



June 14, 2019

Inspector General Calvin L. Scovel III
U.S. Department of Transportation
Office of Inspector General
1200 New Jersey Ave SE, 7th Floor
Washington, D.C. 20590

Dear Mr. Scovel,

We write to respectfully request that the U.S. Department of Transportation's Office of Inspector General investigates U.S. Secretary of Transportation Elaine Chao for her ongoing failure to divest her shares in Vulcan Materials Company, which likely violates financial conflict-of-interest restrictions under federal law.

I. Factual Background

On February 13, 2015, Elaine Chao began serving on the board of directors of Vulcan Materials Company,¹ which describes itself as "the nation's largest producer of construction aggregates—primarily crushed stone, sand and gravel—and a major producer of aggregates-based construction materials, including asphalt and ready-mixed concrete."²

On November 29, 2016, President-elect Donald J. Trump announced his intent to nominate Elaine Chao to serve as the U.S. Secretary of Transportation.³ On January 5, 2017, in a letter to the U.S. Department of Transportation ("DOT"), Chao addressed the steps she would take to "avoid any actual or apparent conflict of interest" if confirmed as Secretary of Transportation.⁴ As relevant here, Chao stated

Upon confirmation, I will resign from my position with Vulcan Materials. I hold vested deferred stock units with Vulcan Materials . . . Pursuant to the terms of the company's Directors' Deferred Stock Unit Plan, I will receive a cash payout for all of my vested

¹ U.S. Senate Comm. on Commerce, Science, & Transportation, Elaine Chao Nomination Questionnaire 12 [hereinafter "Chao Nomination Questionnaire"], https://www.commerce.senate.gov/public/_cache/files/e4e680e1-90fe-4a15-a6ae-e25aee036da3/B826198AEC2D70F1523C0C79257A66DF.chao-redacted2.pdf (last visited June 10, 2019).

² Vulcan Materials Co., *About Vulcan*, <https://www.vulcanmaterials.com/> (last visited June 10, 2019).

³ Jeremy W. Peters & Maggie Haberman, *Trump Picks Elaine Chao for Transportation Secretary*, N.Y. Times (Nov. 29, 2016), <https://www.nytimes.com/2016/11/29/us/politics/elaine-chao-transportation-trump.html>.

⁴ Letter from Elaine L. Chao to Judith S. Kaleta, Designated Agency Ethics Official, U.S. Dep't of Transportation (Jan. 5, 2017) [hereinafter "Chao Letter"] (emphasis added), available at <https://assets.documentcloud.org/documents/3351792/Chao-Elaine-L-ethics-agreement.pdf>.

deferred stock units in April of the year following the year of my separation from service. The cash payout will be determined based on the closing price of the company's common stock at the time payment is made that April. Until the deferred stock units are redeemed, I will continue to receive deferred stock unit equivalents, which track dividends on the company's common stock. *Until I receive the cash payment of my vested deferred stock units, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Vulcan Materials, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).*⁵

Chao also disclosed to the U.S. Senate Committee on Commerce, Science, and Transportation her financial interests in Vulcan Materials.⁶ On January 31, 2017, the U.S. Senate confirmed Chao as the 18th U.S. Secretary of Transportation.⁷

In accordance with Vulcan Materials' Deferred Stock Unit Plan, the company confirmed to *The Wall Street Journal* that it paid out shares to Secretary Chao, which the *Journal* valued at almost \$400,000.⁸

On May 28, 2019, the *Journal* reported that Secretary Chao continues to hold shares in Vulcan Materials, despite pledging to divest the shares no later than April 2018.⁹ In the time since, shares of the stock "have risen nearly 13% . . . netting [Chao] a more than \$40,000 gain."¹⁰

Despite Secretary Chao's stated desire not to participate personally and substantially in any matter that to her knowledge has a direct and predictable effect on Vulcan Materials' financial interests, the *International Business Times* reported on August 24, 2017 that Vulcan Materials had hired a firm to lobby DOT on the corporation's behalf regarding "the reauthorization of the Federal Highway Administration, which manages federal funding of maintenance and construction of highways."¹¹ Further reporting by *Construction Dive* shows that Vulcan Materials spent nearly a million dollars to hire firms to lobby DOT during Chao's tenure as

⁵ *Id.* (emphasis added).

⁶ See Chao Nomination Questionnaire, *supra* note 1, at 29.

⁷ Michael Laris, *Trump transportation secretary pick Elaine Chao confirmed in Senate, with some top Democrats balking*, Wash. Post (Jan. 31, 2017), https://www.washingtonpost.com/local/trafficandcommuting/trumps-transportation-secretary-pick-elaine-chao-confirmed-in-senate-with-some-top-democrats-balking/2017/01/31/a15c7604-df42-11e6-ad42-f3375f271c9c_story.html?utm_term=.110bc313b84a.

⁸ Ted Mann & Brody Mullins, *Transportation Secretary Still Owns Stock She Pledged to Divest*, Wall St. J. (May 28, 2019 1:14 PM), <https://www.wsj.com/articles/transportation-secretary-still-owns-stock-she-pledged-to-divest-11559035921>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Josh Keefe, *Trump Administration Ethics Entanglements: 9 Officials Getting Lobbied by Previous Employers*, Intl. Bus. Times (Aug. 24, 2017 5:15 PM), <https://www.ibtimes.com/political-capital/trump-administration-ethics-entanglements-9-officials-getting-lobbied-previous>.

Secretary of Transportation.¹² Disclosure reports reveal that Vulcan Materials has lobbied DOT every quarter since Chao's confirmation in January 2017.¹³

II. Request

As an officer of the executive branch of the federal government, U.S. Secretary of Transportation Elaine Chao is subject to financial conflict-of-interest restrictions. Under 18 U.S.C. § 208(a),

[W]hoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to [their] knowledge, [they], [their] spouse, minor child, general partner, organization in which [they are] serving as officer, director, trustee, general partner or employee, or any person or organization with whom [they are] negotiating or ha[ve] any arrangement concerning prospective employment, has a financial interest—[s]hall be subject to the penalties set forth in section 216 of this title.¹⁴

Congress intended the term “personally and substantially” to cover “any participation on behalf of the Government in a matter in which the employee [or officer] has an outside financial interest.”¹⁵ The U.S. Office of Government Ethics has determined that “[p]articipation may be

¹² Kim Slowey, *USDOT Secretary Elaine Chao made \$40K from Vulcan Materials despite promise to divest shares*, Construction Dive (May 29, 2019), <https://www.constructiondive.com/news/usdot-secretary-elaine-chao-made-40k-from-vulcan-materials-despite-promise/555702/>.

¹³ Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Apr. 16, 2019) (for Q1 2019), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=70D01DB8-3D21-472E-84E3-0E901DFB17B1&filingTypeID=51>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Jan. 22, 2019) (for Q4 2018), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=A8FCD3D7-C51B-4A7C-A2D4-4E85E672E1A4&filingTypeID=78>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Oct. 11, 2018) (for Q3 2018), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=FE327806-FF1C-4A20-9E5A-8406CAA2C6DD&filingTypeID=69>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (July 17, 2018) (for Q2 2018), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=45B0EC3E-A54C-427A-9E9F-4B0AE4C89DC1&filingTypeID=60>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Apr. 20, 2018) (for Q1 2018), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=DEC5CF68-0743-4B47-A296-A67D6298DD61&filingTypeID=51>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Jan. 22, 2018) (for Q4 2017), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=03943A02-0003-4845-8514-8CF5C9FDAEA3&filingTypeID=78>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Oct. 20, 2017) (for Q3 2017), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=52D36C42-F659-4170-B73D-FBCD9BF5647A&filingTypeID=69>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (July 20, 2017) (for Q2 2017), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=D9734A09-441E-450D-8EF0-D7F02496BC57&filingTypeID=64>; Secretary of the U.S. Senate, Lobbying Report – Ice Miller Strategies LLC (Apr. 20, 2017) (for Q1 2017), <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=18CA6983-0BF0-4D12-822C-E6DA95A0C8A2&filingTypeID=51>.

¹⁴ 18 U.S.C. § 208(a). A government officer in violation of 18 U.S.C. § 208 is subject to imprisonment and/or civil fines of “not more than \$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.” *Id.* § 216(a).

¹⁵ S. Rep. No. 87-2213, at 13 (1962), as reprinted in 1962 U.S.C.A.N. 3852; see also *U.S. v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993) (“By enacting section 208, Congress achieved its goal of proscribing governmental activity which

substantial even though it is not determinative of the outcome of a particular matter.”¹⁶ Further, the term “particular matter” extends to matters “that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.”¹⁷

Here, not only has Secretary Chao admitted to DOT that she has a financial interest in Vulcan Materials that may raise potential concerns under 18 U.S.C. § 208(a), but she has conceded that there may be matters she oversees that may present conflict-of-interest issues under the statute. In a January 5, 2017 letter to her designated DOT ethics official, Chao acknowledged that she “hold[s] vested deferred stock units with Vulcan Materials” as part of her years-long position as a director with the corporation.¹⁸ Her pledge “not [to] participate personally and substantially in any particular matter that . . . has a direct and predictable effect on the financial interests of Vulcan Materials,” until she “receive[s] cash payment of [her] vested deferred stock units,”¹⁹ represents a concession on Secretary Chao’s part that only divestment of her corporate shares can disentangle her from serious financial conflicts of interest that may arise.

As a corporation that produces aggregates-based construction materials—which are readily used in infrastructure and transportation projects across the United States—Vulcan Materials has stood to benefit immensely from a variety of actions and positions Secretary Chao has taken during her tenure at DOT. *The Wall Street Journal* reports that “[m]ost of [] DOT’s \$86 billion budget is spent on grants to states and municipalities, whose spending on road projects is a major source of business for Vulcan.”²⁰ The report further states that 45 to 55 percent of Vulcan Materials’s shipments “have been used in projects . . . funded by the [federal] government.”²¹

Secretary Chao has already benefitted financially from her failure to divest from Vulcan Materials, and Vulcan Materials has benefitted financially during Chao’s tenure at DOT. In September 2017, *American Public Media* explained how Chao’s ongoing failure to divest may benefit her financially: “Chao could by turns propel an infrastructure plan in [Vulcan Materials’s] best interest and gain financially when she sells her shares, assuming the price climbs if an infrastructure package gets through Congress.”²²

conflicts with the financial interests of executive branch and independent agency employees. We find that provision, though broad, is not vague.”); *U.S. v. Jewell*, 827 F.2d 586, 587 (9th Cir. 1987) (“[L]iability for conflict of interest may be founded on a variety of acts leading up to the formation of a contract even if those acts are not specifically mentioned in the text of section 208(a). The section’s ‘catch all’ language . . . was designed to allow prosecution on the basis of any type of action taken to execute or carry to completion a contract.”); *U.S. v. Irons*, 640 F.2d 872, 877 (7th Cir. 1981) (concluding that Section 208 “demonstrates an intention to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions . . .”).

¹⁶ 5 C.F.R. § 2640.103(2).

¹⁷ *Id.* § 2640.103(1).

¹⁸ Chao Letter, *supra* note 4, at 2.

¹⁹ *Id.*

²⁰ Mann & Mullins, *supra* note 8.

²¹ *Id.*

²² *Id.*

Observers have noticed that each time Secretary Chao speaks publicly about infrastructure, Vulcan Materials' stock price "jump[s] in the days afterward."²³ In fact, since April 2018—the date by which Chao vowed to divest her shares—Vulcan Materials' stock price "ha[s] risen nearly 13%."²⁴ But Vulcan Materials is not the only one who has benefitted: the rise in the corporation's stock price netted Chao "a more than \$40,000 gain."²⁵

It is hardly surprising to hear the Secretary of Transportation discuss infrastructure, road improvements, and transportation. These are, after all, issues deeply relevant to her job responsibilities. However, it is *exactly* for this reason that federal laws subject government officers and employees to civil and criminal penalties if they participate personally and substantially in activities they—or those close to them—have financial interests in. And yet, despite acknowledging her obligations under federal law, Secretary Chao has held onto her shares in Vulcan Materials and made more money, all while directing and overseeing the dissemination of federal funds and the implementation and reauthorization of federal laws and programs that likely will benefit Vulcan Materials and, in turn, Secretary Chao's wallet.

For instance, in June 2018, DOT announced a \$184 million grant to the Georgia Department of Transportation to fund the construction of express toll lanes on a congested highway in Georgia.²⁶ There is absolutely no indication that Secretary Chao recused herself from any and all grantmaking processes where Vulcan Materials served to benefit. In fact, just a month after this award, Secretary Chao traveled to Georgia to "celebrate" the issuance of the grant with employees of Vulcan Materials.²⁷ And there may have been a lot to celebrate. Vulcan Materials is an aggregates producer listed on the "Qualified Products List" produced by the Georgia Department of Transportation's Office of Materials and Testing, meaning that Georgia has certified Vulcan Materials as an approved source of materials to build roadways.²⁸ In other words, Secretary Chao may have participated personally and substantially in grantmaking processes in which she has a financial interest, by virtue of the shares she continues to hold in an aggregates producer that profits considerably from DOT-funded projects.

Given the broad intersection of DOT's programs and Vulcan Materials' work, there are almost certainly other instances in which Secretary Chao may have participated personally and substantially in particular matters involving Vulcan Materials—in which she continues to maintain a financial interest.

²³ Tom Scheck, *Elaine Chao, champion of Trump's infrastructure plan, chose to keep stock in a building company*, Am. Public Media Reports (Sept. 29, 2017), <https://www.apmreports.org/story/2017/09/29/elaine-chao-vulcan-stock>.

²⁴ Mann & Mullins, *supra* note 8.

²⁵ *Id.*

²⁶ U.S. Dep't of Transportation, FY 2017-2018 INFRA Grant Proposed Awards (June 5, 2018), <https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/buildamerica/311246/infra-proposed-awards-final-652018.pdf>; see also Press Release, U.S. Rep. Rob Woodall, *DOT to Contribute \$184M for Ga. 400 Express Lanes* (June 8, 2018), <https://woodall.house.gov/media-center/in-the-news/dot-contribute-184m-ga-400-express-lanes>.

²⁷ Nat'l Stone, Sand, & Gravel Assoc., *Chao Visits NSSGA Members in Georgia*, <https://www.nssga.org/chao-visits-nssga-members-in-georgia/> (last visited June 10, 2019).

²⁸ See Ga. Dep't of Transportation, Office of Materials and Testing Qualified Products List (revised May 14, 2019), available at <http://www.dot.ga.gov/PartnerSmart/Materials/Documents/qpl02.pdf>.

It remains unclear whether Secretary Chao has received a waiver—and if so from whom—that would allow her to ignore her promise and continue to hold shares in Vulcan Materials, while engaging in and overseeing decision-making that affects *her* financial interests. Under 18 U.S.C. § 208(b), Section 208(a) does not apply if an executive branch officer obtains in advance a waiver from an appropriate government official “that the [financial] interest is not so substantial as to be deemed likely to affect the integrity of the services which the [g]overnment may expect from such officer.”²⁹ The officer must, however, first advise the government official “responsible for appointment to [their] position of the nature and circumstances of the . . . particular matter” and fully disclose to the official the financial interest.³⁰ If Secretary Chao has in fact received such a waiver, we formally request “a copy of any determination granting an exemption” in accordance with 18 U.S.C. § 208(d)(1).

III. Conclusion

In her January 5, 2017 letter, Elaine Chao professed her commitment “to the highest standards of ethical conduct for government officials” and her desire “to avoid any actual or apparent conflict of interest” as Secretary of Transportation.³¹ But her conduct suggests otherwise.

Secretary Chao’s personal and substantial participation in a variety of matters that could affect Vulcan Materials financially—coupled with her ongoing failure to divest her shares in the corporation—constitutes a likely violation of federal conflict-of-interest restrictions imposed under federal law. Her conduct also raises serious ethics concerns and reflects discredibly on DOT’s efforts to protect and improve our nation’s transportation system.

Therefore, we respectfully request that the U.S. Department of Transportation’s Office of Inspector General investigates U.S. Secretary of Transportation Elaine Chao for her ongoing failure to divest her shares in Vulcan Materials Company.

Sincerely,



Kyle Herrig
Senior Advisor, Restore Public Trust

²⁹ 18 U.S.C. § 208(b)(1).

³⁰ *Id.*

³¹ Chao Letter, *supra* note 4, at 1.