



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 16, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1998-12

Katrina W. Vega, Attorney
Ashland Inc.
P.O. Box 391
Ashland, KY 41114

Dear Ms. Vega:

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

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

The Plan has been established and is administered to satisfy the requirements of the Internal Revenue Code, at 26 U.S.C. §401(a), 401(k), and 401(m). It is open to eligible salaried employees of Ashland and its subsidiaries who have one year of service with the company or a subsidiary. Participation is voluntary. The funding of the plan is divided into contributions made by the employees and contributions made by Ashland.

An individual participant may elect to make contributions into the Plan from his or her salary on an after-tax basis (“Account”) or on a tax-deferred basis (“Tax-Deferred Account”). See Plan, Section 2.1 and Articles 5, 6, 7, and 8. The Plan contains several alternatives for investments by a participant in her Account or Tax-Deferred Account. These alternatives include various mutual funds, funds containing public or private securities, and the Ashland Inc. Common Stock Fund (“Ashland CSF”). The Ashland CSF is comprised of Ashland’s only class of outstanding capital stock; it is voting common stock and is publicly traded on the New York Stock Exchange. See Plan, Section 8.1. Dividends on the Ashland stock are paid to the Trustee of the Plan, allocated proportionately to the accounts of the participants on the basis of each participant’s investment in Ashland CSF, and used to purchase additional Ashland stock.

Ashland matches each participant’s contributions to the Plan.¹ A portion of the company’s contribution is automatically invested in the Ashland CSF and designated to the Restricted Company Match Account. The remainder is placed in the participant’s Account or Tax-Deferred Account and invested in the same funds and with the same percentages that the participant selected for her contributions. See Plan, Sections 7.1 and 10.1.²

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

The ability of a participant to withdraw funds from the Plan, without any suspension from the Plan, varies according to the type of contribution made. If a participant has such a withdrawal right, it may be exercised once during any 12-month period. A participant may withdraw all or any part of the funds she contributed to her Account, including Rollover Contributions. This withdrawal right is not dependent upon the amount of time such funds are in the Account. See Plan, Section 12.1. A participant may withdraw all or any part of the funds contributed by the company to the Account if such company contributions have been in the Account for over 24 months. See Plan, Section 12.1. A participant who is 59½ years of age or older and still employed by the company may withdraw, from the Tax Deferred Account, funds contributed by her. This may be done once the participant has withdrawn all of the funds in her Account, minus the company’s contributions and the earnings on the company’s contributions that occurred during the previous 24 months. See Plan, Section 12.2.

¹ 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.

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

Outside of the above-described options, a participant may make a withdrawal because of a financial hardship but that withdrawal would result in a 12-month suspension in the ability to make contributions to the Plan. See Plan, Sections 5.3, 6.3, and 12.3.³ Moreover, as a general rule, no funds may be withdrawn from the Restricted Company Match Account until the termination of the participant's employment. See Plan, Sections 12.5 and 8.6.⁴

The Act permits a corporation or its separate segregated fund to solicit contributions at any time from its executive and administrative personnel, its individual stockholders, and the families of such individuals. 2 U.S.C. §441b(b)(4)(A)(i); 11 CFR 114.5(g)(1). 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 1996-10, 1994-36, 1994-27, and opinions cited therein.

With respect to the first requirement, all participants in the Plan are fully vested in their Accounts, Tax-Deferred Accounts, and Restricted Company Match Accounts, regardless of their service with the company. See Plan, Section 10.1.⁵ Thus, the participants would have a fully vested beneficial interest in their Ashland common stock held in those accounts.

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

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 past opinions have contained some limitations regarding the withdrawal of either the accumulated dividends or the underlying stock. See Advisory Opinions 1996-10, 1994-36, 1994-27, and 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

³ 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.

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

⁵ 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).

period or similar restriction for such a withdrawal, the Commission has concluded that those participants had the right to receive dividends and were stockholders under 11 CFR 114.1(h). Advisory Opinion 1996-10.

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

If a participant's holdings in the funds that she is permitted to withdraw once, without incurring a suspension, are invested at least partially in Ashland CSF and include one share of Ashland stock, then the participant would be solicitable as a stockholder for contributions to the Committee. Thus, a participant who has one share of Ashland stock within the total of her contributions to the Account, her Rollover Contributions to the Account, and those company contributions to the Account that have been in the Account for over 24 months, is a stockholder for the purposes of the Act. In addition, a participant who is eligible to withdraw her contributions from the Tax Deferred Account, without suspension, is a stockholder if she has one share of Ashland stock in her contributions to the Tax Deferred Account.⁶

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

⁶ 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.

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)

Joan D. Aikens
Chairman

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