MONUMENT GROUP

March 29, 2024

J. Matthew DeLesDernier
Deputy Secretary Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications (File Number SR–FINRA– 2023–016)

Dear Mr. DeLesDernier:

This letter is submitted in response to the request for public comments by the Securities and Exchange Commission (the "SEC") with respect to FINRA's proposed amendments to Rule 2210, as modified by Amendment No. 1 (the "Proposed Amendments").

Monument Group reiterates and incorporates by reference herein its previously filed January 2024 comment letter (the "MG January 2024 Letter"), a copy of which is also submitted herewith.

As detailed in the MG January 2024 Letter, while we greatly appreciate FINRA's proposal to allow for the use by its members of performance projections and targets, we unfortunately believe that the Proposed Amendments do not address the existing unlevel "playing field" among private fund managers and their FINRA-registered placement agents – a disadvantage which *threatens the very viability of placement firms in the fund distribution marketplace.*

Projections/target returns constitute extremely 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 in relation to marketing materials put both placement agents, as well as any manager who could benefit from the use of a placement agent, at a true competitive disadvantage. At the same time, these rule inconsistencies work to the detriment of the investor community that the rules are designed to protect – *i.e.*, *they prevent the use in marketing materials prepared by FINRA Members of material information on which institutional investors rely in order to make informed private fund investment decisions.*

I. Summary of Points Made in the MG January 2024 Letter

Much further detail is contained in the MG January 2024 Letter, but we reiterate here our main concerns with the Proposed Amendments:

(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 member firms/placement agents.

(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*.

(c) *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 would unnecessarily burden member firms/placement agents with onerous and duplicative due diligence and record requirements in connection with marketing private funds.

FINRA Rule 2210 already prohibits members from using false, misleading or promissory statements and requires members to ensure "that all communications be based on principles of fair dealing and good faith, be fair and balanced, provide a sound basis for evaluating the facts 'in regard to any particular security or type of security, industry, or service' and include all 'material fact[s] or qualification[s]' necessary to ensure such communications are not misleading."[1] Nevertheless, 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

[1] *See*, 2021 Report on FINRA's Examination and Risk Monitoring Program, Communications with the Public, Regulatory Obligations and Related Considerations.

and timeliness of any research use, among other things –would create ambiguous and onerous due diligence and document retention requirements that, at a minimum, would overlap with those of private fund managers and that could actually dissuade members from using performance projections and targets with investors.

(d) *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 (all of which must be Qualified Purchasers ("QPs") or institutional investors under the Proposed Amendments). These proposed requirements are not just, at a minimum, redundant of existing suitability obligations under Rule 2111, but also appear to impose *additional* suitability obligations on members vis-à-vis institutional investors that are more akin to those required for retail investors (*e.g*., the investor's investment portfolio, liquidity needs, *etc*,).[2] Such a result could once more deter placement agents from using projections and 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.

Conclusion

Projections/target returns are useful informational tools on which institutional and other sophisticated investors rely heavily in connection with investment decisions. Unfortunately, we believe that the Proposed Amendments do not address the existing unlevel "playing field" among fund managers and FINRA-registered placement agents.

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 member firms to provide the same quality information to institutional investors in a way that is consistent with the principles of investor protection and that does not instead serve to

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[2] 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 to QPs and institutional investors – undermines the purpose of existing 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 QPs/institutional investors.***

undermine the potential for the success of 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.[3]

Very truly yours,

Signature: Molly M Diggins
Molly M Diggins (Mar 29, 2024 14:34 EDT)

Email: mdiggins@monumentgroup.com

Monument Group, Inc.

[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.

Projections Comment Letter - MG (3.29.24)

Final Audit Report 2024-03-29

Created:	2024-03-29
By:	Molly Diggins (molly@monumentgroup.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAknw3Sw4HtHAYM_d-OBL4flo9cSMhYKAE

"Projections Comment Letter - MG (3.29.24)" History

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2024-03-29 - 3:57:19 PM GMT- IP address: 24.147.70.214

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2024-03-29 - 3:57:23 PM GMT

Email viewed by Mary M Diggins (mdiggins@monumentgroup.com)
2024-03-29 - 6:34:20 PM GMT- IP address: 104.47.70.126

Signer Mary M Diggins (mdiggins@monumentgroup.com) entered name at signing as Molly M Diggins
2024-03-29 - 6:34:45 PM GMT- IP address: 24.147.70.214

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2024-03-29 - 6:34:47 PM GMT