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OFFICE OF CHIEF COUNSEL
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33 Act --



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Thomas C. Sauran November 3, 1987
President

Registered with the
Commodity Futures
Trading Commission as a
Commodity Trading Advisor

Member
National Futures
Association

Mr. William E. Morley
Office of the Chief Counsel
Division of Corporate Finance
Securities Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

PUBLIC AVAILABILITY DATE: 12-14-87
ACT SECTION RULE
1933 2(1) ---

Dear Mr. Morley:

Customer Funds Fully
Segregated

SKJ Commodities Corporation ("SKJ") requests advice

All Brokers
Registered CFTC
and NFA

that the Commission staff will not recommend that the
Commission initiate any enforcement action against SKJ

Subscriber
Commodity World
News Network

under the federal securities laws in connection with
the offer and sale of its Annuity program, more fully

Subscriber Reuters
Satellite System

described below. Specifically, SKJ requests advice

Direct Links to
New York
London

Zurich, Hong Kong, and
Chicago Trading Floors

that it is not offering or selling a security, as
defined in Section 2(1) of the Securities Act of 1933

(the "Act"), or in the alternative, that any such offer

Direct Teletype &
Computer Link to
Cash Markets

or sale is not subject to the registration and
antifraud provisions of the Act.

Simultaneous Analytical
Charting Equipped

FACTS

SKJ is an Illinois corporation, with its main place
of business in Niles, Illinois. SKJ is registered with
the Commodity Futures Trading Commission ("CFTC") as a
Commodity Trading Advisor ("CTA") under Section 4m of
the Commodity Exchange Act ("CEA"). In addition, SKJ
is a member of the National Futures Association, the
self-regulatory organization for the commodity futures
industry.

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SKJ intends to offer the SKJ Annuity Program ("Annuity Program"). The Annuity Program will be a trading advisory program offered to public customers, and it will be structured as follows.

The Annuity Program is a two part program involving the purchase of an annuity contract, and the trading of a commodity futures options account. SKJ will consult with each investor regarding his investment objective, net worth and suitability. In this consultation SKJ, as a CTA, will advise each investor as to the amount that optimally should be invested in the Annuity Program.

Approximately fifty-five to sixty percent of the investment will be used to purchase an annuity. This amount reflects the sum that needs to be applied to purchase a fixed annuity producing an expected return, after a specified period. This period will be either three or five years, as chosen by the investor. The exact annuity amount will be set by the insurance company that issues the annuity yields. The balance will be designated for commodity futures options trading.

The investor will issue a check to a Futures Commission Merchant ("FCM"), in the full amount of the investment. Depending on the annuity selected by the investor, the FCM will send fifty-five to sixty percent of this amount to the insurance

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company, to purchase the annuity. The FCM will apply the balance to open an options trading account as described below.

SKJ will have no custody or control over the funds used to purchase the annuity, which will remain a contractual obligation between the investor and the insurance company. An agent of the insurance company, not affiliated with SKJ, will handle all aspects of marketing the annuity to the investor.

With regard to the account opened with the FCM, the investor will instruct the FCM that SKJ, as a CTA, will direct the trading program in commodity futures. SKJ will have discretionary authority over the commodity futures account.

As a registered CTA, SKJ will deliver to the investor a disclosure document which comports with the requirements of the CEA. This disclosure document will describe the risks involved, the trading strategies to be employed, and the past performance record of SKJ. In addition, the disclosure document will contain the incentive fees that SKJ will charge, which will be thirty percent of the net profit. The disclosure document also generally will describe SKJ's business and operating history.

DISCUSSION

Although we believe that the Annuity Program is not within the federal securities laws, we recognize that there may be some question as to whether it is an "investment contract" within Section 2(1) of the Act.

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It should be noted that insurance annuity contracts and commodity futures options traditionally are viewed as exempt from registration. Under the Act, Section 3(a)(8) provides an exemption for annuity contracts issued by insurance companies which are subject to the supervision of a state insurance commission or similar regulatory authority. Although the effect of Section 3 generally is to exempt a security from the Act's registration provisions, insurance policies and annuity contracts are considered outside the purview of the Act. As noted by Professor Loss, the Commission has taken the position that "policies or annuity contracts were not intended to be securities, and that in effect Section 3(a)(8) is supererogation." L. Loss, Fundamentals of Securities Regulation 214 (1983) [hereinafter L. Loss]. Courts considering annuities have held that although certain variable annuities may be subject to the securities laws, fixed annuities generally are exempt. See Otto V. Variable Annuity Ins. Co., (VALIC), [Current Developments] Fed. Sec. L. Rep. (CCH) Para. 93,012 (7th Cir. 1986); SEC v. VALIC 359 U.S. 65, 69 (1959). The commission recently adopted Rule 151 which provides a safe harbor for annuity contracts, if they: 1) are issued by an insurance company subject to state supervision; 2) include certain guarantees of principal and interest sufficient for the insurer to be deemed to assume the investment risk; and 3) are not marketed primarily as investments. In promulgating the Rule the Commission noted that "compliance with Rule 151 will assure 'non-security status'." Release 33-6645 (May 29, 1986).

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Most commodity futures and futures options also are considered outside the scope of the federal securities laws. Again, Professor Loss states, "clearly the term 'security' does not comprehend a commodity futures contract per se any more than it does an orthodox life insurance policy." See L. Loss, at 254. And, commodity futures options similarly are non-securities. Id at 256; see Glazer v. National Commodity Research and Statistical Serv., 547 F.2d 392, 393 (7th Cir. 1977). Generally, the regulation of commodity futures, and futures options, is within the exclusive jurisdiction of CFTC. See L. Loss at 258; CEA Section 2(a)(1).

Under the Annuity Program, investors will be purchasing only fixed annuities and commodity futures options that are exempt from the federal securities laws. SKJ will monitor investors' annuity purchases, and will verify that the contracts are fixed annuities meeting the requirements of Rule 151 and Section 3(a)(8). Similarly, only commodity futures options will be allowed in the SKJ-managed accounts maintained with FCM's.

A concern arises over whether the Annuity Program, involving the purchase of fixed annuities and futures options, may be construed as an investment contract. It should be noted that SKJ will not have access to the fixed annuity. The annuity will be contracted directly between the insurance company and the investor. SKJ never will have possession or constructive control of the funds used to purchase the annuity, nor will it have

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control over the purchased annuity. The annuity's pay-out to the investor will be independent of any activity undertaken by SKJ in managing the investor's commodity futures account.

Due to this structure, the Annuity Program should not be considered an "investment contract" within the meaning of Section 2(1). The two components of the Annuity Program, fixed annuities and commodity futures options, normally are afforded "non-security" status, as described above. Moreover, the Annuity Program does not bear any of the traditional investment contract indicia. Separate trading accounts will be maintained, and there will be no pooling of investors' funds. The investor will be relying on SKJ's managerial efforts only in connection with trading in his commodity account. This reliance on SKJ's trading expertise is identical to any investor's reliance on a CTA for managing a commodity trading account, and activity outside the securities laws.

In light of the above, we believe that the Annuity Program proposed by SKJ is exempt from registration under the Act. We request the concurrence of the staff of the Division of Corporate Finance that it will not recommend that the Commission initiate enforcement action against SKJ in connection with the offer and sale of these programs.

Very truly yours,

SKJ Commodities Corporation


Thomas C. Souran

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RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

Re: SKJ Commodities Corporation ("SKJ")
Incoming letter dated November 3, 1987

Based on the facts presented, this Division is of the view that the annuity contract portion of SKJ's Annuity Program does not involve the sale of a "security" under Section 2(1) of the Securities Act of 1933 (the "1933 Act"). However, in view of (1) the fact that the Annuity Program will be offered publicly, (2) the unsettled state of the law regarding the necessity for registration of discretionary commodities futures options accounts, and (3) the possibility that a no-action position could be misconstrued or misapplied in other situations, this Division is not in a position to express any view as to the applicability of the provisions of the 1933 Act to the Annuity Program as described in your letter.

Sincerely,

Sara Hanks

Sara Hanks
Attorney Fellow