

July 9, 2023

Ms. Heidi Shyu
Under Secretary of Defense for Research and Engineering (OUSD (R&E))
Department of Defense
The Pentagon
Washington, DC 20301

Dear Under Secretary Shyu:

I write regarding my concerns that the Department lacks the safeguards necessary to prevent conflicts of interest in the Office of Strategic Capital (OSC). While I understand that one of the objectives of OSC is to “improve the government’s relationship with the venture community,”¹ I am concerned that this is resulting in a conflation of interests that creates clear conflicts.

OSC was created in 2022 to “to integrate efforts across the Department of Defense and to partner with other U.S. Government Departments and Agencies to develop, integrate, and implement proven partnered capital strategies to shape and scale investment in critical technologies.”² The Director of the OSC prepares and provides “investment priorities in the form of an investment prospectus” to the Strategic Capital Advisory Council, which is made up of “the Undersecretaries for Research and Engineering, Acquisition and Sustainment, Policy, [the] Comptroller, ... [the] General Counsel of the Department of Defense and the Director of Cost Assessment and Program Evaluation, and other members as deemed appropriate.”³ If the Department’s budget request is approved by Congress, OSC would receive \$115 million in fiscal year 2024.⁴

While some experts see this office supporting the development of key national security capacities, others have called it merely “good innovation theater.”⁵ I am concerned that this office is already too cozy with private investment firms. For example, when there was a run on Silicon Valley Bank (SVB), OSC was one of the offices urging government intervention.⁶ The director of OSC

¹ Bloomberg, “Boeing Joins Defense Startup to Develop AI-Piloted Aircraft,” Lucy Papachristou, March 8, 2023, <https://finance.yahoo.com/news/boeing-joins-defense-startup-develop-223842888.html>.

² Department of Defense, “Establishment of the Office of Strategic Capital,” December 1, 2022, <https://media.defense.gov/2022/Dec/01/2003123982/-1/-1/1/ESTABLISHMENT-OF-THE-OFFICE-OF-STRATEGIC-CAPITAL.PDF>.

³ *Id.*

⁴ Breaking Defense, “Pentagon teams up with SBA to sweeten the pot for tech investments,” Sydney J. Freedberg Jr., March 20, 2023, <https://breakingdefense.com/2023/03/pentagon-teams-with-sba-to-make-key-tech-investments-dod-cant-legally-do-itself/>.

⁵ Wall Street Journal, “Pentagon Office to Support Tech Investment Critical for National Security,” Sharon Weinberger and Doug Cameron, December 1, 2022, <https://www.wsj.com/articles/pentagon-office-to-support-tech-investment-critical-for-national-security-11669918443?st=nga9nrb5ep9yhug>.

⁶ The Intercept, “Pentagon Tries to Cast Bank Runs as National Security Threat,” Ken Klippenstein and Daniel Boguslaw, April 3, 2023, <https://theintercept.com/2023/04/03/silicon-valley-bank-bailout-pentagon/>.

wrote in an “engagements” listserv email that “many of the small businesses affected by the SVB failure are not only organizations that have worked alongside us, but also employ close friends.”⁷ He went on to explain that the office was “actively collaborating with our DOD and other government colleagues” in their advocacy for the companies impacted by SVB’s failure.⁸

One of the consultants OSC hired will simultaneously work at WestExec Advisors, an “ultra-connected Washington consultancy that works with tech and defense companies” and offers “remarkably similar services” to what will be provided by the OSC.⁹ WestExec has “succeeded in getting tech startups into defense contracts and helped defense corporations modernize with tech,” and “worked to help multinational companies break into China.”¹⁰ Another OSC adviser also still works at New Vista Capital,¹¹ which is “focused on supporting emerging companies in aerospace, defense, and logistics and transportation.”¹²

According to press reports, OSC hired both of these consultants as special government employees (SGEs).¹³ SGEs are subject to many but not all of the ethics laws that apply for federal employees.¹⁴ For example, SGEs are prohibited from “participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interests or on the financial interests of any person whose interests are imputed to them.”¹⁵ Any violations could subject them to penalties, including imprisonment of up to five years or civil penalties of not more than \$118,635 per infraction.¹⁶ But depending on their rank and duties, SGEs are not barred from lobbying on behalf of or representing outside entities to federal agencies in all cases,¹⁷ and may continue to receive outcome income.¹⁸ If a senior SGE serves for less than 60 days they are not subject to a one-year cooling off period that bars them from contacting their former agency on matters seeking official action.¹⁹

⁷ NextGov, “Pentagon Office Tracking National Security Impact of Silicon Valley Bank Collapse,” Edward Graham, March 13, 2023, <https://www.nextgov.com/emerging-tech/2023/03/pentagon-office-tracking-national-security-impact-silicon-valley-bank-collapse/383941/>.

⁸ *Id.*

⁹ Vox, “The thorny ethical issues of the Pentagon partnering with the private sector,” Jonathan Guyer, April 28, 2023, <https://www.vox.com/politics/2023/4/28/23698006/pentagon-investing-capital-ethical-gray-areas-consulting>.

¹⁰ The Intercept, “Meet the Consulting Firm That’s Staffing the Biden Administration,” Jonathan Guyer and Ryan Grim, July 6, 2021, <https://theintercept.com/2021/07/06/westexec-biden-administration/>.

¹¹ Vox, “The thorny ethical issues of the Pentagon partnering with the private sector,” Jonathan Guyer, April 28, 2023, <https://www.vox.com/politics/2023/4/28/23698006/pentagon-investing-capital-ethical-gray-areas-consulting>.

¹² Export-Import Bank, “Kristen Bartok Touw,” <https://www.exim.gov/leadership-governance/advisory-committees/exim-chairs-council-china-competition/kirsten-bartok-touw>.

¹³ Vox, “The thorny ethical issues of the Pentagon partnering with the private sector,” Jonathan Guyer, April 28, 2023, <https://www.vox.com/politics/2023/4/28/23698006/pentagon-investing-capital-ethical-gray-areas-consulting>.

¹⁴ Department of Defense Standards of Conduct Office, “An ethics guide for special government employees, including consultants and experts (such as advisory committee members),” p.3, https://dbb.defense.gov/Portals/35/Documents/Misc_Documents/SGE_Re-appointments/2020%20SGE%20Guide%20with%20cert.pdf.

¹⁵ *Id.*, p. 2.

¹⁶ 18 U.S.C. § 216(a) and (b) (penalties and injunctions); Federal Register, U.S. Department of Justice Notice, “Civil Monetary Penalties Inflation Adjustments for 2023,” January 30, 2023, p. 4, <https://www.govinfo.gov/content/pkg/FR-2023-01-30/pdf/2023-01704.pdf>.

¹⁷ Office of Government Ethics, “Ethics Laws Applicable to Special Government Employees,” p. 5.

¹⁸ *Id.*, pp. 8-9.

¹⁹ *Id.*, p. 10.

The Department claims these consultants will be limited to “broad policy discussions” and not specific investment decisions, but ethics watchdogs have raised concerns that “it would take Herculean firewalls in one’s brain” to prevent conflicts of interest.²⁰ Their positions provide them access to non-public political intelligence information, which “can be collected through briefings, meetings, committee hearings, public or non-public documents, personal conversations, and other communications between an employee of a political intelligence firm and an executive branch employee, a Member of Congress, or a legislative branch employee.”²¹ The OSC appears to be providing these consultants an opportunity to refresh their rolodexes without having appropriate guardrails in place to protect the public interest. As one of the consultants has observed, winning defense contracts is “about relationships and connectivity.”²²

My *Anti-Corruption and Public Integrity Act* would require all federal ethics rules for federal employees to apply to SGEs who serve for 61 days or longer.²³ It would also require most executive branch employees, including SGEs, to recuse themselves from matters that might financially benefit themselves, a previous employer, or client from the preceding four years.²⁴

In order to better understand how OSC is preventing conflicts of interest, please answer the following questions no later than July 28, 2023:

1. What is DoD’s policy to review and determine whether SGEs investments present a conflict of interest with their official government duties?
2. Has DoD required any SGEs employed by OSC to recuse themselves from any particular matters that have been specifically identified as affecting their outside employers, clients, or investments? What were those matters?
3. Which companies contacted OSC about SVB’s collapse?
4. Are any of the companies that contacted OSC about SVB’s collapse current or former employers or clients of OSC personnel?
5. Which companies are currently clients of or have received investments from firms that employ SGEs hired by OSC?
6. Are SGEs employed by OSC required to disclose to OSC when they are pursuing prospective investments or clients?

²⁰ Vox, “The thorny ethical issues of the Pentagon partnering with the private sector,” Jonathan Guyer, April 28, 2023, <https://www.vox.com/politics/2023/4/28/23698006/pentagon-investing-capital-ethical-gray-areas-consulting>.

²¹ Government Accountability Office, “Political Intelligence: Financial Market Value of Government Information Hinges on Materiality and Timing,” April 4, 2013, p. 4, <https://www.gao.gov/assets/gao-13-389.pdf>.

²² Business Executives for National Security, “Building the Base episode 5: Kirsten Bartok Touw, Co-Founder, New Vista Capital,” June 20, 2022, <https://bens.org/building-the-base-episode-5-kirsten-bartok-touw-co-founder-new-vista-capital/>.

²³ Anti-Corruption and Public Integrity Act, S. 5070, Section 108 (c), <https://www.congress.gov/bill/116th-congress/senate-bill/5070>.

²⁴ *Id.*, Section 103.

7. How many days a year does OSC expect its SGEs to work?
8. Has DoD established any written screening arrangements for SGEs employed by OSC to prevent conflicts of interest? Please provide copies of those screening arrangements.
9. Please provide copies of all SGE financial disclosure forms.
10. Does DoD require SGEs employed by OSC to disclose the clients of their outside employers who are not their own clients? If not, how does DoD ensure that they do not work on particular matters that would benefit their employers' clients?
11. How many SGEs work in OSC? How many of those SGEs are senior employees? How many of the SGE senior employees will work for more than 60 days?
12. Have any OSC employees been issued waivers from government ethics rules? Please provide any waivers issued.
13. Were OSC employees asked to make any divestments to avoid conflicts of interest? Please provide any requests and the responses to the requests.
14. How will OSC assess companies' financial stability in awarding funding?
15. Does OSC plan to use competition in recommending investment priorities?
16. How will OSC use market research to inform investment priorities?
17. Are there any representational or lobbying restrictions imposed on OSC staff?
18. Will SGEs employed by OSC agree to a two year cooling off period?

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator