January 12, 2012

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments on File Number SR-FINRA-2011-057 (Notice of Filing of Proposed Rule Change to Adopt New FINRA Rule 5123)

Dear Ms. Murphy:

We appreciate the opportunity to comment on FINRA's proposed Rule Change to Adopt FINRA Rule 5123 ("Proposed Rule 5123") regarding the private placement of securities. We apologize for the delayed submission of these comments but, prior to any Commission action on the proposed rule, wish to voice our concerns that the rule could have unique negative consequences for Monument Group Inc. ("Monument Group") and potentially all FINRA-regulated independent third party placement agents for private funds.

1. Background on Monument Group/Independent Placement Agents for Private Funds

Monument Group is an independent broker-dealer registered with the Commission and a member of FINRA, as well as a registrant with the MSRB, and its primary business is helping investment advisers that manage private investment funds raise capital from institutional investors. The firm is independently owned and currently employs a total of 21 employees with 11 FINRA licensed registered representatives who, collectively, have over 200 years of experience in the investment business with an average of approximately 17 years. The business and educational credentials of the firm's principals and employees are those of investment professionals - CFAs, MBAs, investment analysts and consultants. The primary business of the firm is helping investment advisers that manage private investment funds, such as private equity, venture capital, real estate and energy funds, raise capital from institutional investors. Monument Group provides placement agency services *only* for issuers of private funds – *i.e.*, generally, for funds that are exempt from registration under Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the "Investment Company Act").

The help that Monument Group, as an independent placement agent, provides to investment advisers for private funds 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 (including public pension plans) 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 also provide significant benefits to *investors* in private funds, including the following: (i) "quality screening" of funds prior to their introduction to investors who rely on Monument Group's expertise and successful track record in providing such screening; (ii) the provision of extensive due diligence packages – *e.g.*, references, historical track record verification and analysis, models for testing market variables (leverage, P/E or EBITDA multiples, etc.) and independent macroeconmic 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 small investors in getting their voices heard by investment advisers on topics ranging from fees to 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 small businesses. In addition, many independently owned placement agents, including Monument Group, are minority- or women-owned businesses. They are, for the most part, thinly capitalized and minimally staffed. Accordingly, incremental regulatory requirements can create resource and cost issues for independent agents such as Monument Group that are more easily addressed at larger firms.

2. <u>FINRA Should Amend the Proposed Rule to Provide an Explicit or "Implicit" Exemption for Offers of Private Funds by Independent Placement Agents</u>

Proposed Rule 5123 creates a separate rule for private placements other than member private offerings (as defined in Rule 5122) and imposes disclosure and filing requirements similar to those applicable to member private offerings. In particular, a member participating in a private placement subject to Rule 5123 would be required to do the following:

(i) Provide to each investor prior to sale a private placement memorandum or term sheet describing the anticipated use of offering proceeds, the amount and type of offering expenses and the amount and type of compensation provided or to be provided to sponsors, finders, consultants and members and their associated persons in connection with the offering. If no private placement memorandum or term sheet has been prepared by the issuer, the member must create and provide the necessary disclosure; and

(ii) No later than 15 calendar days after the date of first sale, file the private placement memorandum or term sheet/other disclosure (and all exhibits thereto) with FINRA and file any material amendment to the offering material with FINRA no later than 15 days after the date of first use.[1]

[1] In response to comments to the earlier rule proposal, FINRA has removed any reference in the proposed rule to review by FINRA of the filed offering material. In its statement in response to comments, FINRA stated: "[B]y requiring a "notice" filing [*i.e.*, post sale] FINRA will remove any implication that the FINRA staff will provide comments on a filing; that such filing with FINRA could be a precondition to commencing an offering; or that members should expect to receive any FINRA staff input before proceeding with an offering." The final proposed rule, however, still leaves open the possibility that FINRA could or would (post-offering) take issue with the contents of any particular offering document, whether created by the issuer or the FINRA member firm.

Monument Group will not repeat the many cogent points on Proposed Rule 5123 already raised by numerous other comment providers. Rather, Monument Group proposes, for the discrete reasons enumerated below, that the proposed rule either exempt from its coverage all offers of private funds by registered independent placement agents, or alternatively – and for all intents and purposes achieving the same effect – include offers to "accredited investors" (as defined in Rule 501 of Regulation D of the Securities Act of 1933) as an additional exemption to the proposed rule.

As currently proposed, Rule 5123 explicitly exempts, among other private placements, those that are offered solely to "institutional accounts, as defined in NASD Rule 3110(c)(4)," as well as to "qualified purchasers, as defined in Section 2(a)(51)(A)" of the Investment Company Act of 1940. The proposed rule further appears to provide that if a single purchaser in the offering proves to be a mere "accredited investor" – regardless as to whether the member placement agent solicited the investor (or even knew that any accredited investor was otherwise investing in the fund, through a relationship either with another non-exclusive placement agent or with employees of the fund manager itself) – the exemption from the rule for the entire offering would be lost. The potentially unintended effects of this rule construction could include any of the following:

The marginalization of an important category of investors in private funds: Simply to avoid the potential for scrutiny by an additional regulator, private fund issuers may uniformly bar accredited investors (who do not otherwise qualify for an exemption). Many other comment providers have already provided insightful summaries as to why this important category of investor should not be excluded from participation in private fund offerings. (*See*, *e.g.*, letters from Securities Industry and Financial Markets Association (March 14, 2011), New York City Bar Association (March 14, 2011), and Sullivan & Cromwell LLP (March 14, 2011).)

The creation of a disincentive for issuers to engage third party placement agents: Independent placement agents are generally required to register with FINRA.[2] In contrast, fund issuers (and their investor relations employees) may avoid FINRA regulation entirely by relying upon the "issuer exemption" from registration under Rule 3a-4 of the Securities Exchange Act of 1934 (the "Exchange Act") in connection with the offering of their own funds. Accordingly, rather than risk the potential for additional scrutiny of their offering documents, disclosures *etc.*, by FINRA under the proposed rule, issuers who wish to allow investment by any accredited investors in their funds may avoid the use of independent placement agents in connection with the sale of their funds altogether. Given the important "value adds" (as described above) that such independent placement agents provide to both issuers and fund investors alike, this "disintermediation" of placement agents is clearly not in the best interests of the private fund industry.

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[2] Any third-party solicitor who, for transaction-related compensation, solicits public pension plans or other public customers in the U.S. to invest in the securities issued by a private investment fund generally should be registered with the Commission as a broker-dealer and be a member of FINRA. As such, placement agents that act as third-party solicitors for investment advisers to private investment funds, such as Monument Group, generally should be registered broker-dealers and FINRA members.

The additional disclosure requirements of Proposed FINRA Rule 5123 would have an unnecessary incrementally anticompetitive effect on registered placement agents: Over the past two years, independent placement agents such as Monument Group have been required to submit to various levels of additional regulation by different regulators. In particular, in addition to being a member of FINRA, Monument Group, as well as many other independent placement agents, have recently registered with the Municipal Securities Rulemaking Board ("MSRB") based upon proposed "municipal adviser" regulations under Dodd-Frank. While the Municipal Advisor rules are still being considered by the Commission, there are likely to be additional reporting and compliance requirements imposed – by either FINRA, the MSRB *or by both regulators* – on independent placement agents as a result of these proposals.

In addition, "pay-to-play" regulations now in place at many state levels require placement agents to register as lobbyists at state, county ***and*** municipal levels in order to receive any payment from funds for legitimate placement agent activities. Some state or local laws ban receipt of contingency fees by placement agents (even by those registered as lobbyists). Still others ban the participation of third party placement agent activities entirely. Even where compensation is permitted, placement agents are required by most of the local lobbyist laws to submit to onerous registration, reporting and annual compliance requirements (again, at many different state and local levels). Many of these lobbyist regulations and placement agent policies also require fund issuers to register at these various state and local levels as "lobbyist employers" and to submit onerous disclosures to the investing plans *simply as a result of engaging a third party placement agent*.[3]

Many other commenters have provided detailed arguments in their letters that the proposed FINRA rule is unnecessary in light of existing (and proposed) regulation applicable to fund issuers[4] and to private offerings.[5] Others have pointed out that existing FINRA conduct rules and federal securities laws prohibiting fraud in connection with the sale of securities would achieve the same goals as the proposed rule without the additional layer of regulatory filings by compliant member firms.[6]

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[3] Many public pension plans have recently adopted "placement agent policies" requiring investment managers who use independent placement agents to file and update periodic reports disclosing compensation paid, *etc*., on a regular basis.

[4] *See, e.g.*, letter from the Managed Funds Association (March 14, 2011) ("MFA"). Many of Monument Group's clients are now required under Dodd-Frank regulations to register as investment advisers under the Investment Advisers Act of 1940. In addition to the existing general anti-fraud provisions of the securities laws – *e.g.*,. Exchange Act Rule 10b-5 and Advisers Act Rule 206(4)-8 – to which these issuers are already subject, this registration requirement will also impose increased disclosure and filing requirements on issuers concerning the funds they offer.

[5] *See, e.g.*, letters from MFA and the New York State Bar Association (March 28, 2011).

[6] Much like Rules 10b-5 and Rule 206(4)-8, FINRA Rule 2020 prohibits FINRA members from effecting "any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." In addition, in Regulatory Notice 10-22, FINRA has already provided detailed guidance to members for regulatory compliance in connection with Regulation D offerings.

Despite the demonstrated effectiveness of these existing regulations, however, FINRA Proposed Rule 5123 would now impose additional compliance burdens – *i.e.*, the filing of disclosure documents and updates thereto within certain prescribed time periods, as well the potential requirement to draft such disclosures – on registered placement agents as long as a single accredited investor is permitted to invest in a private fund for which it provides placement services. As noted above, the rule as proposed poses the potential for significant anticompetitive impact on registered placement agents – *i.e.*, the potential for their "disintermediation" from the sales process entirely - in connection with private placements of funds in which accredited investors may invest. This anticompetitive impact would apply *in addition to the anticompetitive impact of the existing pay to play laws as well as the potentially burdensome "municipal advisor" compliance requirements also described herein.* The incremental but unintended effect of all of these existing and/or proposed regulations may effectively put compliant SEC- and FINRA-registered placement agents – who provide significant value to private fund advisers and investors alike – out of business.

3. Conclusion/Recommendation

As noted above, independent private placement agents such as Monument Group provide significant benefits not only for fund issuers but also for fund investors – *e.g.*, due diligence, acting as a conduit for communication, *etc*. At the same time, over the past two years, the exponential growth of the various (and sometimes overlapping) regulations promulgated by well-meaning regulators could easily result in the "squeezing" out of these smaller – but no less important – independent placement agents, simply because the cost of compliance with many different regulators at many different levels will become too onerous.

Monument Group proposes that - rather than "piling on" to the existing and proposed regulations that may already have an irreparable anticompetitive effect on independent placement agents for private funds – FINRA provide an exemption for offerings of private funds by independent placement agents from the application of Rule 5123. The proposed rule would continue to apply to the private placement of unlisted securities (that are not pooled vehicles exempt from registration under the Investment Company Act). In addition, existing Rule 5122 would still apply to prevent conflicts of interest that may arise when a private placement is offered through an affiliate of an issuer. Adopting this discrete exemption would avoid the unintended anticompetitive impact of the rule to compliant SEC- and FINRA-registered placement agents while still achieving the investor protection that FINRA seeks with its proposal.

Alternatively, Monument Group would propose that the exemptions of Proposed Rule 5123 include an exemption for offers to "accredited investors" as defined in Rule 501 of Regulation D of the Securities Act of 1933. Accredited investors are not typically targets of placement agents such as Monument Group – *i.e.*, the vast majority of investors are institutional investors, qualified purchasers or qualified institutional buyers – but as noted in Section 2, above, if a single purchaser in the offering proves to be a mere "accredited investor," the exemption from the rule for the entire offering would be lost. This potential outcome could create a large administrative burden on funds and placement agents in connection with the tracking of investors and their status – especially where the engagement of the placement agent is not exclusive. A placement agent could – without knowing that an accredited investor has invested through another agent or through a relationship with the issuer itself – inadvertently fail to file the

prospectus or disclosure with FINRA required by the proposed rule.[7] Including "accredited investors" within the exemptions of Proposed Rule 5123 would allow independent placement agents to continue to offer private funds to all sophisticated investors, including "accredited investors," in compliance with existing FINRA rules and securities laws without worrying about a "technical" violation of a rule whose goals – as other commenters have persuasively posited – are already sufficiently addressed by existing securities laws.

We believe that these alternatives would allow independent placement agents to compete in the private placement market and continue to provide valuable services to both issuers and investors while still preserving FINRA's goals of curtailing fraud in connection with the private placement of securities.

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Thank you in advance for considering these comments. I am available for and would welcome further discussion.

Yours sincerely,

Alicia M. Cooney, CFA
Managing Director

Cc: Marc Menchel, Executive Vice President and General Counsel for Regulation, FINRA

[7] One way to avoid this administrative burden would be for the fund to prohibit "accredited investors" from investing at all. However, as noted above, the marginalization of all accredited investors from investing in private funds is not likely an intended industry goal.