Monument Group

July 31, 2012

Ronald W. Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street, Suite 600
Alexandria VA 22314

Re: MSRB Notice 2012-28

Dear Mr. Smith:

We appreciate the opportunity to comment on the recent Municipal Securities Rulemaking Board (MSRB) concept release concerning the public disclosure of financial incentives paid or received by dealers and municipal advisors.[1] The Notice raises a number of issues for comment revolving around a central proposition that would require dealers and municipal advisors to publicly disclose (through the MSRB's Electronic Municipal Market Access (EMMA) website), certain payments and receipts arising out of their municipal securities/advisory activities and potentially representing conflicts of interest.

Monument Group is a small, independently owned broker-dealer (21 employees) registered with the SEC and a member of FINRA. In addition to being a member of FINRA, Monument Group, as well as many other independent placement agents, registered last year with the MSRB based upon proposed "municipal adviser" regulations under Dodd-Frank.[2] Monument Group's primary business is helping investment advisers that manage private investment funds, including private equity, venture capital, real estate and energy funds (collectively "private funds"), raise capital from institutional investors. Monument Group does not provide its services to issuers/managers of municipal securities.

Monument Group recognizes that the SEC has yet to adopt a final definition of "municipal advisor." In its current form, however, the SEC's definition of municipal advisor would include entities such as Monument Group and other independent placement agents who may solicit investment by government pension funds in private funds.

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[1] *See* "Request for Comment on Concept Proposal to Provide for Public Disclosure of Financial Incentives Paid or Received by Dealers and Municipal Advisors Representing Potential Conflicts of Interest," MSRB Notice 2012-28 (May 31, 2012) (the "Notice").

[2] *See* §975(a)(1)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), amending §15B(a)(1) of the Securities Exchange Act of 1934, making it "unlawful for a municipal advisor . . . to undertake a solicitation of a municipal entity. . . unless the municipal advisor is registered in accordance with this subsection." Monument Group and many other placement agents registered pursuant to the SEC's "interim final temporary" Rule 15Ba2-6T, allowing municipal advisors to comply with the registration requirement of Dodd-Frank §975, while the SEC and MSRB adopted implementing final rules.

In the first instance, Monument Group does not believe that the solicitation by placement agents of government pension funds for their investment in private funds should fall within the scope of the new "municipal advisor" regime. The regulation of municipal advisors with respect to its application to third party solicitors is geared virtually entirely toward "pay to play" restrictions – *i.e.*, curbing improper payments by solicitors or fund managers to influence the investment decisions of public pension funds. Such solicitors, however, already fall well within the ambit of the SEC's regulations as members of FINRA, which is also in the process of adopting "pay to play" restrictions for third party solicitors.

In particular, Rule 206(4)-5 under the Investment Advisers Act of 1940 (the "Pay-to-Play Rule") prohibits registered investment advisers from compensating a third party (such as a placement agent) for soliciting an investment from a government entity unless (i) such placement agent is registered with the SEC as an investment adviser, broker-dealer ***or*** "municipal advisor," and (ii) the placement agent is subject to payment restrictions equivalent to those of the Pay-to-Play Rule.[3] It is the SEC's expectation that FINRA will be proposing and ultimately adopting play-to-play restrictions equivalent to the Pay-to-Play Rule. *See* SEC June 8 Release ("It was our understanding at the time, and it still is, that FINRA is planning to propose a rule that would meet [the Pay-to-Play Rule] requirements. . .").

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 – including *for public pension fund investors*. Subjecting these placement agents to two separate regulators with respect to the same subject matter – *i.e.*, pay to play restrictions – would result in overlapping and potentially conflicting regulations and could ultimately competitively harm, rather than help, the very investors the regulators are seeking to protect.

The recent adoption by FINRA of Rule 5123 (Private Placement of Securities) is a particularly relevant example of overlapping or potentially conflicting regulations that could result from regulation of private placement agents by both FINRA and the MSRB. As originally proposed, Rule 5123 required FINRA members to disclose, among other things, the amount and type of offering compensation received by the member in connection with private placements to investors. In response to a number of comments made by industry members on the proposed rule, FINRA made a number of substantive changes, including the elimination of the compensation disclosure requirement, and the SEC granted accelerated approval of the rule as amended. *See* SEC Release No. 34-67157; File No. SR-FINRA-2011-057 (June 7, 2012) ("SEC June 7 Release"). Now, however, the MSRB's current Notice (on which this letter provides comment) contains virtually the same public disclosure requirement (through the EMMA site) of compensation received by placement agents that was *eliminated from the proposed FINRA rule in response to industry comment.*[4] If the currently proposed definition of "municipal advisor" is

[3] The SEC recently delayed until June 13, 2012, the solicitor restriction compliance date in order to provide FINRA and the MSRB sufficient time to adopt such equivalent "pay to play" restrictions for broker-dealers and municipal advisors. *See* SEC Release No. IA-3418; File No. S7-18-09 (June 8, 2012) (the "SEC June 8 Release).

[4] Monument Group itself provided comments on FINRA's proposed Rule 5123 and Amendment No. 1 thereto, and these comments were cited in subsequent releases by both the SEC and FINRA on the rule. *See*, *e.g.*, SEC June 7 Release at Note 5. Although Monument Group will not repeat in their entirety here, many of the same arguments

adopted by the SEC, Monument Group and other independent placement agents would, in this scenario, be subject to entirely conflicting disclosure rules by separate regulators.

As noted above (and to the SEC and FINRA in Monument Group's prior letters concerning FINRA Rule 5123), the relatively recent exponential growth of the various (and sometimes overlapping) regulations promulgated by well-meaning regulators has put tremendously costly and anticompetitive pressures on smaller – but no less important – independent placement agents, with potentially harmful unintended effects to the industry. In particular, independent placement agents may *uniquely* become subject to both FINRA and MSRB regulations under the SEC's current definition of "municipal advisor." Both the SEC/FINRA and MSRB "pay to play" regulations come *on top of* the adoption by many state, county and municipal governments of their own "pay-to-play" laws requiring placement agents to register as lobbyists in order to receive any payment from funds for legitimate placement agent services or even prohibiting third party placement agent activities entirely. In fact, 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*.[5]

To conclude, overlapping, duplicative and/or conflicting regulation by well-intended regulators may hold uniquely negative consequences for independent private placement agents, such as Monument Group, who provide significant investment disclosure and communication benefits not only to fund issuers but also to fund investors, including public pension funds. The exponential growth of these regulatory burdens 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 regulatory schemes at many different levels will become too onerous.

Accordingly, in the event that placement agents do ultimately fall within the ambit of MSRB regulation as "municipal advisors," Monument Group would propose that the MSRB consider the potential effect of any overlapping and conflicting results that the proposals of its current Notice – and of any rulemaking concerning municipal advisors to come – may have on Monument Group and all other FINRA-regulated placement agents.

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

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cited in its letters to the SEC regarding the disclosure requirements of Rule 5123 as originally proposed would apply equally to the EMMA disclosure requirement proposed by the MSRB's Notice.

[5] 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.

Yours sincerely,

/s/
Molly M. Diggins
General Counsel

CC: Alicia M. Cooney, CFA
Managing Director