The Formal Opinion Letter

Stanley J. Friedman
I. Definition. "Opinion . . . A formal expression by an expert, professional authority, or the like, of his thought upon or judgment or advice concerning a matter." Webster's New International Unabridged Dictionary (2nd Ed. 1954).


II. Purpose. To describe legal status or relationships arising out of defined fact situations in order to achieve one or more of the following objectives, among others:

A. To resolve disputes or uncertainties (e.g. as to the meaning of particular language in a contract).

B. To provide assurance (e.g. as in a title opinion).

C. To justify going forward by describing (i.e. predicting) legal consequences (or, conversely, by providing a basis for assuming absence of adverse legal consequences) of prior or proposed transactions (e.g. tax opinion).

D. To satisfy contractual requirement (e.g. opinion of issuer's counsel pursuant to underwriting agreement).

E. To satisfy regulatory requirements (e.g. opinion given in connection with Securities Act Registration).

F. To provide a basis upon which a regulatory body may rely in its own interpretation of fact situations (e.g. opinion relied on by staff of Securities and Exchange Commission in giving "no-action" letter).
C. To resolve questions raised by other professionals and to provide authoritative basis for statements in reports and opinions with respect to matters as to which other professionals are not competent to make (or are unwilling to assume responsibility for) judgments (e.g. to provide sources of professional judgment and "audit evidence" for accountants, or to provide opinions on local law for general counsel).

III. Elements of Formal Opinion.

A. Addressee: To whom is opinion addressed?
   1. To client.
   2. To third party dealing with client.

B. Statement of Context.
   1. For whom is opinion written (e.g. for delivery to underwriter).
   2. For what purpose (e.g. to set forth the writer's opinion of the tax consequences of a proposed transaction).

C. Statement of relationship of attorney to client, including some or all of the following:
   1. General counsel vs. special counsel.
   2. Duration of relationship.
   3. Participation of attorney in structuring and documenting transaction under review.
   4. Other relationships (e.g. ownership of client's securities, service as director or corporate officer).
   5. Conflicts of interest (e.g. relationship to other parties involved in the transaction).
D. Statement of facts underlying the opinion and extent to which facts are based on:

1. Direct examination of parties.
2. Review of original documents or certified copies.
3. Reliance on official documents (e.g., certified copies of charter documents).
4. Statement of facts or representations delivered by client (often in form of memorandum or affidavit prepared by lawyer).
5. Assumed set of facts (but see V.C. below).

E. Statement of legal principles applied to facts.

1. Statutes and regulations.
2. Cases.
3. Legislative history.
4. Administrative interpretations, both formal and informal (e.g. no-action letters of Securities and Exchange Commission, tax rulings, administrative interpretations of state securities commissioners).
5. Reliance on opinions of other lawyers (e.g. as to law of another jurisdiction or as to particular matters involving specialized areas of expertise).

F. Legal analysis.

1. Summary statement.
2. Analytical statement in nature of brief or memorandum weighing relevant authorities and applying them to facts (particularly in hard cases)
   See V.D. below.

G. Statement of the opinion ("Based on the foregoing, it is our opinion that ...")
   1. Unqualified opinion (e.g. "The Corporation is duly organized, validly existing and in good standing under the laws of New York State").
   2. Qualified opinion (e.g. "Subject to compliance with applicable state securities laws, the shares of the Company will, when issued and sold in accordance with the prospectus included in the registration statement of which this opinion is part, be validly issued ...").

H. Disclaimers (e.g. "In rendering this opinion, we express no views with respect to the status of the Limited Partnership for purposes of the Internal Revenue Code of 1954, as amended ...")

IV. Stylistic Matters
   A. Long vs. short opinion (possibly in the latter case, backed up by a memorandum to files).
   B. Conclusion at beginning followed by supporting analysis vs. analysis leading up to conclusion at end.
   C. Use of the precise and correct statutory terms (e.g. does the state corporate law use the term "stockholder" or "shareholder"; does it refer to "common stock" or "common shares"?).
   D. Use of defined terms (e.g. 300,000 shares of common stock, par value $1 per share (the "Shares")).
E. Quotations from original sources vs. paraphrasing.

V. Some Caveats.

A. Scope of Opinion. The opinion should deal with the question asked and not with other matters which, though interesting, are either outside the scope of the opinion, or are not necessary to the analysis by which the opinion is reached.

B. Competence of lawyers. Subject matter of opinions should be within the area of the attorney's expertise; and attorneys should avoid wherever possible giving opinions for which they have no professional competence. It is difficult to see on what basis an attorney can opine that an issuer has reasonable grounds to believe that an "offeree and his offeree representative(s) have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and rights of the prospective investment, and that the offeree is able to bear the economic risk of the investment" in the context of an opinion given with respect to Rule 146 under the Securities Act of 1933.

C. Use of assumptions. If the assumptions in the opinion embrace the totality of the legal question, the result is not an opinion at all but merely a restatement of the question. This is, of course, hardly an accident where the subject matter of the opinion is to a large extent outside the competence of the attorney. (See, e.g. opinions with respect to Rule 146 under the Securities Act of 1933 elsewhere in this course handbook.

D. Close Questions. If there is a close question, the opinion should make clear why contrary authority has been rejected or particular facts have been given more weight than others.
E. Moral judgments. Don't confuse moral judgments (especially your own) with legal opinions.

F. Time to negotiate opinion. The time to negotiate an opinion is at the start of a transaction. It is obviously important to know in advance what kinds of problems the opinion will present.

G. Preparation and Review. As the developments underlying this program make clear, giving an opinion is a serious business and should not be taken lightly. The procedures by which opinions are prepared, reviewed and signed require careful controls as a matter of firm policy. These procedures should be reviewed periodically in light of changing developments in law -- and liability.

H. Date. Opinions should be dated. The law or the facts may change. Except in special circumstances requiring an earlier date (which should be specified in the opinion) the date should be the date of delivery.

I. Distribution and Quotation. Self-interest dictates a prohibition against distribution (except to identified persons) and quotation without prior written consent.
October 24, 1974

In re: Sale of up to 45 Herd Units

Gentlemen:

For "curiosity review" of the above-captioned offering, you require an opinion that the "non-public offering" exemption afforded by Section 4(2) of the Securities Act of 1933, as amended, (the "Act"), is applicable to the proposed offering of the Herd Units of the Company, thereafter referred to as (the "Company").

As counsel for a broker-dealer licensed under the laws of the state of Ohio, and a member of the National Association of Securities Dealers, Inc., we have examined the Private Placement Brochure regarding the offering of the Herd Units, and we have examined Section 4(2) of the Act, the various Rules and Interpretative Releases of the Securities and Exchange Commission ("SEC") promulgated pursuant thereto, and the case law concerning that section.

LAW

Recognizing the need for objective standards to enable responsible businessmen to rely on the Section 4(2) exemption in order to raise capital in a manner that complies with the purposes of the Act, the SEC responded with a proposal "to implement the purposes and policies underlying the Act" to permit exemptions from registration "in situations where the benefits to be derived by registration are too remote or the offenses of the securities are in a position to fend for themselves." (SEC Securities Act Release No. 5336 (November 28, 1972), introducing Proposed Rule 146.) This proposal was revised, in part, by SEC Securities Act Release No. 5430, published on October 18, 1973.

On April 23, 1974, the SEC announced the adoption of Rule 146 under the Act, to become effective June 10, 1974, which, as indicated above, had been first noticed for comment in Securities Act Release No. 5336.
which had been reporposed for comment in revised form in Securities
Act Release No. 5430. (Securities Act Release No. 5487, April 23,
1976.)

Rule 146 (sometimes referred to herein as the rule) is designed to
provide more objective standards for determining when offers or sales
of securities by an issuer would be deemed to be transactions not in-
volving any public offering within the meaning of Section 4(2) of the
Act and thus would be exempt from the registration provisions of the
Act. The rule is not the exclusive basis for determining whether that
exemption is available. Accordingly, although persons claiming the
exemption have the burden of proving its availability, persons may
continue to rely on the Section 4(2) exemption by complying with the
relevant administrative and judicial interpretations in effect at the
time of the transaction. (Preliminary Note 1, to Rule 146.) The pro-
tection afforded by the rule, however, is available only to those who
satisfy all its conditions.

The conditions of Rule 146 relate to limitations on the manner of
offering, the nature of the offerees, access to or furnishing of
information about the issuer, limitations on the number of pur-
chasers and limitations on the subsequent disposition of securities
acquired pursuant to the rule.

In connection with the manner of offering, Rule 146(c) states, "neither
the issuer nor any person acting on its behalf shall offer, offer to
sell, offer for sale, or sell the securities by means of any form of
general solicitation or general advertising, ....". In order to avoid
any public manner of offering, this section precludes general adver-
tising or general solicitation. Rule 146(c)(1) prohibits "any adver-
tising, article, notice or other communication published in any
newspaper, magazine or similar medium or broadcast over television or
radio." Limited exceptions to the general advertising prohibition
are found in Rule 146(c)(2) and (3) which allow seminars or meetings
and written communications with those persons or their offeree repre-
sentatives qualifying as having such knowledge and experience in finan-
cial and business matters that they are capable of evaluating the merits
and risks of the prospective investment or that the offeree can bear the
economic risk of the investment. (See Rule 146(d)(2) below.)

In order to assure that the offerees can fend for themselves, the rule
was conditioned on the nature of the offeree. Rule 146(d), "Nature
of Offerees," states, "The issuer and any person acting on its behalf
who offer, offer to sell, offer for sale or sell the securities shall
have reasonable grounds to believe and shall believe:
"(1) Immediately prior to making any offer, either:

"(i) that the offeror has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

"(ii) that the offeree is a person who is able to bear the economic risk of the investment; and

"(2) Immediately prior to making any sale, after making reasonable inquiry, either:

"(i) that the offeror has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or

"(ii) that the offeror and his offeror representative(s) together have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment and that the offeror is able to bear the economic risk of the investment."

Rule 166(d)(1) requires that the issuer and any person acting on its behalf shall have reasonable grounds to believe, and shall believe, immediately prior to making an offer, that the offeror has such knowledge and experience that he is capable of evaluating the merits and risks of the proposed investment or that the offeree can bear the economic risk of the investment.

Rule 166(d)(2) requires that the issuer must prior to a sale, after making reasonable inquiry, have reasonable grounds to believe and shall believe either that the offeree himself has the requisite knowledge and experience, or that the offeror and his offeror representative have such knowledge and experience and that the offeree himself is capable of bearing the economic risk of the investment.

As to the information that must be provided regarding the issuer, Rule 166(e), Access to or furnishing of information, states:

"(1) Either

"(i) each offeree shall have access during the course of the transaction and prior to the sale to the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense; or
"(ii) each officer or his officer representative(s), or both, shall have been notified during the course of the transaction and prior to sale, by the issuer or any person acting on its behalf, the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can ascertain it without unreasonable effort or expense. This condition shall be deemed to be satisfied as to an officer if the officer or his officer representative is furnished with information, either in the form of documents actually filed with the Commission or otherwise, as follows:

"(a) in the case of an issuer that is subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934:

"(1) the information contained in the annual report required to be filed under the Exchange Act or a registration statement on Form S-1 under the Act or on Form 10 under the Exchange Act, whichever filing is the most recent required to be filed, and the information contained in any definitive proxy statement required to be filed pursuant to Section 14 of the Exchange Act and in any reports or documents required to be filed by the issuer pursuant to Section 13(a) or 15(d) of the Exchange Act, since the filing of such annual report or registration statement, and

"(2) a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs which are not disclosed in the documents furnished;

"(b) in the case of all other issuers, the information that would be required to be included in a registration statement filed under the Act on the form which the issuer would be entitled to use, provided, however, that if the issuer does not have the audited financial statements required by such form and cannot obtain them without reasonable effort or expense, such financial statements may be provided on an unaudited basis;

"(c) notwithstanding subdivisions (a)(1)(ii)(a) and (b) exhibits required to be filed with the Commission as part of a registration statement or report need not be furnished to each officer or officer representative if the contents of the exhibits are identified and such exhibits are available pursuant to subparagraph (e)(2)"
(2) The issuer shall make available, during the course of the transaction and prior to sale, to each officer or his officer's representative(s) or both, the opportunity to ask questions of, and receive answers from, the issuer or any person acting on its behalf concerning the terms and conditions of the offering and to obtain any additional information, to the extent the issuer possesses such information or can acquire it without unreasonable effort or expense, necessary to verify the accuracy of the information obtained pursuant to subparagraph (c)(1) above; and

"(3) The issuer or any person acting on its behalf shall disclose to each officer, in writing, prior to sale:

"(i) any material relationship between his officer's representative(s) or its affiliates and the issuer or its affiliates, which then exists or mutually is understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship;"

"(ii) that a purchaser of the securities must bear the economic risk of the investment for an indefinite period of time because the securities have not been registered under the Act, and therefore, cannot be sold unless they are subsequently registered under the Act or an exemption from such registration is available; and

"(iii) the limitations on disposition of the securities set forth in subparagraphs (h)(2), (h)(3), and (h)(4) of the rule."

Rule 146 contains a limitation on the number of purchasers. Rule 146(g), Number of Purchasers, states,

"(i) there shall be no more than thirty-five purchasers of the securities of the issuer from the issuer in any offering pursuant to the rule."

For purposes of computing the number of purchasers Rule 146(g)(2) advises:

"(i) the following purchasers shall be excluded:

"(a) any relative or spouse of a purchaser and any relative of such spouse, who has the same home as such purchaser; and

"(b) any trust or estate in which a purchaser or any of the persons related to him as specified in subdivision
(q)(1)(i) or (c) collectively have 100 percent of the
beneficial interest (excluding contingent interests):

"(c) any corporation or other organization of which a
purchaser or any of the persons related to him as specified
in subdivision (p)(2)(1)(a) or (b) collectively are the
beneficial owners of all the equity securities (excluding
directors’ qualifying shares) or equity interest; and

"(d) any person who purchases or agrees in writing to
purchase for cash in a single payment or installments,
securities of the issuer in the aggregate amount of
$165,000 or more.

"NOTE: The issuer would have to satisfy all the other pro-
visions of the rule with respect to the purchasers
specified in subdivision (p)(2)(1)."

If the issuer is dealing with "offeree representatives", Rule 166(a)(1)
defines an "offeree representative" as follows ... "any person or per-
son, each of whom the issuer and any person acting on his behalf,
after making reasonable inquiry, have reasonable grounds to believe
and believe satisfies all of the following conditions:

"(1) is not an affiliate, director, officer or other
employee of the issuer, or beneficial owner of 10 percent or
more of any class of the equity securities or 10 percent or
more of the equity interest in the issuer, except where the
offeree is:

"(a) related to such person by blood, marriage or
adoption, no more remotely than as first cousin;

"(b) any trust or estate in which such person or any
persons related to him as specified in subdivision (p) or
(c) collectively have 100 percent of the beneficial interest
(excluding contingent interests) or of which any such per-
son serves as trustee, executor, or in any similar capacity;
or

"(c) any corporation or other organization in which
such person or any persons related to him as specified in
subdivision (p) or (c) collectively are the beneficial
owners of 10 percent of the equity securities (including
directors’ qualifying shares) or equity interest;
"(ii) has such knowledge and experience in financial and business matters that he, either alone, or together with other officers, representatives of the officer, is capable of evaluating the merits and risks of the prospective investment;"

"(iii) is acknowledged by the officer, in writing, during the course of the transaction, to be his officer representative in connection with evaluating the merits and risks of the prospective investment; and"

"(iv) discloses to the officer, in writing, prior to the acknowledgement specified in subdivision (iii), any material relationship between such person or its affiliates and the issuer or its affiliates, which then exists or is mutually understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship."

As was noted in the release accompanying the rule as proposed for comment in October 1973, (Securities Act Release No. 5430) the acknowledgement and disclosure of relationships must be made with respect to each prospective investment even in the case of a discretionary account. Where an advisor with discretionary authority wants to act as officer representative, the rule requires that the acknowledgement specified in subdivision (b)(iii)(iii) be obtained for each transaction. Accordingly, advance blanket acknowledgement for "all securities transactions" or "all private placements" or similar broad advance acknowledgements will not satisfy the rule.

**OPINION**

Since the applicability of the "nonpublic offering" exemption to any particular situation depends on the factual circumstances surrounding the offering, we have made certain factual assumptions with respect to the manner in which the Hard Units of the Company will be offered in rendering our opinion with respect to the applicability of the exemption. Accordingly, our opinion is based upon the following assumptions of fact:

(a) the sale of the Hard Units will be limited to a small group of investors, in any event not to exceed 35 persons and that the computing of the number of purchasers, 35, will comply with 146(g)(12) (para.); and

(b) the Hard Units will be offered only to persons who the issuer and any person acting on its behalf shall have reasonable ground to believe and shall believe immediately prior to making an offer either that the officer has such knowledge and experi-
once in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or that an offeror can bear the economic risk of the investment. In addition, immediately prior to making a sale, the issuer and any person acting on its behalf, after making reasonable inquiry, shall have reasonable grounds to believe and shall believe either (1) that the offeror has the requisite knowledge and experience, or (2) that the offeror and his offeree representative have the requisite knowledge and experience and that the offeror is a person who is able to bear the economic risk of the investment. All purchasers or their representatives will so represent, in writing.

(c) the issuer and any person acting on its behalf, have, after making reasonable inquiry, reasonable grounds to believe and believes that an offeror representative of an offeror or purchaser is not an affiliate, director, officer or other employee, or beneficial owner of ten (10%) percent or more of the issuer; has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment; is acknowledged, in writing, by the offeror during the course of the transaction to be his offeror representative; and discloses to the offeror, in writing, any material relationship existing or mutually understood to be contemplated between himself or his affiliates and the issuer or its affiliates or any such relationship which existed during the previous two years, and any compensation received as a result of such relationship.

(d) each offeror shall have ready access during the course of the transaction and prior to the sale to the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense; or each offeror or his offeror representative, or both, shall have been furnished during the course of the transaction, prior to sale, by the issuer or any person acting on its behalf, the same kind of information that is specified in Schedule A of the Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense. This condition shall be deemed to be satisfied as to an offeror if the offeror or his offeror representative is furnished with information that would be required to be included in a registration statement filed under the Act on the form which the issuer would be entitled to use. (See Rule 164(e) supra.)

(e) in offering the New Units for sale, 

will make reasonable inquiry to assure that the purchasers of the New Units will not acquire such units with a view to disposition, but rather, will acquire such units for purposes
of long term investment. The purchasers of the limited partnership units will so represent, in writing, to

(f) neither the issuer nor any person acting on its behalf shall offer to sell or sell the Fund Units by means of any form of general solicitation or general advertising.

Based on the foregoing assumptions of fact, and reviewing each of the standards established in Rule 146, we reach the following conclusions with respect to the offering for sale of the Fund Units presently under consideration.

1. Number of Purchasers. The SEC in Rule 146 has established a numerical test, limiting the sale of the securities to no more than 35 persons in the type of offering presently under consideration. Since Rule 146 has established a numerical limitation of 35 purchasers, we conclude that the present offering should comply with this standard, based on the assumption set forth above that the present offering will be limited to the sale of limited partnership units to a small group of investors not to exceed 35 persons, and on that assumption that the offering, offeror representative, purchasers, or purchaser's representative have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment.

2. Identify of Offerees and Purchasers. The determination of compliance with this standard involves an examination of the relative "sophistication" of the offerees, access of the offerees to the kind of information necessary to make an informed investment decision, and the relationship of the offerees to the issuer and to each other. Rule 146 sets forth certain objective criteria to determine these factors, requiring the issuer or its representative to have "reasonable grounds to believe" prior to making an offer that the offeree or his investment representative has "such knowledge and experience in financial and business matters that he is capable of utilizing the information (provided to him) to evaluate the risks of the prospective investment and of making an informed investment decision; and that the offeree is a person who is able to bear the economic risks of the investment." Further, the rule required that the offeree or offeree representative be provided with access to the kind of information that would be made available by registration under the Act and to such other information as is necessary for verification. Based on the assumptions made above with respect to the nature of the persons to whom the Fund Units of the Company will be offered, and with respect to the type of information to be provided, and to the ready availability of additional information, we conclude that the present offering should comply with this standard.
3. Size and Manner of Offering. Paragraph (I) of the Rule requires that the offeror have access to the same kind of information that is required by Schedule A of the Act to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense or that the offeror or his offeror’s representative be furnished, during the course of the transaction and prior to sale, such information. We have been advised by the issuer that such information is readily available. In addition, no form of general advertising may be employed. We have been advised by the issuer that the present offering will not employ any form of general advertising. Further, based on the assumptions and facts set forth above with respect to the means by which the limited partnership units will be offered and sold, it will meet the test promulgated by Rule 146. Therefore, we conclude that this standard should be met.

4. Investment Intent. This standard prohibits the sale of securities to a person who is an underwriter as defined in the Act. The thrust of this prohibition is to assure that purchasers do not acquire the securities with an intention to engage in a further distribution. Accordingly, each investor must have “an investment intent” and must retain the securities acquired for a sufficient “holding period”. See, SEC Securities Act Release No. 4554 (1942) supra. Rule 146 requires the issuer to make reasonable inquiry into ENGS circumstances which might indicate that purchasers are underwriters, and to use reasonable care to assure that the securities acquired have come to rest after the initial placement. Because the Subscriber Representatives to be executed by all of the investors contain a representation of investment intent, we conclude that the present offering should comply with this standard, based on the assumptions of facts set forth with respect to investment intent.

We therefore conclude that the above standards for determining the applicability of the “nonpublic offering” exception to the present offering will be complied with, assuming compliance with the assumptions of facts set forth above.

Based on our examination of the foregoing documents and of the foregoing conclusions, and in reliance upon the foregoing assumptions of fact, it is our opinion that the offering for sale of the Hard Units of the Company will qualify the offering for exemption pursuant to Section 4(2) of the Securities Act of 1933, as amended.

This opinion is given to the Ohio Division of Securities in response to its requirement thereof, solely for purposes of satisfying its requirements for the effectiveness of the registration of the offering of the specific Hard Units referred to herein, and is not given with respect to any other offering of securities by any other person, nor is it given to, or may it be relied upon by, any other person, or entity, other than the Ohio Division of Securities, including, without limitations, any offeror, purchaser, investor, investment advisor or representative, or any other person interested directly or indirectly in the offer for sale of the above-named limited partnership units.

Very truly yours,

[Signature]