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FEDERAL ELECTION COMMISSION

Washington, DC 20463

July 9, 1998

**AGENDA ITEM**

For Meeting of: 7-16-98

**MEMORANDUM**

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

Subject: Draft AO 1998-12

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 16, 1998.

Attachment

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1 **ADVISORY OPINION 1998-12**

2  
3 **Katrina W. Vega, Attorney**  
4 **Ashland Inc.**  
5 **P.O. Box 391**  
6 **Ashland, KY 41114**

7  
8 **Dear Ms. Vega:**  
9

10 **This responds to your letter dated May 28, 1998, on behalf of Ashland Inc.**  
11 **Political Action Committee for Employees ("the Committee"), requesting an advisory**  
12 **opinion concerning the application of the Federal Election Campaign Act of 1971, as**  
13 **amended ("the Act"), and Commission regulations to the Committee's solicitation for**  
14 **political contributions.**

15 **The Committee is the separate segregated fund of Ashland Inc. ("Ashland" or "the**  
16 **company") and has been registered with the Commission since 1977. The Committee**  
17 **wishes to solicit contributions from certain Ashland employees who own stock in the**  
18 **company through their participation in the Ashland Inc. Employee Savings Plan ("the**  
19 **Plan"). You ask whether these individuals are considered stockholders under 11 CFR**  
20 **114.1(h) and thus may be solicited under 11 CFR 114.5(g), even if many of them are not**  
21 **executive or administrative personnel. Assuming that the Act and regulations permit the**  
22 **solicitation of these individuals, you ask whether Ashland may use the payroll deduction**  
23 **method to transfer contributions to the Committee from such employee/stockholders.**  
24 **Your opinion request includes a copy of the Plan and a Summary Plan Description.**

25 **The Plan has been established and is administered to satisfy the requirements of**  
26 **the Internal Revenue Code, at 26 U.S.C. §401(a), 401(k), and 401(m). It is open to**  
27 **eligible salaried employees of Ashland and its subsidiaries who have one year of service**  
28 **with the company or a subsidiary. Participation is voluntary. The funding of the plan is**  
29 **divided into contributions made by the employees and contributions made by Ashland.**  
30 **An individual participant may elect to make contributions into the Plan from his or her**  
31 **salary on an after-tax basis ("Account") or on a tax-deferred basis ("Tax-Deferred**  
32 **Account"). See Plan, Section 2.1 and Articles 5, 6, 7, and 8. The Plan contains several**  
33 **alternatives for investments by a participant in her Account or Tax-Deferred Account.**

1 These alternatives include various mutual funds, funds containing public or private  
2 securities, and the Ashland Inc. Common Stock Fund ("Ashland CSF"). The Ashland  
3 CSF is comprised of Ashland's only class of outstanding capital stock; it is voting  
4 common stock and is publicly traded on the New York Stock Exchange. See Plan,  
5 Section 8.1. Dividends on the Ashland stock are paid to the Trustee of the Plan, allocated  
6 proportionately to the accounts of the participants on the basis of each participant's  
7 investment in Ashland CSF, and used to purchase additional Ashland stock.

8 Ashland matches each participant's contributions to the Plan.<sup>1</sup> A portion of the  
9 company's contribution is automatically invested in the Ashland CSF and designated to  
10 the Restricted Company Match Account. The remainder is placed in the participant's  
11 Account or Tax-Deferred Account and invested in the same funds and with the same  
12 percentages that the participant selected for her contributions. See Plan, Sections 7.1 and  
13 10.1.<sup>2</sup>

14 The Plan also provides that a participant who is an active employee and who has  
15 previously made contributions to another plan that meets the requirements of 26 U.S.C.  
16 §401(a) can roll those contributions into the Plan ("Rollover Contributions"). See Plan,  
17 Section 5.4. Once in the Plan, the Rollover Contributions are placed in the participant's  
18 Account and invested as directed by the participant.

19 The ability of a participant to withdraw funds from the Plan, without any  
20 suspension from the Plan, varies according to the type of contribution made. If a  
21 participant has such a withdrawal right, it may be exercised once during any 12-month  
22 period. A participant may withdraw all or any part of the funds she contributed to her  
23 Account, including Rollover Contributions. This withdrawal right is not dependent upon  
24 the amount of time such funds are in the Account. See Plan, Section 12.1. A participant  
25 may withdraw all or any part of the funds contributed by the company to the Account if  
26 such company contributions have been in the Account for over 24 months. See Plan,

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<sup>1</sup> A participant may contribute not less than one percent, and not more than 16 percent, of her compensation into the Plan. Ashland will match those contributions not exceeding four percent of the participant's compensation. See Plan, Section 5.1.

<sup>2</sup> According to a chart in your request, the company designates most of its contribution to the Restricted Company Match Account.

1 Section 12.1. A participant who is 59½ years of age or older and still employed by the  
2 company may withdraw, from the Tax Deferred Account, funds contributed by her. This  
3 may be done once the participant has withdrawn all of the funds in her Account, minus  
4 the company's contributions and the earnings on the company's contributions that  
5 occurred during the previous 24 months. See Plan, Section 12.2.

6 Outside of the above-described options, a participant may make a withdrawal  
7 because of a financial hardship but that withdrawal would result in a 12-month  
8 suspension in the ability to make contributions to the Plan. See Plan, Sections 5.3, 6.3,  
9 and 12.3.<sup>3</sup> Moreover, as a general rule, no funds may be withdrawn from the Restricted  
10 Company Match Account until the termination of the participant's employment. See  
11 Plan, Sections 12.5 and 8.6.<sup>4</sup>

12 The Act permits a corporation or its separate segregated fund to solicit  
13 contributions at any time from its executive and administrative personnel, its individual  
14 stockholders, and the families of such individuals. 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR  
15 114.5(g)(1). Under the Commission regulations, a stockholder is defined as a person who  
16 (i) has a vested beneficial interest in stock; (ii) has the power to direct how that stock  
17 shall be voted (if it is voting stock); and (iii) has the right to receive dividends. 11 CFR  
18 114.1(h); see also Advisory Opinions 1996-10, 1994-36, 1994-27, and opinions cited  
19 therein.

20 With respect to the first requirement, all participants in the Plan are fully vested in  
21 their Accounts, Tax-Deferred Accounts, and Restricted Company Match Accounts,  
22 regardless of their service with the company. See Plan, Section 10.1.<sup>5</sup> Thus, the

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<sup>3</sup> Financial hardship includes the need to make payments for medical expenses, the purchase of a principal residence, the prevention of eviction or mortgage foreclosure on a permanent residence, and college tuition. In order to make the withdrawal, the participant must certify that such needs cannot be met by other means such as insurance payments, loans, liquidation of other assets, or the cessation of contributions to the Plan. See Plan, Section 12.3.

<sup>4</sup> The Commission notes that your request does not pertain to those who are no longer employed by the company.

<sup>5</sup> Section 10.1 notes that there are exceptions to the participants' "nonforfeitable right" to amounts in her accounts. These exceptions pertain to the right to a participant's contributions to the fund that are in excess of the allowable amount and company matching that is related to such excess amounts. See Plan, Sections 5.3, 6.1, 6.3, and 7.2(b) and (c).

1 participants would have a fully vested beneficial interest in their Ashland common stock  
2 held in those accounts.

3 Under the Plan, any Ashland common stock in a participant's Account, Tax-  
4 Deferred Account, or Company Restricted Match Account is voted by the participant.  
5 The participant does this by giving voting instructions to the Trustee of the Plan who  
6 votes the participant's shares in accordance with those instructions. See Plan, Section  
7 15.6. This satisfies the second requirement.

8 In past treatments of employee stock purchase plans, the third requirement -- the  
9 right to receive dividends -- is the element that has received the most analysis. Most of  
10 the plans discussed in past opinions have contained some limitations regarding the  
11 withdrawal of either the accumulated dividends or the underlying stock. See Advisory  
12 Opinions 1996-10, 1994-36, 1994-27, and opinions cited therein. The test that the  
13 Commission has used is whether "participants are able to withdraw at least one share of  
14 stock purchased ... without incurring a suspension period..." If there was no suspension  
15 period or similar restriction for such a withdrawal, the Commission has concluded that  
16 those participants had the right to receive dividends and were stockholders under 11 CFR  
17 114.1(h). Advisory Opinion 1996-10.

18 The Commission has concluded that, if an employee has already withdrawn stock  
19 of the company, which formed part of her investment in the company's plan, the  
20 employee would be construed as having the right to receive dividends and would be  
21 considered a stockholder for purposes of the regulations, so long as she continues to hold  
22 one share of the company's stock. Advisory Opinions 1996-10, 1994-36, 1988-36, and  
23 1984-5. Accordingly, a participant, with at least one share still invested in Ashland CSF,  
24 who has already made a withdrawal of funds from the Plan at a time when the withdrawal  
25 represented at least one share of Ashland stock, would qualify as a stockholder under 11  
26 CFR 114.1(h). The remaining issue is whether, absent any actual withdrawal, a  
27 participant would qualify as a stockholder under the regulations.

28 If a participant's holdings in the funds that she is permitted to withdraw once,  
29 without incurring a suspension, are invested at least partially in Ashland CSF and include  
30 one share of Ashland stock, then the participant would be solicitable as a stockholder for

1 contributions to the Committee. Thus, a participant who has one share of Ashland stock  
2 within the total of her contributions to the Account, her Rollover Contributions to the  
3 Account, and those company contributions to the Account that have been in the Account  
4 for over 24 months, is a stockholder for the purposes of the Act. In addition, a participant  
5 who is eligible to withdraw her contributions from the Tax Deferred Account, without  
6 suspension, is a stockholder if she has one share of Ashland stock in her contributions to  
7 the Tax Deferred Account.<sup>6</sup>

8 The Commission has long held that the payroll deduction method may be used to  
9 facilitate the making of contributions to a company's separate segregated fund by  
10 employees who do not fall within the Commission regulation's definitions of executive or  
11 administrative personnel at 11 CFR 114.1(c) if they qualify as stockholders under 11  
12 CFR 114.1(h). See Advisory Opinions 1996-10 and 1983-17. Thus, the company may  
13 use a payroll deduction method with respect to those participants who are eligible  
14 stockholders as described above. Of course, the solicitation by the Committee or the  
15 company must otherwise meet the requirements for a proper solicitation under the Act  
16 and regulations. See 2 U.S.C. §441b(b)(3)(A), (B), and (C); 11 CFR 114.5(a).

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

20 Sincerely,

21  
22  
23  
24 Joan D. Aikens  
25 Chairman  
26

27 Enclosures (AOs 1996-10, 1994-36, 1994-27, 1988-36, 1984-5, and 1983-17)

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<sup>6</sup> This person would have already qualified as a stockholder under the regulations if she earlier made a withdrawal of one share of Ashland stock or has one share of Ashland stock in the three previously denoted types of contributions.