

# MONUMENT GROUP

May 17, 2017

Ms. Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington DC 20006-1506

Re: Regulatory Notice 17-06 – Request for Comments on Proposed  
Amendments to Rules Governing Communications with the Public

Dear Ms. Asquith:

We recognize that we are submitting this letter beyond the deadline, but we believe it is important to comment on the proposal to amend FINRA Rule 2210 (Communications Rule) to create an exception to the rule's prohibition on projecting performance to permit a firm to distribute a customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy. While we support the proposal and believe that reconsideration of the prohibition on projecting performance is appropriate, we wish to voice our concern that the rule could have unnecessary negative consequences for Monument Group Inc. ("Monument Group") and other FINRA-regulated independent third-party placement agents for private funds.

## **Background on Monument Group**

Monument Group is an independent broker-dealer registered with the Commission and a member of FINRA. Its primary business for over 20 years has been to help investment advisers that manage private investment funds to raise capital from institutional investors. The firm is independently owned and currently employs a total of 24 employees with 16 FINRA licensed registered representatives who, collectively, have over 200 years of experience in the investment business with an average of approximately 18 years.

Monument Group's 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 and provide placement agency 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"). Because we act as placement agents for only 3(c)(7) funds, all institutional investors we approach must be both "accredited investors" and "qualified purchasers" for purpose of the Company Act exemptions.

Monument Group acts solely as an intermediary with respect to the placement of fund interests. We do not open or maintain customer accounts; rather, we introduce institutional investors and other qualified purchasers to the fund managers, who are our clients. We provide private placement memoranda, subscriptions documents and other sales material to prospective investors. When a prospective investor purchases, the investor sends a completed subscription agreement and wires funds directly to the fund manager, who approves the investor, accepts the funds and reflects the investment in its records. Monument Group holds no advisory relationship with investors.

## **SUMMARY**

Forecasts and projections ("projections") have a place in securities offerings and securities advice. As the Regulatory Notice (the "Notice") points out, "the Investment Advisers Act does not prohibit the presentation of projections that comply with the antifraud provisions of the Act."

Projections that have a reasonable basis are useful informational tools, when used with other types of information. Private fund managers often use projections in their offering material and, for some types of investments, such as real estate funds, institutional investors and other sophisticated investors expect to receive projected performance information. We believe that, as a general matter, member firms should not be prohibited from using projections that have a reasonable basis. We support the proposal to permit the projected performance of an asset allocation or other investment strategy in a customized hypothetical investment planning illustration, but urge FINRA to permit members to treat the investment objectives of a private fund as an investment strategy designed for multiple clients who share an account. We also urge FINRA to consider, as part of any potential change to its rule prohibiting projections, the unnecessary burdens placed by the current projection prohibition on placement agents to private funds. Finally, we encourage FINRA to permit all member firms to use projected performance with institutional investors and qualified purchasers, as capital acquisition brokers ("CABs") will be permitted to do when the CAB rules go into effect in April. We discuss these three points in further detail below.

## DISCUSSION

### ***1. Private Funds as Asset Allocation or Investment Strategies for Multiple Clients Who Share an Account***

FINRA's Notice requests comments in seven specific areas. In the sixth request, FINRA asks whether there are "single investment products that operate like an asset allocation or other investment strategy for which performance projections might be appropriate." The Notice states that "the proposal would provide an exception to the prohibition of projections for a customized hypothetical investment planning illustration," with footnote 4 to that sentence clarifying that "a 'customized' investment planning illustration is one designed for a particular client ***or multiple clients who share an account.***" (Emphasis supplied.) We believe that the investment objectives of a private fund are the asset allocation or investment strategy for the fund and thus, in effect, a customized investment planning illustration for an account shared by multiple clients – i.e., the set of limited partners invested in the private fund.

We recognize that the use of projections will not be equally suitable for all private funds. The performance of a fund that invests in only corporate bonds or office buildings in a specified geographic area can be more reliably projected than that of a fund in which the adviser has greater discretion to determine the mix and types of assets. For this reason, the "reasonable basis" determination with regard to the projected performance of the fund should include not only how assets will perform but how accurately the mix of assets acquired can be predicted.

Most private fund managers, however, limit performance projections to those of prior funds, where the portfolio investments have been completed, but exits from such investments have not. A performance projection of that prior fund, accordingly, is self-limiting and can focus only on the projected performance of those specific assets (or of a limited number of other similar, intended investments), for which the fund manager has ample performance information and, certainly, a "reasonable basis" upon which to project the fund's ultimate performance based on those investments. Institutional investors considering investment in the manager's subsequent fund – one with the same or substantially similar investment strategy – would certainly find those projections at least as helpful as the hypothetical illustration of the performance of an asset allocation or investment strategy to a single client would be. We urge FINRA to permit reasonable-basis projections to be used in both cases.

## **2. Current FINRA Rules Prohibiting Projections Place Unnecessary Burdens on Placement Agents for Private Funds.**

It should be noted that the majority of Monument Group's clients are registered under the Advisers Act – or otherwise comply with most Advisers Act rules and with the SEC anti-fraud rules and regulations – which likewise require a reasonable basis for projection information and, consistent with the guidance in the Notice, would also require that marketing materials “clearly and prominently disclose the fact that the illustration is hypothetical,” that there is “no assurance that any described investment performance or event will occur,” and that “all material assumptions and limitations”<sup>1</sup> are disclosed.

Monument Group works closely with its clients – i.e., private fund managers – to develop marketing strategies and documentation that describe a fund manager's principals, their experience and, quite often, the performance of the manager's prior private equity funds. Due to the longer investment terms for private equity funds, the current fund's marketing materials may include some projections of the performance of portfolio investments made by the manager's prior funds. Our clients consider these materials crucial to marketing their abilities and expect Monument Group to employ them as part of our marketing strategy on their behalf. Indeed, institutional investors often consider strong prior fund performance to be a *sine qua non* for any serious consideration of a possible investment with a particular private equity manager.

In these circumstances, Monument Group often finds itself unable to convey in its own marketing materials what its clients can convey in their own. Yet, the client documents provided by placement agents to investors on their clients' behalf – e.g., a private placement memorandum or a fund “teaser” – often contain the “prohibited” projection information. Placement agents find themselves having to explain to their clients their inability to use certain important information in their own marketing materials. The FINRA projection prohibitions can accordingly have an awkward and potentially negative impact on a placement agent's relationship with its clients and can unnecessarily hinder the quality of a placement agent's services to its clients.<sup>2</sup> We urge FINRA to take these unnecessary burdens on

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<sup>1</sup> Notice, p. 3.

<sup>2</sup> Notably, the Notice appears to condone the use of projections-related communications by dually registered representatives with their *retail clients*. The notice states that these dually registered representatives may “choose to align the way they provide projections in their investment advisory business to the proposed amendments, thereby simplifying compliance and minimizing the costs of regulatory oversight.” Certainly the same policy considerations – i.e., simplification of compliance requirements and minimization of unnecessary compliance costs and burdens – should be an equally compelling consideration for FINRA in its assessment of a potential change to the prohibition on use of projections by placement agents to private funds vis-à-vis *institutional investors*.

private fund placement agents into account when considering the scope of any changes to the Communications Rule.

### ***3. Use of Predicted Performance with Institutional Investors and Qualified Purchasers***

The Notice states 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 the Suitability Rule, the filing and supervision provisions of the Communications Rule and, most recently, in the 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.

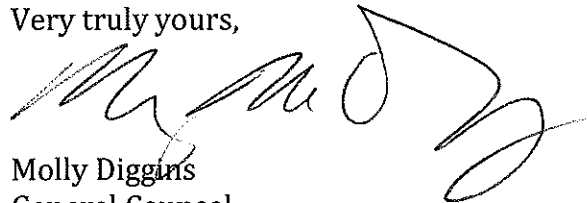
Some FINRA members, like Monument Group, would be able to qualify as a CAB except for technical conditions, like the prohibition on secondary sales. Non-CAB FINRA members should have the same freedom to provide projected performance information to Rule 016(i) institutional investors as CABs, not merely for reasons of competitive fairness and equal treatment, but because the same fundamental principle applies: institutional investors have sufficient sophistication to evaluate the projected performance and the weight to be given to it in the overall investment decision. We urge FINRA to, 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.

## CONCLUSION

We urge FINRA: (1) to permit brokers to make reasonable-basis projections about the investment objectives of a private fund as a form of hypothetical illustration for multiple clients sharing an account, (2) to consider, as part of its rule-making with respect to its members' use of projections, the unnecessary burdens imposed on placement agents to private funds by existing prohibitions, and (3) to allow brokers to provide reasonable-basis projections to Rule 0161(i) institutional investors in offerings exclusively to those investors and consistent with other rules applicable to brokers in the context of capital raising for institutional investors. We believe that amending the content standards of Rule 2210 in that way will enable brokers to provide higher quality information to investors in a way that is consistent with the principles of investor protection.

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

Very truly yours,

A handwritten signature in black ink, appearing to read 'Molly Diggins', is written over the typed name.

Molly Diggins  
General Counsel  
Monument Group, Inc.