



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 9, 1996

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-10

Bruce E. Lammel, Corporate Counsel
USX Corporation
600 Grant Street
Pittsburgh, PA 15219-2776

Dear Mr. Lammel:

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

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

As with most such programs, the funding of the plan is divided into Plan contributions made by the employee and Plan contributions made by USX. There are two ways an employee may make contributions into the Plan. Plan participants may either contribute funds through salary redirection ("Pre-Tax Savings") or through payroll deductions ("After-Tax Savings"). The portions of the employee contributions that are matched by company contributions are referred to as matched contributions.¹ See Plan description, sections 1.02(l) and 2.05.

Participants may designate their contributions to several different investment funds. Among these options is to purchase any of USX's three types of common stock. All of the Company's contributions are invested in USX's Steel Group Common stock. See Plan description, sections 2.05 and 2.06.² An employee's right to the matching Company contributions vests according to when the employee was hired. If the plan participant was hired prior to December 1, 1993, the vesting occurs at the earlier of two years after the end of the calendar year in which the contributions were made, or upon attainment of five years of continuous service. For employees hired on or after December 1, 1993, vesting occurs once the plan participant attains five years of continuous service. While these provisions attach uniformly to the plan participants, the right to withdraw funds from the Plan varies to some extent according to the account in which the funds are placed. When a withdrawal is made from an account that includes investments in USX stock, the participant has the choice of receiving the stock itself or its value in cash. Plan Summary description, section 20. The right to withdraw stock and funds from such plans has been treated by the Commission as the equivalent of the right to receive dividends. Therefore, each plan account and way in which withdrawals are permitted is detailed below.

THE ACCOUNTS

After-Tax Savings (Pre-1987 funds) Account

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

After Tax Savings (Post 1986 funds) Account

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

Pre-Tax Savings Account

This account contains investments remaining in the Plan from participants' Pre-Tax savings (including any account earnings). Again, withdrawal rights vary according to different circumstances. See Plan Description, sections 2.08, 4.01(g), 4.02. To be able to withdraw funds without any restrictions, the participant must have be at least age 59-1/2 and must withdraw unmatched savings or matched savings that have been in the account for at least 24 months. If any of these conditions are not met (i.e. the participant is younger than 59-1/2, is drawing matched funds which have not been in the plan for 24 months or more), a withdrawal can only be accomplished if they are necessary due to financial hardship.³ Assuming these conditions are

met, following the withdrawal, the participant is suspended from the Plan for a period of six months.

Company Contributions Account

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

Roll Over Account

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

Act and Commission Regulations

The Act permits a corporation or its separate segregated fund to solicit its individual stockholders and their families. 2 U.S.C. 441b(b)(4)(A)(i). Under the Commission regulations, a stockholder is defined as a person who (i) has a vested beneficial interest in stock; (ii) has the power to direct how that stock shall be voted (if it is voting stock); and (iii) has the right to receive dividends. 11 CFR 114.1(h); see also Advisory Opinions 1994-36, 1994-27, 1988-36, 1988-19, 1984-5, 1983-35 and 1983-17. Commission regulations permit corporations to use a payroll deduction plan for voluntary contributions to its separate segregated fund from the personnel in its restricted class, i.e., stockholders, executive and administrative personnel. 11 CFR 114.5(k) and 114.1(c)(1). See Advisory Opinions 1995-15 and 1994-23.

Solicitation of USX Share Holders

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

In past treatments of employee stock purchase plans, the third requirement--the right to receive dividends--is the element that has received the most analysis. Most of the plans discussed in the past have contained some limitations regarding the withdrawal of either the accumulated dividends or the underlying stock. See Advisory Opinions 1994-36, 1994-27 and the opinions cited therein. The test that the Commission has used is whether "participants are able to withdraw at least one share of stock purchased ... without incurring a suspension period... ." If there was no suspension period or similar restriction, the Commission has concluded that those participants had the right to receive dividends and were stockholders under 11 CFR 114.1(h).

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

If an employee has actually withdrawn USX stock, which formed part of his investment in an account of the Plan, that employee would have the right to receive dividends in the same manner as any other USX stockholder and so would be considered as stockholder for purposes of the regulations. As in the past opinions, the remaining issue is whether, absent any actual withdrawal of stock, any vested Plan participant may qualify as a stockholder under section 114.1(h). Applying the past standard, any Plan participant who is in a position to withdraw USX stock or dividends, without incurring a suspension from the Plan, would qualify as a stockholder and could be solicited.

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

Plan participants who fall into these categories may be solicited as stockholders.⁵ Furthermore, the payroll deduction method may be used to facilitate the making of the contributions by USX employees who come within these classes of stockholders. Of course, the solicitation by the Committee or the Company must otherwise meet the requirements for a proper solicitation under the Act and regulations. 2 U.S.C. 441b(b)(3)(A), (B) and (C); see 11 CFR 114.5(a).

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

Sincerely,

(signed)

Lee Ann Elliott
Chairman

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

Endnotes

1/ 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.

2/ 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.

3/ 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."

4/ 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.

5/ 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.