February 27, 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 Partial Amendment No. 1 to Filing of Proposed Rule Change to Adopt New FINRA Rule 5123)

Dear Ms. Murphy:

We appreciate the opportunity to comment on Notice of Partial Amendment No. 1 to FINRA's proposed Rule Change to Adopt FINRA Rule 5123 ("Amendments to Proposed Rule 5123" or the "Rule 5123 Amendments") regarding the private placement of securities.

Monument Group, Inc. ("Monument Group") supports FINRA in its efforts to combat abuses in the private placement market. It further commends FINRA for its thoughtful consideration of the various comments of industry members in connection with issuing the Rule 5123 Amendments, as well as the Securities and Exchange Commission ("SEC") for its initiative in seeking further additional comments on the Rule 5123 Amendments.

Despite FINRA's laudable efforts to address the many concerns raised by prior comment letters, for many of the same reasons stated in its letter from Alicia M. Cooney, Managing Director of Monument Group, to Elizabeth M. Murphy, Secretary, SEC, dated January 12, 2012 ("Letter of January 12th") and as stated further below, ***Monument Group believes that Proposed Rule 5123, as modified by Partial Amendment No. 1, continues to present uniquely negative consequences for Monument Group and potentially all FINRA-regulated independent third party placement agents for private funds.***

1. Summary of Monument Group's Letter of January 12th

Monument Group is a small, independently owned broker-dealer (21 employees) registered with the SEC and a member of FINRA, as well as a registrant with the Municipal Securities Rulemaking Board ("MSRB"). Its primary business is helping investment advisers that manage private investment funds, including private equity, venture capital, real estate and energy funds, raise capital from institutional investors. Monument Group does *not* provide placement agency services for issuers other than private funds – *i.e.*, generally, 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").

As provided in greater detail in the Letter of January 12th, independent private placement agents such as Monument Group provide significant benefits not only for fund issuers but also for fund investors – *e.g.*, quality screening, the provision of extensive due diligence, and acting as a conduit for communication between funds and investors, among other things. However, as Monument Group's previous letter also details, the relatively recent exponential growth of the

various (and sometimes overlapping) regulations promulgated by well-meaning regulators have put tremendously costly and anticompetitive pressures on these smaller – but no less important – independent placement agents with potentially harmful unintended effects to the industry.

In particular, as the its Letter of January 12th points out, in addition to being a member of FINRA, Monument Group, as well as many other independent placement agents, have recently registered with the MSRB based upon proposed "municipal adviser" regulations under Dodd-Frank. While the Municipal Advisor rules are still being considered by the Commission, there is 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. These municipal advisor regulations come on the heels of the adoption by many state, county and municipal governments of "pay-to-play" regulations requiring placement agents to register as lobbyists in order to receive any payment from funds for legitimate placement agent activities or even prohibiting third party placement agent activities entirely. As the Letter of January 12th further points out, many of these lobbyist regulations also require fund issuers to register at these various state and local levels as "lobbyist employers" *simply as a result of engaging a third party placement agent*.[1]

In its Letter of January 12th, Monument Group proposed that, to alleviate the disproportional impact that recent regulation has had on FINRA members acting as independent placement agents, FINRA instead adopt one of the following alternatives (either achieving, for all intents and purposes, the same end result for such placement agents):

- Provide an exemption for offerings of private funds by such placement agents from the application of Rule 5123;[2] or

- Include an exemption from the application of proposed Rule 5123 for all offers to "accredited investors" as defined in Rule 501 of Regulation D of the Securities Act of 1933. (As Monument Group's prior letter pointed out, if a single purchaser in the offering proved to be a mere "accredited investor," the exemption from the rule for the entire offering would be lost, creating 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.)[3]

Monument Group's Letter of January 12th proposed that these alternatives would allow independent placement agents to compete in the private placement market and continue to

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[1] Most state and local lobbyist regulations also require fund issuers who use independent placement agents to file and update periodic reports disclosing compensation paid, *etc*., on a regular basis.

[2] The January 12th letter pointed out that 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) and that 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.

[3] Monument Group's prior letter noted that 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.

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.

2. Partial Amendment No. 1 to Proposed Rule 5123 Fails to Alleviate the Anti-Competitive Effects of the Rule on Independent Placement Agents

Among other things, FINRA's Amendments to Rule 5123 include the following proposals:

- Clarifying the term "private placement" to mean a non-public offering of securities conducted in reliance on an available exemption from registration under the Securities Act of 1933 (including a clarification of exemptions from this definition for certain secondary transactions, for certain offerings by banks and for securities issued in connection with Section 1145 of the Bankruptcy Code);

- Narrowing the application of proposed Rule 5123's disclosure requirements to only private placements in which a disclosure document drafted by or on behalf of the issuer is used; and

- Clarifying that sales to institutional accredited investors (entities, not individuals) would be exempt from the proposed rule.

While, as noted above, Monument Group appreciates FINRA's thoughtful consideration of the comments provided by many industry members in response to its initial rule proposal, we still consider the proposed rule, as modified by Partial Amendment No.1, to have a uniquely anticompetitive impact on independent placement agents.

Proposed Rule 5123, as modified by Partial Amendment No. 1, continues to create a disincentive for private fund issuers to engage third party placement agents: As noted in Monument Group's Letter of January 12th, independent placement agents are generally required to register with FINRA.[4] 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. While the Rule 5123 Amendments now include an exemption for *institutional* accredited investors, this amendment does not alleviate the anti-competitive pressures of the rule identified in Monument Group's prior letter. In particular, 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 *non-institutional* accredited investors in their funds would *still* 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

[4] 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.

investors alike, this "disintermediation" of placement agents is clearly not in the best interests of the private fund industry. [5]

Proposed Rule 5123, as modified by Partial Amendment No. 1, continues to create unnecessary and incrementally anticompetitive burdens on registered placement agents: Proposed Rule 5123 as amended would continue to impose additional compliance burdens – *i.e.*, the filing of disclosure documents and updates thereto within certain prescribed time periods – on registered placement agents as long as a single non-institutional accredited investor is permitted to invest in a private fund for which it provides placement services. In addition, the Rule, even with the proposed amendments – *i.e.*, clarifying that private placements to *institutional* accredited investors are exempt from the proposed rule – still creates unnecessary burdens on placement agents for private funds. In particular, although FINRA has now proposed that offers to *institutional* accredited investors be exempt from the proposed rule, if a single purchaser in the offering proves to be a mere *individual* "accredited investor," the exemption from the rule for the entire offering would be lost. As Monument Group's previous letter points out, 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 individual 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.

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.

As detailed in Monument Group's Letter of January 12th, many other commenters on FINRA's initial Rule 5123 proposal provided detailed arguments that the proposed FINRA rule is unnecessary in light of existing (and proposed) regulation applicable to fund issuers[6] and to

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[5] 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 and in further detail in the Letter of January 12th*.

[6] *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.

private offerings.[7] 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.[8]

Given existing regulations that effectively achieve the same investor protection goals that FINRA now seeks with Rule 5123 (and its proposed amendments), and in light of the above-described unanticipated compliance burdens and anticompetitive pressures on placement agents that would result from the rule's implementation – *including the potential for the disintermediation of placement agents from participation in the private placement of funds entirely* – Monument Group believes the proposed rule, as modified by Partial Amendment No. 1, should either (i) exempt offers of private funds by independent placement agents from its application or, alternatively, (ii) be disapproved by the SEC in its entirety. 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

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

[8] 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.