



February 10, 2022

Shalanda D. Young, Acting Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Dear Acting Director Young:

As the agency that “oversees the implementation of the President’s vision across the Executive Branch,” the Office of Management and Budget (OMB) has a responsibility to set the ethical tone for government from the top. The Project On Government Oversight (POGO) has uncovered information revealing that OMB has fallen short in this responsibility with regard to its management of the conflicting financial interests of U.S. Digital Service (USDS) Administrator Mina Hsiang, whose role in technology has government-wide reach.

Ms. Hsiang’s significant ongoing investments in tech companies do real harm to the American people by exposing government projects to the influence of an official who may have financial interests in them. Rather than fixing this ethical problem, OMB has papered it over with ethics waivers, claiming her interests are not so substantial as to be likely to affect her services. The waivers themselves are legally flawed, and they are not the only issue. OMB’s approach to assets not covered by the waivers may already have caused problems. Urgent action is needed.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

In reviewing the ethics waivers OMB granted Ms. Hsiang, we found an alarming situation that jeopardizes digital programs throughout the executive branch, undermines public trust, and calls into question a federal contract. Our review found several red flags:

- OMB has exempted nearly everything Ms. Hsiang owns from a criminal conflict-of-interest law. *These waivers cover 94% of Ms. Hsiang’s investment portfolio.*
- OMB granted a waiver for her \$950,000 investment in a hedge fund, with one critical problem: The waiver is a blank check — *OMB has no idea what it waived.*
- OMB used the wrong technique to assess Ms. Hsiang’s financial interest in her family’s holding company. As a result, *an approximately \$7.7 million investment was labeled sufficiently “insubstantial” to qualify for a waiver.*
- For 11 months, OMB allowed Ms. Hsiang to hold several assets that *the government now says posed conflicts of interest.*

- Four weeks after she became USDS administrator, Ms. Hsiang sold her interest in an artificial intelligence defense contractor, Rebellion Defense, for between half a million and a million dollars, *an amount 10 to 67 times its reported value*.

POGO's analysis of these and other red flags is enclosed and incorporated by reference. Career ethics officials did not issue these waivers; the official who issued them is a political appointee. As acting head of OMB, regulations make you responsible for "establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency," and you have the power to reverse course.

OMB should rescind the waivers and require Ms. Hsiang to divest her conflicting interests or, at the very least, mitigate her conflicts of interest by reassigning her to a nonsupervisory position in which her recommendations will be subject to close oversight. And the circumstances surrounding her lucrative sale of Rebellion Defense cry out for investigation. The public also deserves answers to several key questions:

- Will OMB rescind the waivers and require Ms. Hsiang to divest all potentially conflicting assets or, at least, remove her supervisory authority and monitor her recommendations?
- Why did OMB officials feel it was appropriate to issue waivers covering nearly her entire investment portfolio, including a "blank check" waiver for an investment fund whose holdings frequently change?
- Has Ms. Hsiang ever *asked* her family to divest the conflicting assets in its holding company or distribute her share of those assets to her for divestiture?
- Does Ms. Hsiang still hold an approximately \$360,000 interest in Google?
- Did her ownership of Rebellion Defense invalidate the company's defense contract because she was a federal employee?
- How did a newly promoted USDS administrator manage to sell her interest in an artificial intelligence defense contractor for between 10 to 67 times its reported value?

Answers to these questions are crucial because Ms. Hsiang's extraordinary ethics waivers send an undeniable message that the higher officials go at OMB, the less accountable they are to the public for ethical conduct. This message fails to respect the sacrifices that millions of rank-and-file employees routinely make for their public service. Greater authority should come with greater responsibility, but OMB has turned this principle on its head.

A former U.S. Chief Technology Officer once told USDS recruits, “Do what you would do in the private sector and we’ll blow up the barriers in the way.” The case of Ms. Hsiang suggests that OMB believes the government’s ethics rules are the “barriers” it should blow up. Though USDS aspires to emulate the practices of Silicon Valley corporations, there is no escaping the fact that the office wields governmental power. The government cannot and should not operate like a profit-seeking corporation when it comes to ethics. Citizens may reject a company’s offerings, electing to do without or seek a competitor’s better offer, but they only have one federal government — and its directives, backed by the force of law, are not optional. OMB should put the people’s interests before the private convenience of a wealthy top administration official.

I look forward to your response.

Sincerely,

A handwritten signature in blue ink, reading "Walter M. Shaub, Jr." with a stylized flourish at the end.

Walter M. Shaub, Jr.  
Senior Ethics Fellow

Enclosure:

Analysis of OMB’s Management of the USDS Administrator’s Conflicts of Interest

## **Analysis of OMB's Management of the USDS Administrator's Conflicts of Interest**

The Office of Management and Budget (OMB) has failed to responsibly manage the conflicts of interest of the administrator of the U.S. Digital Service (USDS), Mina Hsiang. This situation jeopardizes digital programs throughout the executive branch, undermines public trust, and calls into question at least one federal procurement.

OMB has issued ethics waivers exempting *nearly everything Ms. Hsiang owns* from a criminal conflict-of-interest law. They authorize her to work on projects directly affecting her investments.

Other investments not covered by the waivers pose additional ethical risks. For example, based on one source, Ms. Hsiang may have been one of only a few investors in an artificial intelligence firm with deep ties to the administration. The government's award of a defense contract to the firm in 2021 may have violated a prohibition on knowingly contracting with a company "substantially owned" by a federal employee. Four weeks after OMB promoted Ms. Hsiang to be USDS administrator, she sold her share of the firm — *for up to 67 times its reported value*.

OMB urgently needs to remedy these problems. OMB should rescind Ms. Hsiang's ethics waivers and require her to divest all potentially conflicting interests — those that the waivers cover and those that they do not.

If OMB is unwilling to do so, it should, at the very least, mitigate Ms. Hsiang's conflicts of interest by reassigning her to a nonsupervisory position in which her activities and recommendations will be subject to enhanced oversight to protect the integrity of the crucial government programs on which she works.

OMB should also arrange for an independent investigation to assess the circumstances surrounding Ms. Hsiang's ownership and mysteriously lucrative sale of Rebellion Defense, as well as the validity of the defense contract that the firm landed in 2021.

### **OMB's Waivers Paper Over Dangerous Conflicts of Interest**

Ms. Hsiang's tech investments create the potential for conflicts of interest that do real harm to the American people by exposing government projects to the influence of an official who may have financial interests in them. In waiving them, OMB has failed to consider the risks and has extravagantly placed far too many of her financial interests above the law.

#### *A Far-reaching Role*

OMB has failed to fully consider the nature and importance of Ms. Hsiang's role at USDS.

Government-wide regulations controlling the issuance of conflict-of-interest waivers advise an agency to consider the nature and importance of an employee's role, including "the extent to

which the employee is called upon to exercise discretion.”<sup>1</sup> OMB failed to factor this consideration into its decision to issue two extraordinary ethics waivers to Ms. Hsiang.

As head of USDS, Ms. Hsiang has executive branch-wide authority, is a final decision maker, and supervises 200 employees, most of whom are experts in their fields.<sup>2</sup> OMB has written that Ms. Hsiang has government-wide responsibility for “the development and delivery of the full spectrum of Federal digital services.”<sup>3</sup> The mission of USDS is nothing less than to transform the public-facing services of the federal government,<sup>4</sup> and OMB’s acting director, Shalanda Young, recently emphasized that the office is engaged in “government’s most pressing technical problems.”<sup>5</sup> Citing the pandemic’s effect on a changing environment, Ms. Hsiang herself has said that the government services she helps deliver “are more critical now than ever.”<sup>6</sup> Indeed, they are. USDS has been intimately involved in programs that the pandemic has affected at the Centers for Disease Control, the Centers for Medicare and Medicaid Services, the Small Business Administration, the Department of Veterans Affairs, and other federal agencies.<sup>7</sup>

USDS can also influence the government’s federal procurement decisions related to digital service. While USDS does not make final procurement decisions, the office’s website makes clear that its recommendations can influence agencies as they develop requirements, criteria for evaluation, and other aspects of the acquisition process: “From jumping in on short discovery sprints to acquisition strategy across product portfolios, our biggest strengths are in market intelligence, innovating on evaluation methods, and creating contracts that focus on results over requirements.”<sup>8</sup>

Given the breadth and importance of Ms. Hsiang’s work, conflicts of interest may arise unpredictably. The danger is made greater by her office’s deployment of “rapid response teams,” which jump into federal projects with little notice.<sup>9</sup> Because Ms. Hsiang supervises all USDS staff, her reach is government wide. Because she is ultimately responsible for everything the office does, the impact of any conflict of interest is great.

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<sup>1</sup> 5 C.F.R. § 2640.301(b)(5) (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2640/subpart-C/section-2640.301>.

<sup>2</sup> Margaret Harding McGill, “Exclusive: New boss for government’s tech ‘SWAT team,’” *Axios*, September 2, 2021, <https://www.axios.com/new-boss-us-digital-service-mina-hsiang-6d4d3a2e-689e-4026-a27f-5e06fc783c57.html>.

<sup>3</sup> Office of Management and Budget, “Conflict of Interest Waiver For Mina Hsiang - GOB LLC,” at 1, August 18, 2021, <https://www.pogo.org/document/2022/02/conflict-of-interest-waivers-for-mina-hsiang/>.

<sup>4</sup> U.S. Digital Service, “United States Digital Service” (fact sheet), fall 2018, <https://www.usds.gov/assets/files/2018-10-Recruiting-1-Sheet.pdf>.

<sup>5</sup> The White House, “Office of Management and Budget Announces Mina Hsiang As New Administrator of the United States Digital Service,” Press Release, September 2, 2021, <https://www.whitehouse.gov/omb/briefing-room/2021/09/02/office-of-management-and-budget-announces-mina-hsiang-as-new-administrator-of-the-united-states-digital-service/>.

<sup>6</sup> Margaret Harding McGill, “Exclusive: New boss for government’s tech ‘SWAT team,’” [see note 2].

<sup>7</sup> Billy Mitchell, “How the U.S. Digital Service is helping during the coronavirus pandemic,” *FedScoop*, April 23, 2020, <https://www.fedscoop.com/usds-digital-services-coronavirus-projects/>.

<sup>8</sup> “How we work,” U.S. Digital Service, <https://www.usds.gov/how-we-work> (accessed January 19, 2020).

<sup>9</sup> Eunice Garcia, “Happy 5th Birthday, USDS,” U.S. Digital Service, August 14, 2019, <https://usdigitalservice.medium.com/happy-5th-birthday-usds-dbad0eab841e>.

## *An Extraordinary Exemption*

Instead of asking her to divest from all technology companies, OMB has granted waivers for 94% of Ms. Hsiang's investment portfolio. The decision to grant waivers for nearly everything Ms. Hsiang owns places her above the law.

On August 18, 2021, as OMB was considering then-senior advisor Hsiang for the USDS administrator position, the agency's general counsel granted her two written conflict-of-interest waivers. Though the waivers do not explain why they were issued as separate documents, doing so may have obscured their combined magnitude. Based on OMB's own calculations, these two waivers exempt no less than 94% of Ms. Hsiang's investment portfolio from the criminal conflict-of-interest statute.<sup>10</sup>

One waiver covers Ms. Hsiang's approximately \$7.7 million financial interest in a holding company that members of her immediate and extended family own, GOB LLC.<sup>11</sup> OMB defends its issuance of this extraordinary waiver, in part, by suggesting that divestiture was never an option for Ms. Hsiang. The waiver states that Ms. Hsiang lacks "authority to direct" the company's board to divest conflicting assets.<sup>12</sup> What the waiver does not say is whether she ever asked the board members — presumably all relations — to divest conflicting financial interests or, alternatively, to distribute her share of the company's assets to her so that she could divest them herself.

Before asking the American people to accept Ms. Hsiang's extraordinary exemption from a criminal law, it would have been reasonable for OMB to ask her to at least try to resolve her conflicts of interest.<sup>13</sup> If Ms. Hsiang refused, or the family declined her request, OMB would

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<sup>10</sup> POGO used information in the waivers and Ms. Hsiang's new entrant financial disclosure report to ascertain that the waivers cover at least 94% of her investment portfolio. One of the waivers, which covers Ms. Hsiang's \$7.7 million interest in a holding company, indicates that Ms. Hsiang's proportional share of the trust's investment in Google is worth \$360,000 and further indicates that this amount represents 3.2% of the value of her entire investment portfolio. "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," [see note 3]. These figures establish that OMB believes Ms. Hsiang's investment portfolio is worth \$11,250,000 because \$360,000 is 3.2% of \$11.25 million. But a review of Ms. Hsiang's March 2021 new entrant financial disclosure report identified an investment portfolio worth not less than \$2.9 million and not more than \$9.2. million. "New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang," March 9, 2021,

<https://www.pogo.org/document/2022/02/financial-disclosures-certificate-of-divestiture-for-mina-hsiang/>.

A second waiver covers Ms. Hsiang's \$950,000 interest in an investment fund called MFN Partners. Office of Management and Budget, "Conflict of Interest Waiver For Mina Hsiang - MFN Partners Management, LP," at 2, August 18, 2021, <https://www.pogo.org/document/2022/02/conflict-of-interest-waivers-for-mina-hsiang/>. Therefore, the combined value of interests covered by the two waivers is \$8.65 million, which accounts for at least 94% of her entire investment portfolio — and even more if, as is likely the case, some of her investments are worth less than the top of the value ranges she reported in her financial disclosure report.

<sup>11</sup> "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 3, [see note 3].

<sup>12</sup> "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 2, [see note 3].

<sup>13</sup> The waiver indicates that Ms. Hsiang's dependent child also has a separate interest in the company through a trust. The company could have distributed the child's share of assets to the trust for divestiture by the trustee. If that were impossible, the sale of the interests of Ms. Hsiang and her spouse in the company would have presumably resolved the bulk of her conflicting interests. The precise degree to which the conflict of interest would be resolved is unknown because Ms. Hsiang either failed to disclose her dependent child's interest in the company or, at least, failed to disclose it as a separate entry in her financial disclosure report. "New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang," Part 6 [see note 10].



then have had cause to find someone other than Ms. Hsiang to lead USDS. A federal employee's intra-family disagreement should never become the entire nation's problem.

The primary conflict-of-interest statute prohibits millions of executive branch employees from participating — “through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise” — in any “particular matter” affecting their personal financial interests.<sup>14</sup> Not so with Ms. Hsiang.

With these waivers, OMB has authorized Ms. Hsiang to participate in any “particular matter” that does not involve specific parties.<sup>15</sup> She can participate personally and substantially in policy deliberations focused on an industry in which she has financial interests.<sup>16</sup> She could help an agency develop requirements or evaluation criteria for a procurement that screen out competitors of companies in which she has invested.<sup>17</sup> There are any number of ways the waiver could compromise the integrity of digital services across the government, which could undermine public confidence in the government's service or lead to ineffective outcomes.

Granting Ms. Hsiang ethics waivers did not lessen the reach and impact of her conflicts of interest. The waivers solved her legal problem, but they did not solve the nation's problem of having a top administration official with conflicts of interest potentially touching every aspect of the government's digital services.

## **The Waivers Themselves Are Legally Flawed**

Both waivers also fall short legally. Ms. Hsiang's investments fail the “insubstantiality test,” a legal requirement that, to qualify for a waiver, an employee's investments must not be so substantial as to be likely to affect the integrity of an employee's services.<sup>18</sup>

### *A Blank Check*

OMB granted a waiver exempting an investment of almost \$1 million — and it has no idea what holdings it exempted from the conflict-of-interest law.

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<sup>14</sup> 18 U.S.C. § 208(a) (2018), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section208&num=0&edition=prelim>.

<sup>15</sup> The term “particular matter” is a legal term of art referring to any matter that is focused on the interests of either individual parties (e.g., an individual government contractor) or a discrete and identifiable class of persons (e.g., all companies that are eligible to bid on a contract opportunity). 5 C.F.R. § 2640.103(a)(1). An industry is an example of a discrete and identifiable class of persons. Example 3 to 5 C.F.R. § 2640.103(a)(1), (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2640/subpart-A/section-2640.103>.

<sup>16</sup> 5 C.F.R. § 2640.103(a)(1) (“The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons”), [see note 15].

<sup>17</sup> The Office of Government Ethics has found that a request for proposals is a “particular matter” but not one involving specific parties. Office of Government Ethics, Adv. Op., 84 x 15, November 19, 1984, [https://www.oge.gov/Web/oge.nsf/0/26BA54D6DAE56AAC852585BA005BEF5A/\\$FILE/0a7087309ff44d15894736a1c1d1c9cc2.pdf](https://www.oge.gov/Web/oge.nsf/0/26BA54D6DAE56AAC852585BA005BEF5A/$FILE/0a7087309ff44d15894736a1c1d1c9cc2.pdf).

<sup>18</sup> 18 U.S.C. § 208(b)(1), [see note 14].

Of the two waivers OMB granted, the smaller has the more obvious problem: The waiver for Ms. Hsiang's \$950,000 investment in a hedge fund is a blank check. In the waiver, OMB admits that the fund, MFN Partners, "actively trades."<sup>19</sup> This means that the investments held by the hedge fund when OMB issued the waiver on August 18 are probably not the same as those it holds today, and what the fund holds next month will likely be something else entirely. As you read this letter, neither the public nor OMB knows the holdings of MFN Partners. OMB acknowledges as much in the waiver, citing the "uncertainty of MFN Partners' future holdings."<sup>20</sup>

In effect, the waiver outsources responsibility for managing this massive conflict of interest to the fund's manager, who has likely never heard of Ms. Hsiang and most certainly has no interest in the government's ethics program. Though the waiver states that Ms. Hsiang has agreed to divest MFN Partners, OMB admits that she will not begin selling this investment until December 31, 2022, and she will not complete the sale until after the next presidential election on December 31, 2024.<sup>21</sup>

### *A Flawed Approach*

OMB used the wrong technique to assess Ms. Hsiang's financial interest in a holding company — and an approximately \$7.7 million investment was labeled sufficiently "insubstantial" to warrant a waiver.

The MFN Partners waiver isn't the only extraordinary decision OMB made regarding Ms. Hsiang's investments. The office also granted a second waiver, covering her approximately \$7.7 million interest in a holding company, GOB LLC. As highlighted earlier, these two waivers together exempt 94% of Ms. Hsiang's investments from conflict-of-interest law.

After making the decision to exempt Ms. Hsiang from a criminal law, OMB justified her exemption with a flawed legal analysis. The conflict-of-interest law authorizes OMB to issue a waiver only if an employee's financial interest is "not so substantial as to be deemed likely to affect the integrity of the services" that the government may expect from the employee.<sup>22</sup> OMB applies this insubstantiality test to the final section of the waiver, but it is applied to the wrong asset.

Among GOB LLC's holdings is Baupost Group LLC, a hedge fund that has invested millions in Google. The waiver indicates that Ms. Hsiang's proportional share of that investment in Google is worth approximately \$360,000.<sup>23</sup> Fracturing the holdings of the holding company in this way, OMB claims that Ms. Hsiang's interest in Google is small enough to satisfy the insubstantiality test.<sup>24</sup> The problem with this claim is that OMB is not waiving only Ms. Hsiang's approximately

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<sup>19</sup> "Conflict of Interest Waiver For Mina Hsiang - MFN Partners Management, LP," at 2, [see note 10].

<sup>20</sup> "Conflict of Interest Waiver For Mina Hsiang - MFN Partners Management, LP," at 2, [see note 10].

<sup>21</sup> "Conflict of Interest Waiver For Mina Hsiang - MFN Partners Management, LP," at 2, [see note 10].

<sup>22</sup> 18 U.S.C. § 208(b)(1), [see note 14].

<sup>23</sup> "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 3, [see note 3].

<sup>24</sup> The waiver proclaims: "OMB has determined that Ms. Hsiang's proportionate ownership of Google — currently 4.4 percent of the holdings of GOB LLC and 3.2 percent of the value of Ms. Hsiang's entire investment portfolio —



\$360,000 interest in Google — OMB is waiving her approximately \$7.7 million interest in GOB LLC.<sup>25</sup>

It is a tall order to show that Ms. Hsiang's approximately \$7.7 million investment in GOB LLC is sufficiently insubstantial to warrant a waiver. And if the logic behind the OMB's waiver feels like shell-game magic, it is because the office is misusing an analytic technique developed for quite different circumstances.

The technique involves analyzing the underlying holdings of investment funds or other pooled investment vehicles.<sup>26</sup> This approach only makes sense when an employee's duties are so narrowly focused that the employee is unlikely to participate in particular matters affecting multiple holdings of the pooled investment vehicle,<sup>27</sup> the waiver is only temporary,<sup>28</sup> and the pooled investment vehicle does not contain substantial holdings in a sector that may be affected by a particular matter in which the employee will be called upon to participate.<sup>29</sup> An employee's involvement in a national emergency, such as the COVID-19 pandemic response, may also be relevant.<sup>30</sup>

This approach does not make sense in Ms. Hsiang's case: Her sprawling responsibilities could reach almost any federal program, and "particular matters" will arise unpredictably;<sup>31</sup> her duties are not limited to a national emergency; she will not eventually divest her interest in the company;<sup>32</sup> and her company's investments include significant interests in technology

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is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from Ms. Hsiang." "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 4, [see note 3].

<sup>25</sup> The waiver is clear as to what OMB is waiving: "To allow Mina Hsiang to serve as Administrator of USDS, the Office of Management and Budget is granting her a waiver to maintain the interests in GOB LLC that she, her spouse, and her dependent child hold." "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 4, [see note 3].

<sup>26</sup> Office of Government Ethics, "Waivers Under 18 U.S.C. § 208," OGE Inf. Adv. Op. 07 x 4, at 26 (2007), [www.oge.gov/Web/oge.nsf/Legal%20Docs/92CB9ED267120B37852585BA005BECF7/\\$FILE/07x4.pdf?open](http://www.oge.gov/Web/oge.nsf/Legal%20Docs/92CB9ED267120B37852585BA005BECF7/$FILE/07x4.pdf?open)

<sup>27</sup> 5 C.F.R. § 2640.301(b)(5), [see note 1].

<sup>28</sup> Office of Government Ethics, "Waivers Under 18 U.S.C. § 208," at 5 (2007), [see note 26].

<sup>29</sup> As illustrated by regulatory exemptions for certain *de minimis* holdings in publicly traded securities, the conflict-of-interest law applies to all financial interests affected by a "particular matter." 5 C.F.R. § 2640.201 (2022) (applicable only if the *aggregate value* of an employee's interests in "one or more entities affected by the matter" is below a specified threshold), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2640/subpart-B/section-2640.201>. Therefore, the government should consider the potential for gain or loss to *all companies affected by a matter*. 5 C.F.R. § 2640.103(b)(3) [see note 15]. Logic dictates that the more highly diversified a fund is, the fewer of its holdings will be affected by a "particular matter."

<sup>30</sup> 5 C.F.R. § 2640.201(b)(6)(i), [see note 29].

<sup>31</sup> "Report to Congress," U.S. Digital Service, 2017, [www.usds.gov/resources/USDS-Fall-2017-Report-to-Congress.pdf](http://www.usds.gov/resources/USDS-Fall-2017-Report-to-Congress.pdf).

<sup>32</sup> "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 2-4, [see note 3].

companies,<sup>33</sup> as well as the related communications sector.<sup>34</sup> It also bears noting that, once again, OMB does know exactly what this waiver exempts from the conflict-of-interest law because, contrary to a claim OMB makes in the waiver, the Baupost hedge fund in her holding company has recently raised capital and bought assets.<sup>35</sup>

### *A Fundamental Misunderstanding*

OMB's analysis in the holding company waiver reveals an underlying misunderstanding of the conflict-of-interest law.

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<sup>33</sup> One source identifies 75.01% of the investments of Baupost, her company's biggest holding, as being specifically in the information technology and communications sectors (and the source lists both Google and Facebook as communications companies). "Baupost Group LLC," Whale Wisdom, [https://whalewisdom.com/filer/baupost-group-llc-ma#tabholdings\\_tab\\_link](https://whalewisdom.com/filer/baupost-group-llc-ma#tabholdings_tab_link) (accessed February 4, 2022); "New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang," Part 6, [see note 10]. Baupost also holds other assets that may pose conflicts for Ms. Hsiang. For example, it holds health care sector investments and "blank check" companies, such as Dragoner Growth Opportunities Corp. III and Horizon Acquisition Corporation II, which says it plans to focus in a specific sector but cautions "we may pursue an initial business combination target in any industry." "Baupost Group LLC," Whale Wisdom, [see above in this note]; Horizon Acquisition Corporation II, "About Us," <https://www.horizonacquisitioncorp-ii.com/home/default.aspx> (accessed February 5, 2022); Yahoo Finance, "Dragoner Growth Opportunities Corp. III," <https://finance.yahoo.com/news/dragoner-growth-opportunities-corp-iii-021700057.html> (accessed February 5, 2022). In December, the government declared Ms. Hsiang's health care investments a conflict of interest. David J. Apol, General Counsel, U.S. Office of Government Ethics, "Certificate of Divestiture OGE-2021-223," December 1, 2021, <https://www.pogo.org/document/2022/02/financial-disclosures-certificate-of-divestiture-for-mina-hsiang/>.

<sup>34</sup> OMB claims that communications companies are not relevant to the analysis, but, for example, USDS was involved in helping agencies convert to telework during the pandemic. Mazin Hussain, "Can This Mysterious 'Startup' Fix Government?" Medium, April 10, 2021, <https://medium.datadriveninvestor.com/can-this-mysterious-startup-fix-government-e86acb0847ef>. And AT&T has cited a successful USDS project as involving the type of services that the company can provide. AT&T, "Transforming the public sector contact center," 2019, <https://www.business.att.com/content/dam/attbusiness/briefs/vc-contact-center-solutions-public-sector.pdf>. In addition, Google is considered a communications company — and OMB has conceded that Google is a conflict. "Baupost Group LLC," Whale Wisdom, [see note 33]; "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 4, [see note 3].

<sup>35</sup> In the waiver, OMB states that the holding company's biggest holding, a hedge fund named Baupost Group LLC, "is not taking any additional investors or capital" and is "unlikely to acquire new assets." "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 3, [see note 3]. Baupost made large purchases in 2021. Toby Sterling, "Baupost raises stake in Just Eat Takeaway to 5.13%, filing shows," Reuters, October 19, 2021, <https://www.nasdaq.com/articles/baupost-raises-stake-in-just-eat-takeaway-to-5.13-filing-shows-2021-10-19>; Sohini Podder, "Digital ad platform Outbrain valued at more than \$1 bln in Nasdaq debut," Reuters, July 23, 2021, <https://www.reuters.com/technology/digital-ad-platform-outbrain-valued-more-than-1-bln-nasdaq-debut-2021-07-23/>; Ivan Levingston and Lisa Pham, "Seth Klarman Hedge Fund Buys \$645 Million Stake in Just Eat Takeaway," Bloomberg, August 12, 2021, <https://www.bloomberg.com/news/articles/2021-08-12/klarman-s-baupost-buys-645-million-stake-in-just-eat-takeaway>; "Western Union Announces Agreement to Sell Western Union Business Solutions to Goldfinch Partners and The Baupost Group for Approximately \$910 Million in Cash," BusinessWire, August 4, 2021, <https://www.businesswire.com/news/home/20210804006057/en/Western-Union-Announces-Agreement-to-Sell-Western-Union-Business-Solutions-to-Goldfinch-Partners-and-The-Baupost-Group-for-Approximately-910-Million-in-Cash>. The year before, Baupost raised capital from new investors. "Hedge Funds Legends Quietly Contacting Investors, Citing Historic Buying Opportunity," *Institutional Investor*, March 25, 2020, <https://www.institutionalinvestor.com/article/b1kxctg877kfxd/Hedge-Funds-Legends-Quietly-Contacting-Investors-Citing-Historic-Buying-Opportunity>.

To meet the legal standard for issuing a waiver, OMB must show that Ms. Hsiang's financial interest is sufficiently insubstantial that it will not jeopardize the integrity of her service.<sup>36</sup> As discussed in the preceding section, OMB has tried to argue that the value of each underlying holding of GOB LLC can be considered individually for the purpose of this insubstantiality test. The argument necessarily rests on an assumption that Ms. Hsiang's activities will affect only one of the corporation's holdings at a time. The assumption is dubious, but ultimately irrelevant: The law is not concerned with only her own activities. OMB's discussion of GOB LLC's holdings reveals a fundamental misunderstanding of this feature of the conflict-of-interest law.

The misunderstanding is evident, for example, in the following statement in the waiver: "[A]ny *official actions* taken by the Administrator or USDS would likely have a negligible effect on Ms. Hsiang's interest in Google and, therefore, a very small percentage of her total investment portfolio" (emphasis added).<sup>37</sup> This statement focuses, incorrectly, on the *actions of USDS officials*. But that is not what the law covers.

The law covers financial interests affected by "*particular matters*" in which USDS participates. "Particular matter" is a legal term defined in regulations of the Office of Government Ethics (OGE). The term refers to any governmental matter that is focused on either the interests of specific parties (e.g., an individual company that is a party to a contract) or the interests of a discrete and identifiable class of persons (e.g., an industry).<sup>38</sup> One example of a discrete and identifiable class of persons is the class of companies that are eligible or qualified to compete for a contract, and a matter focusing on their interests — such as the establishment of procurement requirements or evaluation criteria for bids — would be a "particular matter."

A simple, albeit somewhat incomplete, way of summarizing the legal prohibition is: The law bars Ms. Hsiang from working on any projects that affect her investments, even if the part she or USDS would play in those projects has no effect at all on them. OMB's focus on her activities was incorrect. OMB should have focused on the projects that USDS may assist agencies with.<sup>39</sup>

And while it's possible that Ms. Hsiang could avoid engaging not only "actions" but also "particular matters" that affect Google, it's not the only tech company that GOB LLC has invested in. According to her financial disclosure form, the company's investments include businesses that are involved in software, hardware, artificial intelligence, data storage and analytics, and application performance monitoring.<sup>40</sup>

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<sup>36</sup> 18 U.S.C. § 208(b)(1), [see note 14].

<sup>37</sup> "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 3, [see note 3].

<sup>38</sup> 5 C.F.R. § 2640.103, [see note 15].

<sup>39</sup> OGE has issued guidance emphasizing that the conflict-of-interest law, 18 U.S.C. § 208, is triggered by the effect that a "particular matter" has on an employee's financial interests, rather than merely by the effect that an employee's own activities have on those interests: "Section 208 applies even in situations where the employee's role in the particular matter does not directly affect his [or her] financial interest. Section 208 applies as long as the employee participates personally and substantially in the overall particular matter that affects his [or her] interest." Office of Government Ethics, "Waivers Under 18 U.S.C. § 208," at 1, [see note 26].

<sup>40</sup> "New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang," Part 6, Lines 1-1.3, [see note 10].

The law's focus on "particular matters," rather than an employee's activities, makes irrelevant OMB's hair-splitting attempts to distinguish the various types of information technology companies that GOB LLC owns.<sup>41</sup> The relevant question is not whether Ms. Hsiang's *actions* would affect *only Google*; the relevant question is whether a "particular matter" in which she participates will affect other holdings of GOB LLC.<sup>42</sup> If that's possible, OMB erred in focusing only on the value of individual holdings rather than on the overall value of Ms. Hsiang's interest in the corporation.

While OMB may be able to predict whether Ms. Hsiang's own activities are likely to affect certain types of technology companies, the office cannot predict whether "particular matters" that have not yet arisen will affect those types of companies. This is especially true when "particular matters" arise at other agencies or necessitate the deployment of "rapid response teams" in reaction to unforeseen crises.<sup>43</sup> Because GOB LLC has invested, there is a risk that the technology-centered "particular matters" in which Ms. Hsiang is likely to participate would affect GOB LLC's interests.<sup>44</sup> For that reason, it was inappropriate for OMB to base its waiver on an analysis of the value of individual holdings of GOB LLC, rather than on the full value of Ms. Hsiang's considerable investment in the company.

### **Other Assets Could Cause Problems — They May Already Have**

OMB has allowed Ms. Hsiang to retain assets that pose potential conflicts of interest. One of them may already have caused ethics problems for the government.

#### *Problems Beyond Waivers*

OMB permitted the retention of other assets that could cause ethics problems.

Although OMB has inappropriately exempted almost all of Ms. Hsiang's financial interests from the criminal conflict-of-interest law, the agency has allowed her to retain several assets that the waivers do not cover. On December 1, 2021, the U.S. Office of Government Ethics (OGE) declared in a certificate of divestiture that the following investments posed conflicts of interest: United Health Group, Inc.; Teladoc Health, Inc.; Marigold Health, Corvia Medical; and General Catalyst Partners LLP Fund VI.<sup>45</sup> (A certificate of divestiture allows an employee to defer payment of capital gains taxes when the government requires divestiture.)<sup>46</sup> Before OGE could issue the certificate, OMB had to notify OGE in writing that these assets posed a conflict of

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<sup>41</sup> "Conflict of Interest Waiver For Mina Hsiang - GOB LLC," at 4, [see note 3].

<sup>42</sup> Along these lines, note that the conflict-of-interest law, 18 U.S.C. § 208(a), applies to any "particular matter" in which she participates "personally and substantially," and ethics regulations indicate that personal and substantial participation "includes the direct and active supervision of the participation of a subordinate in the matter." 5 C.F.R. § 2640.103(a)(2). [see note 15].

<sup>43</sup> Eunice Garcia, "Happy 5th Birthday, USDS," [see note 9].

<sup>44</sup> "New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang," Part 6, Lines 1-1.3, [see note 10].

<sup>45</sup> In a certificate of divestiture that he issued to Ms. Hsiang in December 2021, OGE's general counsel wrote: "I hereby determine that the divestiture of these described property is reasonably necessary to comply with 18 U.S.C. 208, or other applicable Federal conflict of interest statutes, regulations, rules or executive orders." "Certificate of Divestiture OGE-2021-223," [see note 33].

<sup>46</sup> 5 C.F.R. § 2634.1001 (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2634/toc=1>.

interest for Ms. Hsiang.<sup>47</sup> As a result of OMB permitting Ms. Hsiang to hold these conflicting assets for 11 months after joining USDS, the public is left having to wonder whether she may have participated in “particular matters” affecting her financial interests.

The public has something else to wonder about too: Ms. Hsiang did not disclose her investment in Teladoc Health, Inc., which was worth approximately \$52,000, in her financial disclosures before OGE issued the certificate of divestiture.<sup>48</sup> It is not clear why she did not disclose the asset.<sup>49</sup>

### *An Unusual Sale*

One of the assets OMB allowed Ms. Hsiang to retain already appears to have given rise to alarming ethics issues.

For the first eight months of her employment with USDS, OMB allowed Ms. Hsiang to retain her investments in an artificial intelligence company named Rebellion Defense. Now, OMB should investigate Ms. Hsiang’s sale of her share in that company.

The chronology of events is, on its face, troubling. Ms. Hsiang joined USDS as a senior advisor on January 27, 2021.<sup>50</sup> She was required by law to file a new entrant public financial disclosure report by February 26, 2021.<sup>51</sup> Ms. Hsiang missed that deadline. When she filed her report 11 days late, she disclosed a financial interest Rebellion Defense that she indicated was worth between \$15,001 and \$50,000.<sup>52</sup> On July 28, 2021, Rebellion Defense landed a multimillion-dollar defense contract.<sup>53</sup> On September 2, 2021, OMB promoted Ms. Hsiang to the position of

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<sup>47</sup> 5 C.F.R. § 2634.1005(b)(2) [see note 46].

<sup>48</sup> She did not disclose this asset when she joined OMB. “New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang,” [see note 10]. The certificate of divestiture indicates that she held 560 shares of stock. “Certificate of Divestiture OGE-2021-223,” [see note 33]. The shares were selling for \$93.44 on December 1, 2021. “Teladoc Health Inc,” Google Finance, [https://www.google.com/finance/quote/TDOC:NYSE?sa=X&ved=2ahUKEwjZsPfVl-b1AhX\\_jYkEHcdEAncQ3ecFegQILhAc&window=6M](https://www.google.com/finance/quote/TDOC:NYSE?sa=X&ved=2ahUKEwjZsPfVl-b1AhX_jYkEHcdEAncQ3ecFegQILhAc&window=6M) (accessed February 4, 2022). On January 18, 2022, OMB notified POGO that it had received only one releasable periodic transaction report, the one disclosing her sale of Rebellion Defense. Email from OMB ethics office to Walter M. Shaub, Jr., Project On Government Oversight, to OMB ethics office, January 18, 2022, <https://www.documentcloud.org/documents/21201763-oge-form-201-request-hsiang>. That means that she had not filed a periodic transaction report by as late as December 19, 2021, because government-wide regulations require agencies to release any financial disclosure filed 30 days or more before the filing of a request for the disclosure. 5 C.F.R. § 2634.603(c) (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2634/subpart-F/section-2634.603>.

<sup>49</sup> Disclosure would have been required if she bought the asset after filing her new entrant financial disclosure report, but not if she received this asset as a gift or through inheritance. 5 U.S.C. app. § 103(l) (2018), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5a-node49-node51-section103&num=0&edition=prelim>.

<sup>50</sup> “New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang,” cover page, [see note 10].

<sup>51</sup> 5 U.S.C. app. § 101(a) (2018), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5a-node49-node51-section101&num=0&edition=prelim>.

<sup>52</sup> “New Entrant Public Financial Disclosure Report (OGE Form 278e) of Mina Hsiang,” Part 6, Line 7, [see note 10].

<sup>53</sup> USA Spending, Definitive Contract PIID FA701421C0027, July 28, 2021, [https://www.usaspending.gov/award/CONT\\_AWD\\_FA701421C0027\\_9700\\_-NONE\\_-NONE-](https://www.usaspending.gov/award/CONT_AWD_FA701421C0027_9700_-NONE_-NONE-). “Definitive



USDS administrator.<sup>54</sup> On September 30, 2021, she sold her stock in Rebellion Defense.<sup>55</sup> The law required her to disclose this sale within 30 days of receiving notification of its completion.<sup>56</sup> Ms. Hsiang missed that deadline. On November 15, 2021, she belatedly disclosed the transaction, and her financial disclosure report offers no explanation at all as to how she sold her interest in this artificial intelligence defense contractor for between \$500,001 and \$1 million — *an amount 10 to 67 times its reported value*.<sup>57</sup>

This is an extraordinary leap in the value of Ms. Hsiang's interest, which is made all the more concerning by the fact that she sold the interest shortly after becoming the government's top technology innovation officer. Perhaps the company greatly increased in value over half a year. But, given the magnitude of the increase, this is a red flag warranting an independent investigation.<sup>58</sup> Investigators could examine whether OMB let her retain this investment for so long solely to enable her to get a better price for her shares despite the risk of conflicts of interest. An investigation would also give Ms. Hsiang an opportunity to supply an explanation or any needed context.

The facts that Rebellion Defense is both an artificial intelligence (AI) company and a defense contractor creates an uncomfortable intersection with Ms. Hsiang's role as USDS administrator.<sup>59</sup> The company bills itself as a builder of "mission-focused AI products for the defense and security of the United States, the United Kingdom, and our allies."<sup>60</sup> For its part, OMB has engaged directly with the subject of AI,<sup>61</sup> and a bill pending in Congress would assign

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Contract FA701421C0027," GovTribe, <https://govtribe.com/award/federal-contract-award/definitive-contract-fa701421c0027> (accessed February 2, 2022).

<sup>54</sup> The White House, "Office of Management and Budget Announces Mina Hsiang As New Administrator of the United States Digital Service," [see note 5].

<sup>55</sup> Office of Management and Budget, "Periodic Transaction Report (OGE Form 278-T) of Mina Hsiang," Line 1, November 17, 2021, <https://www.pogo.org/document/2022/02/financial-disclosures-certificate-of-divestiture-for-mina-hsiang/>.

<sup>56</sup> 5 U.S.C. app. § 103(l) [see note 49].

<sup>57</sup> "Periodic Transaction Report (OGE Form 278-T) of Mina Hsiang," Line 1, [see note 55].

<sup>58</sup> Based on OMB's response to POGO's request for financial disclosures, it is possible to rule out that the value of Ms. Hsiang's investment increased because she purchased additional shares of Rebellion Defense, Inc. after March 9, 2021 (unless Ms. Hsiang violated the disclosure law by keeping any such purchase secret, which seems unlikely). The Ethics in Government Act requires her to file a periodic transaction report disclosing any purchase exceeding \$1,000 within 30 days of notification of the transaction's completion. 5 U.S.C. app. § 103(l). [see note 49]. In a January 14, 2022, form requesting Ms. Hsiang's disclosures, POGO specifically requested: "All new entrant, annual, periodic transaction, and termination financial disclosure reports of Mina Hsiang," and the cover letter reiterated that the request was for all disclosures: "Attached is an OGE Form 201 for all financial disclosures filed by Mina Hsiang." OMB responded four days later with copies of Ms. Hsiang's March 9, 2021, new entrant financial disclosure and her November 17, 2021, periodic transaction report. Email from OMB ethics office to Walter M. Shaub, Jr., Project On Government Oversight, to OMB ethics office, January 18, 2022, [see note 48]. No other periodic transaction reports were produced.

<sup>59</sup> Rebellion Defense, <https://rebelliondefense.com/> (accessed January 20, 2022).

<sup>60</sup> Rebellion Defense [see note 59].

<sup>61</sup> "Guidance for Regulation of Artificial Intelligence Applications," Memorandum for the heads of executive departments and agencies from Russell T. Vought, Director, Office of Management and Budget, November 17, 2020, <https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf>.



OMB a role in addressing the use of AI by government contractors.<sup>62</sup> In 2021, the government's National Security Commission on Artificial Intelligence recommended that USDS take a lead role in artificial intelligence. In its final report, the commission said, "Congress should fund teams of data engineers and data scientists organized through the U.S. Digital Service to unlock public data currently held by the government for use by the AI research community."<sup>63</sup> It also recommended that the government's artificial intelligence efforts "leverage existing digital governance efforts across the Executive Branch, including ... the U.S. Digital Service."<sup>64</sup>

Because Rebellion Defense is privately owned, it is possible that Ms. Hsiang sold her investment back to the company's other owners.<sup>65</sup> It is disturbing to think that the USDS administrator may have negotiated this astonishing windfall with the owners of a firm whose business prospects USDS could affect. Maybe the sale was legitimate, or maybe the buyers had an incentive to pay more for her share of the firm than it was worth; either way, the appearance is terrible.

Ms. Hsiang's ownership of Rebellion Defense creates a second problem for the government: The validity of the company's 2021 defense contract award may be in question. Ms. Hsiang was still an owner of the firm when it landed the contract in July 2021. POGO does not know how many owners the firm had at the time of the contract award, but at least one source indicates that the firm has only eight investors today.<sup>66</sup> The Federal Acquisition Regulation expressly prohibits knowingly awarding a government contract to any company "substantially owned or controlled by one or more Government employees."<sup>67</sup> If Ms. Hsiang was only one of only a few owners, the contract may be invalid.

If OMB's response is ultimately that no one told the Defense Department that the USDS administrator was involved in the firm, the response will not speak well of the systems designed to protect the integrity of government procurements and will offer little comfort to taxpayers. The Government Accountability Office has explained that the prohibition against knowingly contracting with government employees addresses not only actual impropriety but even the appearance of impropriety, which equally undermine public trust: "This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their government duties, and to avoid the appearance of favoritism or preferential treatment by the government toward its employees."<sup>68</sup>

If OMB had required Ms. Hsiang to divest Rebellion Defense when she joined USDS in January 2021, the appearance of a problem in this case could have been avoided entirely. Put simply,

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<sup>62</sup> U.S. Senate Committee on Homeland Security and Governmental Affairs, "Peters and Portman Bipartisan Bill to Protect Americans' Privacy by Securing and Preventing Misuse of Data Collected By Artificial Intelligence Advances in Senate," Press Release, November 3, 2021, <https://www.hsgac.senate.gov/media/majority-media/peters-and-portman-bipartisan-bill-to-protect-americans-privacy-by-securing-and-preventing-misuse-of-data-collected-by-artificial-intelligence-advances-in-senate>.

<sup>63</sup> National Security Commission on Artificial Intelligence, "Final Report," at 447, October 21, 2021, <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf>.

<sup>64</sup> National Security Commission on Artificial Intelligence, "Final Report," at 450 [see note 63].

<sup>65</sup> "Rebellion Defense, Inc.," Pitchbook, <https://pitchbook.com/profiles/company/279870-85#overview> (accessed January 20, 2022).

<sup>66</sup> "Rebellion Defense, Inc.," Pitchbook, [see note 65].

<sup>67</sup> Federal Acquisition Regulation, part 3, subpart 3.601, <https://www.acquisition.gov/far/3.601>.

<sup>68</sup> GAO, B-219666, 65 Comp. Gen. 87, December 5, 1985, <https://www.gao.gov/products/b-219666>.

OMB's decision to let Ms. Hsiang retain an artificial intelligence defense contractor while serving in USDS was irresponsible.

### *An Appearance of Favoritism*

OMB's decision to let Ms. Hsiang retain her investment in Rebellion Defense has created an appearance of favoritism for a company with connections to the Biden administration.

OMB's decision to let Ms. Hsiang hold an interest in Rebellion Defense for eight months was irregular, and the company's ties to the Biden administration create the appearance of politics overriding ethics. Whether or not those ties influenced the decision, heads of federal agencies are responsible for an ethics program that avoids even the appearance of impropriety.<sup>69</sup> The optics in this case are terrible.

The maximum time for divestitures is normally three months, but Ms. Hsiang retained this investment for eight months.<sup>70</sup> Though she joined OMB in January 2021, she sold her investment only after Rebellion Defense raised \$150 million in venture capital funds last September.<sup>71</sup> The public may reasonably wonder if OMB let Ms. Hsiang retain a potentially conflicting financial interest for an extended period so that she could maximize her return on investment, despite the increased risk to government operations. The public may also wonder if funders were impressed with this defense contractor's affiliation with the USDS administrator.

Magnifying these appearance concerns is the fact that the company, which one reporter called a "shadowy defense start-up,"<sup>72</sup> has numerous connections to the government. Rebellion Defense can boast links to two members of the Biden-Harris Presidential Transition Team,<sup>73</sup> both of whom were former USDS officials;<sup>74</sup> a company co-founder who also worked for USDS;<sup>75</sup> the

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<sup>69</sup> 5 C.F.R. § 2638.107 (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2638/subpart-A/section-2638.107>; 5 C.F.R. § 2635.101(b)(14), (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2635/subpart-A/section-2635.101>; Federal Acquisition Regulation, part 3, subpart 3.101, [https://www.acquisition.gov/far/part-3#FAR\\_3\\_101](https://www.acquisition.gov/far/part-3#FAR_3_101).

<sup>70</sup> See 5 C.F.R. § 2634.802(c) (2022), <https://www.ecfr.gov/current/title-5/chapter-XVI/subchapter-B/part-2634/subpart-H/section-2634.802>.

<sup>71</sup> Dan Primack, "Exclusive: Rebellion Defense raises \$150 million at \$1 billion valuation," *Axios*, September 15, 2021, <https://www.axios.com/rebellion-defense-raises-150-million-billion-valuation-7e9b6365-10e0-4fdd-b109-9eb5f6965220.html>.

<sup>72</sup> Jonathan Guyer, "Silicon Valley Takes the Battlespace," *American Prospect*, January 19, 2021, <https://prospect.org/power/silicon-valley-takes-battlespace-eric-schmidt-rebellion/>.

<sup>73</sup> An executive at Yelp told reporter Jonathan Guyer, "The fact that they got two people on the landing teams was eyebrow-raising to say the least," and Oracle's executive vice president said, "It's sure odd that a year-old startup like Rebellion winds up with two employees serving on a presidential transition team." "Silicon Valley Takes the Battlespace," [see note 72].

<sup>74</sup> Aaron Mehta, "Biden landing team for Pentagon announced," *Defense News*, November 10, 2020, <https://www.defensenews.com/pentagon/2020/11/10/biden-landing-team-for-pentagon-announced/>; LinkedIn account of Victor Garcia, <https://www.linkedin.com/in/victorgarcia> (accessed February 3, 2022); LinkedIn account of David Holmes, <https://www.linkedin.com/in/domorewithdavid> (accessed February 3, 2022).

<sup>75</sup> Jonathan Guyer, "Silicon Valley Takes the Battlespace," [see note 72].

chairman of a federal advisory committee on artificial intelligence;<sup>76</sup> the Director of National Intelligence;<sup>77</sup> and the White House's director of technology.<sup>78</sup> These may not even be the company's only government ties.<sup>79</sup>

All these connections make an optics nightmare of the irregular decision to let the USDS administrator retain her financial interest in an artificial intelligence defense firm. OMB's soft treatment of this high-level administration official creates the appearance that ethics is subordinate to politics at OMB.

### **OMB Must Take Steps to Address These Lapses**

OMB's mishandling of Ms. Hsiang's considerable conflicts of interest is deeply troubling. The decision to issue a waiver for nearly everything she owns is extraordinary. In the case of the MFN Partners waiver, OMB has no idea what it waived. In the case of the GOB LLC waiver, OMB has shifted the burden of Ms. Hsiang's public service to the public, leaving citizens to worry about the integrity of its government's digital services. OMB also misapplied the law in awarding the GOB LLC waiver by focusing on the effect of Ms. Hsiang's activities rather than the effect of the projects she influences. The decision to let her retain other potentially conflicting assets not covered by the waiver exacerbates these problems. OMB should rescind Ms. Hsiang's ethics waivers and require her to divest all potentially conflicting interests, including both those that the waivers cover and those that they do not.

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<sup>76</sup> Eric Schmidt, a billionaire who now sits on the company's board, advised the Obama-Biden White House when he was CEO of Google, and until October 2021, he chaired the National Commission on Artificial Intelligence. Jonathan Guyer, "Silicon Valley Takes the Battlespace," [see note 72]; National Security Commission on Artificial Intelligence, "Notice of Federal Advisory Committee Meeting," 86 Fed. Reg. 9541, February 16, 2021, <https://www.nscai.gov/commissioners/>.

<sup>77</sup> American Prospect's Jonathan Guyer has reported that Rebellion Defense funded a task force study through the Center for Strategic Information Studies (CSIS) that recommended the government explore using more artificial intelligence, and he notes that two of the task force's members joined the Biden administration: "The co-chair of that Rebellion-funded task force at CSIS was Avril Haines, now Biden's director of national intelligence; its website listed Kathleen Hicks as a senior adviser, and Biden announced in December that she would be number two at the Pentagon." Jonathan Guyer, "Silicon Valley Takes the Battlespace," [see note 72].

<sup>78</sup> David Recordon worked as a consultant for Rebellion Defense until January 2021, the month that he joined the Biden White House to become an Assistant to the President and the administration's Director of Technology. "New Entrant Public Financial Disclosure Report (OGE Form 278e) of David Recordon," January 20, 2021, <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:32ca54d9-508e-395c-9499-ac323bdc9b47>.

<sup>79</sup> Another Rebellion Defense employee, Bob Daigle, is married to a former Assistant Secretary of Defense for Readiness, Victoria Daigle. "Termination Public Financial Disclosure Report (OGE Form 278e) of Victoria Daigle," February 1, 2020, <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:947ca7c0-4b8a-3c57-bb42-60311b0d839a>; *Hearing to Consider the Nominations of Alan R. Shaffer to be Deputy Under Secretary of Defense for Acquisition and Sustainment; Veronica B. Daigle to be Assistant Secretary of Defense for Readiness and Force Management, Hon. Robert H. McMahon to be Assistant Secretary of Defense for the Sustainment; Dr. E. Casey Wardynski to be Assistant Secretary of the Army for Manpower and Reserve Affairs; and Alex A. Beehler to be Assistant Secretary of the Army for Energy, Installations, and Environment: Hearing Before the Senate Armed Services Committee*, 115<sup>th</sup> Cong. (August 21, 2018) (Opening Statement of Victoria Daigle) [https://www.armed-services.senate.gov/imo/media/doc/Daigle\\_08-21-18.pdf](https://www.armed-services.senate.gov/imo/media/doc/Daigle_08-21-18.pdf); Bob Daigle, Linked In, <https://www.linkedin.com/in/bob-daigle> (accessed February 3, 2022). Without access to all of the government's financial disclosure reports, we cannot rule out similar ties to current federal officials.

OMB's refusal to rescind these waivers and require divestiture of conflict assets would degrade public trust in government, but a less effective solution would at least mitigate Ms. Hsiang's conflicts of interest somewhat. The government's ethics regulations on waivers suggest this alternative by recommending an agency consider: "Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person."<sup>80</sup> In this case, the proper adjustment would be to reassign Ms. Hsiang back to her previous position as a senior advisor. In that capacity, she would lack supervisory authority over 200 technology experts and support staffers, would not be the final decisionmaker for USDS, and would be subject to an additional layer of oversight by someone else serving in the position of USDS administrator.

In ascending to the USDS administrator position, Ms. Hsiang chose to seek additional authority without making any personal sacrifice to protect the public's interest. It is not too much to ask that OMB put the public's interests first. But OMB clearly failed to do so when it selected Ms. Hsiang for the administrator position and allowed her to retain her massive technology investments.

The circumstances of Ms. Hsiang's ownership and lucrative sale of Rebellion Defense also scream for an independent investigation. OMB should arrange for an investigation by an outside investigator, such as another agency's inspector general. (OMB does not have one of its own.) The investigation should include an assessment of the validity of the contract that the Defense Department awarded to Rebellion Defense in 2021, given Ms. Hsiang's substantial ownership of the company at the time. The investigation should also determine whether the buyer or buyers paid Ms. Hsiang more than her share of what the firm was worth.

The public also deserves answers to several outstanding questions:

- Will OMB rescind its waivers and require Ms. Hsiang to divest all potentially conflicting assets or, at least, remove her supervisory authority and monitor her recommendations?
- Why did OMB officials feel it was appropriate to issue waivers covering nearly her entire investment portfolio, including a "blank check" waiver for an investment fund whose holdings frequently change?
- Did Ms. Hsiang ever ask her family to divest the conflicting assets in its holding company or distribute her share of those assets to her for divestiture?
- Does Ms. Hsiang still hold an approximately \$360,000 interest in Google?
- Did her ownership of Rebellion Defense invalidate the company's defense contract?
- How did a newly promoted USDS administrator manage to sell her interest in an artificial intelligence defense contractor for between 10 to 67 times its reported value?

Answers to these questions are crucial because Ms. Hsiang's extraordinary ethics waivers send an undeniable message that the higher officials go at OMB, the less accountable they are to the public for ethical conduct. This message fails to respect the sacrifices that millions of rank-and-file employees routinely make for their public service. Greater authority should come with greater responsibility, but OMB has turned this principle on its head.

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<sup>80</sup> 5 C.F.R. § 2640.301(b)(6)(iii), [see note 1].

Former U.S. Chief Technology Officer Todd Park once told USDS recruits, “Do what you would do in the private sector and we’ll blow up the barriers in the way.”<sup>81</sup> Are the government’s ethics rules the barriers OMB is blowing up? USDS aspires to be a different kind of federal office, consciously seeking to emulate the practices of Silicon Valley companies.<sup>82</sup> Unlike those private companies, however, USDS wields governmental power, uses public resources, and influences government programs affecting the lives of the people of this land. Government cannot and should not operate like a business when it comes to ethics. Citizens may reject a company’s offerings, electing to do without or seek a competitor’s better offer; however, they have only one federal government — and its directives, backed by the force of law, are not optional.

The American people have entrusted their government with great power; in return, the government’s duty is to put the people’s interests before the private convenience of wealthy top officials and their business ventures. When it comes to its oversight of USDS, OMB seems to have forgotten that the basic obligation of public service flows from the principle that “*public service is a public trust*.”<sup>83</sup>

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Note: This document is an enclosure to POGO’s February 10, 2022, letter to OMB’s acting director, and citations to sources of information in this document are incorporated by reference in that letter.

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<sup>81</sup> Jack Moore, “Invasion of the innovators,” *GovExec Magazine*, July 8, 2015, <https://www.govexec.com/feature/invasion-innovators/>.

<sup>82</sup> See Jessie Bur’s 2018 *Federal Times* article: “The office looks much like the Silicon Valley startups it is designed to emulate. It’s an environment where office scissors are frequently commandeered for opening the store of freeze pops in the building’s refrigerator.” Jessie Bur, “Inside the agency where you wish you worked,” *Federal Times*, July 25, 2018, <https://www.federaltimes.com/it-networks/2018/07/25/inside-the-agency-where-you-wish-you-worked/>.

<sup>83</sup> 5 C.F.R. § 2635.101(a) (2022), [see note 69].