MONUMENT GROUP

Electronic Submission

January 31, 2024

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Proposed Rule Change to Amend FINRA Rule 2210 (Communications with the Public) to Permit Projections of Performance in Institutional Communications and Specified Communications to Qualified Purchasers (File No. SR-FINRA-2023-016 (the "Release"))

Dear Ms. Countryman:

This letter is submitted in response to the request for public comments by the Securities and Exchange Commission (the "SEC") with respect to its proposal to amend FINRA Rule 2210 to allow the use of projections and targeted returns in "institutional communications" as defined in FINRA Rule 2210 and in communications distributed solely to qualified purchasers (QPs) as defined in the Investment Company Act of 1940 (the "1940 Act"), in each case, subject to certain conditions (the "Proposed Amendments").

We greatly appreciate FINRA's proposal to allow for the use of performance projections and targets, subject to certain guidelines/parameters, in marketing materials and to align Rule 2210 with the standards for presentation of hypothetical performance adopted by the SEC in amended Rule 206(4)-1 (the "Marketing Rule"). However, the Proposed Amendments would fail to mitigate the substantial competitive disadvantages already imposed by the existing FINRA Rules and guidance on third party placement agents for private funds.

I. Brief 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 a 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 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, and our policies and procedures ensure qualification of these investors as such in accordance with existing FINRA guidance.[1]

Monument Group's comment letter to FINRA on August 30, 2023 (the "MG 23-09 Letter", a copy of which is provided herewith)[2] describes the important role that placement agents play in the marketing of funds – particularly those managed by midmarket managers – in the private market. In particular, as the MG 23-09 Letter details, independent placement agents such as Monument Group not only help private fund advisers find a 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; (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 (iii) providing a conduit for feedback — i.e., experienced and knowledgeable placement agents such as Monument Group assist both large and small institutional investors in getting their voices heard by investment advisers on topics ranging from strategy to fees and governance terms.

As also noted in the MG 23-09 Letter, 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 without incurring disproportionately impactful expenses and burdens in order to remain competitive.

(i) The Proposed Amendments Fail to Mitigate the Anticompetitive Effects of Original Rule 2210 on Independent Placement Agents.

As noted in the MG 23-09 Letter, Rule 2201's 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 further discussion below)) inhibits the ability of placement agents to prepare and distribute the most effective marketing materials on behalf of their clients (private fund managers). The Proposed Amendments fail to alleviate this negative impact in many respects particularly with respect to the following:

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[1] "Institutional investor" is defined in FINRA Rule 2210(a)(4) to include persons described in FINRA Rule 4512(c), which are entities such as banks, insurance companies, registered investment companies, registered investment advisers, as well as any person, whether an individual or entity, with total assets of at least $50 million, and governmental entities and certain employee benefit plans. (Monument Group does not, as a matter of internal policy, market to any individual investors, including those individuals who would otherwise qualify as institutional investors.)

[2] A number of the other points we raised in the MG 23-09 Letter are not, for redundancy's sake, repeated here but would equally apply with respect to the Proposed Amendments (*e.g*, FINRA's inconsistent treatment of projections under the CAB rules, *etc*.).

(a) *The Continued Prohibition of Certain Forms of Targeted Returns and Projected Returns Makes the Proposed Amendments Impractical for Placement Agents.*

Statements made by FINRA in Supplementary Material .01 of the Proposed Amendments would continue to ***prohibit*** FINRA members' use of (i) hypothetical, backtested performance, and (ii) the prior performance of a portfolio or model created solely for the purpose of establishing a track record as a basis for the calculation of targets and projections. These continued outright prohibitions by FINRA on the use of hypothetical, backtested and prior performance starkly diverge from the Marketing Rule and will, unfortunately, both substantially limit the practical application of the proposed amendments for member firms and further perpetuate the inefficiencies created by the current difference in standards applicable to, respectively, fund managers and placement agents.

Fund managers often establish model portfolios and seed accounts in advance of launching a new product and rely on backtests to assess how investment strategies would have performed in different market environments. Sophisticated investors routinely request this information to inform their diligence efforts. Under the Marketing Rule, these backtests, models and seed accounts used to establish performance records are treated as hypothetical performance permissible to be shared by advisers with sophisticated investors.

Rather than aligning the treatment of these forms of performance to the Marketing Rule, FINRA has instead proposed to prohibit them entirely. Accordingly, fund managers who use member firms as placement agents may be distributing (through such agents) marketing material that they may consider to be less effective than marketing material such managers themselves can employ. This awkward result would substantially and negatively diminish the value of placement agents in connection with the distribution of private funds and would, accordingly, pose a threat to such agents' continued viability in the private fund marketplace.

(b) The Proposed Amendments' unclear treatment of IRRs, including target IRRs, negatively impacts placement agents for private funds.

In the Release, FINRA only discusses IRR in the context of performance projections, noting that the need for cautionary disclosures "is particularly true when a projection is expressed as an internal rate of return" because "forward- looking IRR" is "calculated on the basis of future cash flows to and from investors." Again, in stark contrast, the Marketing Rule generally treats IRR as actual performance even when unrealized positions are included in the calculation.

Either way – whether representative of actual performance or a projection – an IRR is an extremely important metric to both fund managers and institutional investors alike in connection with an investment decision. For fund managers, a targeted return for a blind pool fund is a metric defined by the fund manager, in the absence of any pre-specified investments or portfolios for the fund. Such 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 of how a fund's investments will perform, but as the fund's targeted risk/return profile – a critical component of an institutional investor's investment decision and essential to proper underwriting, allocation decisions and portfolio management by any institutional investor.

Again, the lack of clarity as to members' use of IRRs puts placement agents at a competitive disadvantage. Both managers and institutional investors may view the lack of a targeted return in marketing materials provided by a placement agent as a material omission, and private fund managers who are able to provide targeted return information in manager-prepared marketing materials may be loath to hire a placement agent who is prohibited from doing the same.

(ii) **The Record keeping obligations associated with the "reasonable basis" requirement create unnecessary and onerous obligations for third-party distributors and placement agents**.

The Proposed Amendments' requirement that a member both establish and document a "reasonable basis" for the criteria and assumptions used in calculating a target or projection also poses challenges for placement agents for third party private funds. In particular, the Proposed Amendments (and associated guidance) are unclear as to whether the broker-dealer must form and document its own reasonable basis for the projections and targets (a duplicative and burdensome process for any independent placement agent) or may rely on the fund sponsor who creates and supplies the projections and targets to the placement agent. The guidelines outlined in Supplementary Material .01 as to sufficient diligence – *e.g.*, inquiries into the source and accuracy of the data used, the rigor of the analysis and the date and timeliness of any research use, among other things – may well create potentially overlapping, ambiguous and onerous requirements that could actually dissuade members from using performance projections and targets with investors.

The Proposed Amendments also state that the member itself must retain written records supporting the basis for all such criteria and assumptions. This obligation – which is distinct from the requirement to perform diligence – appears to require access to and retention of materials by placement agents that fund managers would like consider trade secrets or, as noted above, would require the onerous and duplicative recreation of all such materials by the placement agent.

Again, the need to separately establish and document a "reasonable basis" for any projections used in marketing materials by placement agents could cause unnecessary complications and delays to a fundraise if a manager chooses to hire a placement agent – creating yet further disincentives for a manager to hire such a placement agent in the first instance.

(iii) The Proposed Amendments Impose Redundant and/or Conflicting Suitability Requirements on FINRA Members.

The Proposed Amendments require members to adopt policies and procedures reasonably designed to ensure that communications containing targets and projections are relevant to the likely financial situation and investment objectives of the recipients. FINRA's Proposed Amendments already limit members to distribute such communications only to either institutional investors or to QPs, for which FINRA's current rules already impose certain suitability qualification requirements for its members.

The Proposed Amendments' requirement to adopt policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the investor is at a minimum redundant of existing suitability obligations under Rule 2111, but also appears to impose some additional obligations on members that are more akin to those required for retail investors (*e.g.*, the investor's investment portfolio, liquidity needs, risk tolerance, etc.) than those currently required by FINRA for institutional investors.[3] In addition, the application of these additional requirements to members may only serve to narrow the target audience for members beyond institutional investors and QPs, while, in sharp contrast, advisers may market to a much broader set of investors without the worry of detailed suitability requirements and related policies and procedures.

Again, the additional investor qualification and burdensome compliance requirements of the Proposed Amendments may cause placement agents to entirely forego the use of projections or targets in their marketing material. Such a result would again cause fund managers – who can themselves relatively easily use such projections/targets in their own marketing materials – to question the benefit of hiring a placement agent in the first instance.

II. CONCLUSION

Projections/target returns are 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

[3] See FN 1, above. FINRA Rule 2111 explicitly differentiates the customer-specific suitability information required for a retail investor from that required for an institutional investor. In particular, in contrast to Section 2111(a)'s requirement for members to collect certain customer-specific investment profile information (age, risk tolerance, other portfolio holdings, *etc.*), under Section 2111(b), a member "fulfills the customer-specific suitability obligation for an institutional account, . . . if (1) the member or associated person has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies involving a security or securities and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the member's or associated person's recommendations ." ***The additional requirement of the Proposed Amendments to collect information concerning the financial objectives/financial situation of institutional investors – solely for the purpose of providing marketing material containing investment projections and targets – undermines the purpose of Rule 2111 and would create additional unnecessary and costly compliance burdens for FINRA members that their clients (fund managers) do not need to incur in order to market to the same investors.***

advisers put both placement agents, as well as any manager who could 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.

Unfortunately, we believe that the Proposed Amendments do not address the existing unlevel "playing field" among fund managers and FINRA-registered placement agents. Accordingly, despite the valuable services placement agents provide to both fund managers and investors alike, the Proposed Rules, if adopted, would continue to threaten the very viability of placement firms in the fund distribution marketplace.

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, particularly with respect to communications with institutional investors. We urge both the SEC and FINRA to revisit these rule discrepancies and to amend the content standards of Rule 2210 in a manner that will enable placement agents and other 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 firms 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.[4]

Very truly yours,

Molly Diggins
Molly Diggins (Jan 31, 2024 21:52 EST)

Monument Group, Inc.

4 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.

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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