it pursues, its skill in managing those investments, and prevailing market conditions. Institutional investors accordingly view this information not as a projection as to how a fund's investments will perform, but as the fund's targeted risk/return profile – a critical component to an institutional investor's investment decision and essential to proper underwriting, allocation decisions and portfolio management by any institutional investor. In fact, the prohibition from using targeted returns actually results in a ***material omission from the offering materials and other information received by institutional investors working with member placement agents*** – especially in light of the fact that investors communicating directly with a private fund manager receive targeted return information in the manager-prepared marketing materials.

If the SEC allows for the use of targeted returns by SEC-registered advisers in their marketing material, FINRA should also allow for investors approached by member firms to make equally informed decisions concerning private fund investments.

CONCLUSION

Forecasts and projections have a place in private securities offerings and securities advice. As RN 17-06 points out, "the Investment Advisers Act does not prohibit the presentation of projections that comply with the antifraud provisions of the Act."

Projections/targeted returns are, in fact, useful informational tools on which institutional and other sophisticated investors rely heavily in connection with investment decisions. Current inconsistencies in the rules governing member firms and in those governing registered advisers put both placement agents, as well as any manager who could otherwise benefit from the use of a placement agent, at a true competitive disadvantage, as well as the investor community that the rules are designed to protect.

We believe that, as a general matter, member firms should not be prohibited from using projections in a manner consistent with those permitted under the Marketing Rule. We urge FINRA to permit all FINRA member firms to use projected performance with institutional investors and qualified purchasers. We believe that amending the content standards of Rule 2210 in this manner will enable placement agents who are member firms to provide higher quality information to institutional investors in a way that is consistent with the principles of investor protection and that does not undermine these FINRA-registered agents in a highly competitive fundraising market.

We would be happy to discuss these comments with you or the use of projected performance generally, at your request.[3]

Very truly yours,

Molly M. Diggins
Molly M. Diggins (Aug 30, 2023 14:25 EDT)

Molly Diggins
Partner & General Counsel
Monument Group, Inc.

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3 As General Counsel for Monument Group, I serve as a member of an industry placement agent group – the Independent Placement Agent Compliance Committee (IPACC). While I know that many (if not most) members of IPACC support the arguments articulated herein, this letter is not submitted on the behalf of IPACC and does not represent the group's collective view or the view of any of its other members. Various other IPACC members would, however, also be happy to join any discussion in which you may wish to engage concerning the positions contained in this letter.

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