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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 2, 1996

**AGENDA ITEM**

For Meeting of: 5-9-96

MEMORANDUM

TO: The Commission  
THROUGH: John C. Surina  
Staff Director  
FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael G. Marinelli  
Staff Attorney

SUBJECT: Draft AO 1996-10

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 9, 1996.

Attachment

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**DRAFT**

1 ADVISORY OPINION 1996-10

2  
3 Bruce E. Lammell, Corporate Counsel  
4 USX Corporation  
5 600 Grant Street  
6 Pittsburgh, PA 15219-2776

7  
8 Dear Mr. Lammell:

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10 This refers to your letter of March 21, 1996, on behalf of USX Corporation PAC ("the  
11 Committee"), a separate segregated established by USX Corporation ("USX"). Your request  
12 concerns the application of the Federal Election Campaign Act of 1971, as amended ("the Act"),  
13 to the Committee's solicitation for political contributions.

14 You state that the Committee wishes to solicit stockholders of USX. Among the  
15 stockholders to be solicited would be employees of the Company who are enrolled in what is  
16 described in your request as the USX Corporation Savings Fund Plan for Salaried Employees  
17 ("the Plan"), and who, pursuant to the Plan, are stockholders in USX. You ask whether these  
18 particular stockholders may be solicited under 11 CFR 114.5(g) even though many of these  
19 employees are not executive or administrative personnel as defined by 11 CFR 114.1(c).  
20 Assuming that these individuals could be solicited, you ask whether the corporation may use the  
21 payroll deduction method to transfer contributions to the Committee from such  
22 employee/stockholders. A copy of the Plan with a summary description is provided with your  
23 request.

24 As with most such programs, the funding of the Plan is divided into Plan contributions  
25 made by the employee and Plan contributions made by USX. There are two ways an employee  
26 may make contributions into the Plan. Plan participants may either contribute funds through

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1 salary redirection ("Pre-Tax Savings") or through payroll deductions ("After-Tax Savings"). The  
2 portions of the employee contributions that are matched by Company contributions are referred  
3 to as matched contributions.<sup>1</sup> See Plan Description, sections 1.02(1) and 2.05.

4 Participants may designate their contributions to several different investment funds.  
5 Among these options is to purchase any of USX's three types of common stock. All of the  
6 Company's contributions are invested in USX's Steel Group Common stock. See Plan  
7 Description, sections 2.05 and 2.06.<sup>2</sup> An employee's right to the matching Company  
8 contributions vests according to when the employee was hired. If the Plan participant was hired  
9 prior to December 1, 1993, the vesting occurs at the earlier of two years after the end of the  
10 calendar year in which the contributions were made, or upon attainment of five years of  
11 continuous service. For employees hired on or after December 1, 1993, vesting occurs once the  
12 Plan participant attains five years of continuous service.

13 While these provisions attach uniformly to the Plan participants, the right to withdraw  
14 funds from the Plan varies to some extent according to the account in which the funds are placed.  
15 When a withdrawal is made from an account that includes investments in USX stock, the  
16 participant has the choice of receiving the stock itself or its value in cash. Plan Summary  
17 Description, section 20. The right to withdraw stock and funds from such plans has been treated

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<sup>1</sup> USX will match, under certain circumstances, up to 5% of a participant's contribution. A participant, in most cases, can contribute up to 10% of his salary to the Plan. Any portion of the participant's contribution beyond the Company's 5% contribution is described in the Plan as an unmatched employee contribution. *Id.* The distinction between matched and unmatched employee contributions has important consequences for a participant's right to withdraw funds from the Plan. See below.

<sup>2</sup> Your request states the USX's three classes of common stock are USX-Marathon Group Common Stock, USX-US Steel Group Common Stock and USX-Delhi Group Common Stock. You state that stockholders of any of these classes are holders of common stock of USX Corporation.

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1 by the Commission as the equivalent of the right to receive dividends. Therefore, each plan  
2 account and way in which withdrawals are permitted is detailed below.

3 THE ACCOUNTS

4 After-Tax Savings (Pre-1987 Funds) Account

5 This account contains investments remaining in the Plan from participants' After-Tax  
6 Savings placed prior to 1987 and any earnings in the account. There are no restrictions to the  
7 withdrawal of funds from this account. See Plan Description, sections 2.08 and 4.01(g).

8 After Tax Savings (Post 1986 Funds) Account

9 This account contains investments remaining in the plan from participants' After-Tax  
10 Savings and placed in the Plan after 1986 (including any account earnings). The withdrawal  
11 rights in this account vary according to several conditions. See Plan Description, section 2.08.  
12 There are no withdrawal restrictions, if the funds are drawn from unmatched employee  
13 contributions, or if the funds are matched employee contributions that have been in the account  
14 for at least 24 months. However, if the matched employee contributions have been in the  
15 account for less than 24 months, an employee who withdraws such funds will be suspended from  
16 the program for a period of six months. During that time the employee may not contribute to the  
17 account, and the employee will not receive any matching contributions from USX.

18 Pre-Tax Savings Account

19 This account contains investments remaining in the Plan from participants' Pre-Tax  
20 savings (including any account earnings). Again, withdrawal rights vary according to different  
21 circumstances. See Plan Description, sections 2.08, 4.01(g), 4.02. To be able to withdraw funds

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1 without any restrictions, the participant must have be at least age 59-1/2 and must withdraw  
2 unmatched savings or matched savings that have been in the account for at least 24 months. If  
3 any of these conditions are not met (i.e. the participant is younger than 59-1/2, is drawing  
4 matched funds which have not been in the Plan for 24 months or more), a withdrawal can only be  
5 accomplished if they are necessary due to financial hardship.<sup>3</sup> Assuming these conditions are  
6 met, following the withdrawal, the participant is suspended from the Plan for a period of six  
7 months.

#### 8 Company Contributions Account

9 This account contains investments remaining in the Plan from Company Contributions  
10 and related earnings. Withdrawals may be made this account only if the participant is vested and  
11 the funds to be removed have been in the Plan for at least 24 months.

#### 12 Roll Over Account

13 Investments purchased with funds rolled over on or after December 1st, 1993, from the  
14 benefit plans of USX or its subsidiaries and divisions Company are placed in a special "Roll  
15 Over Account." Withdrawals may be made from this account without any restrictions.

#### 16 ACT AND COMMISSION REGULATIONS

17 The Act permits a corporation or its separate segregated fund to solicit its individual  
18 stockholders and their families. 2 U.S.C. §441b(b)(4)(A)(i). Under the Commission regulations,  
19 a stockholder is defined as a person who (i) has a vested beneficial interest in stock; (ii) has the

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<sup>3</sup> Examples of financial hardship are given in section 21 of the Plan Description. They include "cases involving uninsured medical expenses, purchase of a principal residence, post secondary education expenses for the participant or his dependents, and the prevention of eviction of the participant or the foreclosure of the mortgage on the participant's principal residence."

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1 power to direct how that stock shall be voted (if it is voting stock); and (iii) has the right to  
2 receive dividends. 11 CFR 114.1(h); see also Advisory Opinions 1994-36, 1994-27, 1988-36,  
3 1988-19, 1984-5, 1983-35 and 1983-17. Commission regulations permit corporations to use a  
4 payroll deduction plan for voluntary contributions to its separate segregated fund from the  
5 personnel in its restricted class, i.e., stockholders, executive and administrative personnel. 11  
6 CFR 114.5(k) and 114.1(c)(1). See Advisory Opinions 1995-15 and 1994-23.

7 SOLICITATION OF USX SHARE HOLDERS

8 Any employee with any funds invested in USX Steel Group Stock, either by that  
9 employee's own contributions or the Company's matching contributions, would meet the first  
10 requirement if their contributions purchased at least one share of USX stock. If the share of  
11 stock was purchased by the Company's matching contribution, the unit of value produced by the  
12 contributions would have to be a fully vested unit. The information contained in your request  
13 states that each employee that acquires stock through the Plan has the right to give voting  
14 instructions and that the trustee must comply with those instructions. See Plan Description,  
15 section 5.07. Therefore, the second requirement of the regulations is met.

16 In past treatments of employee stock purchase plans, the third requirement--the right to  
17 receive dividends--is the element that has received the most analysis. Most of the plans  
18 discussed in the past have contained some limitations regarding the withdrawal of either the  
19 accumulated dividends or the underlying stock. See Advisory Opinions 1994-36, 1994-27 and  
20 the opinions cited therein. The test that the Commission has used is whether "participants are  
21 able to withdraw at least one share of stock purchased with employer matching contributions

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1 without incurring a suspension period..." If there was no suspension period or similar restriction,  
2 the Commission has concluded that those participants had the right to receive dividends and were  
3 stockholders under 11 CFR 114.1(h).

4 Your request also inquires whether or not the tax consequences that attach to withdrawals  
5 made by Plan participants might themselves be considered a "significant restriction" of those  
6 rights, as defined by the Commission's past opinions. Your request not only describes the  
7 limitations placed on withdrawal rights included in the various accounts of the Plan, but also  
8 provides information regarding the tax liabilities of these withdrawals. The Commission notes  
9 that past opinions have focused on the limitations on withdrawal rights created by the  
10 corporations responsible for the plans. Some of these restrictions concerned tax planning on the  
11 part of the corporation. However, the Commission concludes that section 114.1(h) concerns only  
12 those limitations on stock ownership directly imposed by the corporation itself, through its  
13 administration of the plan. Therefore, only these limitations will be considered in the discussion  
14 below.

15 If an employee has actually withdrawn USX stock, which formed part of his investment  
16 in an account of the Plan, that employee would have the right to receive dividends in the same  
17 manner as any other USX stockholder and so would be considered as stockholder for purposes of  
18 the regulations. As in the past opinions, the remaining issue is whether, absent any actual  
19 withdrawal of stock, any vested Plan participant may qualify as a stockholder under section  
20 114.1(h). Applying the past standard, any Plan participant who is in a position to withdraw USX

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1 stock or dividends, without incurring a suspension from the Plan, would qualify as a stockholder  
2 and could be solicited.

3 Therefore, participants who are owners of Company stock through the Rollover account or  
4 the Pre-1987 After-Tax Account, which have no withdrawal restrictions, would qualify as  
5 stockholders under section 114.1(h). Plan participants whose only stock holdings consist of  
6 funds in the Company Contributions account would only qualify as stockholders under section  
7 114.1(h) if they have funds that have been in the account for 24 months or more, since they  
8 otherwise would have no withdrawal rights whatsoever. Participants whose funds are in the  
9 After Tax Savings (Post 1986 Funds) account qualify as stockholders under section 114.1(h)  
10 only if that participant has unmatched contributions invested in Company stock, or matched  
11 contributions invested in Company stock for 24 months or more. Any other participant in this  
12 account faces suspension from the program if a withdrawal is made. Participants in the Pre-Tax  
13 savings Account who have invested in USX stock may be solicited only if they are at least age 59  
14 1/2, have unmatched savings or matched savings invested for longer 24 months.<sup>4</sup>

15 Plan participants who fall into these categories may be solicited as stockholders.<sup>5</sup>

16 Furthermore, the payroll deduction method may be used to facilitate the making of the  
17 contributions by USX employees who come within these classes of stockholders. Of course, the  
18 solicitation by the Committee or the Company must otherwise meet the requirements for a proper

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<sup>4</sup>Stockholders who have not reached the age of 59 1/2 may only withdraw funds pursuant to a hardship provision and then face suspension from the program. In Advisory Opinions 1994-36 and 1994-27, the Commission concluded that a hardship purpose based limitation, alone, was at least as restrictive as limitations based on frequency of permitted withdrawals, or those providing for suspension as a penalty for withdrawals.

<sup>5</sup>In all the above situations the Plan participant must have funds not subject to the restrictions that would, in fact, equal one share of stock.

1 solicitation under the Act and regulations. 2 U.S.C. §441b(b)(3)(A), (B) and (C); see 11 CFR  
2 114.5(a).

3 This response constitutes an advisory opinion concerning the application of the Act, or  
4 regulations prescribed by the Commission, to the specific transaction or activity set forth in your  
5 request. See 2 U.S.C. §437f.

6 Sincerely,

7  
8 Lee Ann Elliott  
9 Chairman

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11 Enclosures (AOs 1995-15, 1994-36, 1994-23, 1994-27, 1988-36, 1988-19, 1984-5,  
12 1983-35 and 1983-17)  
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