Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
August 3, 2010

Senate Judiciary Subcommittee on Administrative Oversight and the Courts
Hearing on "Protecting the Public Interest:
Understanding the Threat of Agency Capture"
Tuesday, August 3, 2010

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Mr. Chairman, thank you for holding this important hearing. Since the rise of the regulatory state in the mid 1960s, there has been a well-placed fear that government regulators have far too cozy a relationship with the corporations they regulate. A recent report by the Inspector General of the Department of the Interior exposed widespread corruption at the former Minerals Management Service. Federal regulators responsible for protecting the waters of the Gulf of Mexico allowed industry officials to fill out their own inspection reports, and they accepted lavish meals, tickets to sporting events, and other inappropriate gifts from the oil companies they were responsible for overseeing. We may never know whether these ethical lapses played a role in the events leading up to the Deepwater Horizon oil spill, but these events demonstrate that we need to be doing a better job to ensure that there are no significant conflicts of interest or other inappropriate ties between regulators and the corporations they purport to regulate.

I want to raise a concern that a new, more subtle type of agency capture is beginning to emerge as a result of our increasing reliance on government contractors. The Council of the Inspectors General on Integrity and Efficiency recently reported that the total number of suspensions and debarments in FY 2008 was half the total from five years ago, and that suspensions and debarments had been steadily decreasing over the last five years. This is a disturbing statistic, especially when you consider that the number of contract fraud, Foreign Corrupt Practices Act, and other corruption investigations involving contractors is on the rise. The Interagency Suspension and Debarment Committee (ISDC) is required to submit to Congress an annual report of the progress in the suspension and debarment system, and it has not yet issued its FY2009 report, so it is difficult to know whether this trend has continued under the Obama administration. I look forward to receiving ISDC's report, but I am concerned about this trend, even as incidents of contractor misconduct and overall government reliance on contractors are increasing.

The Project on Government Oversight (POGO) tracks contractor misconduct by the government's current top 100 contractors, which received 55% of all U.S. contracts in 2009. These contracts were valued at a total of $296 billion. According to POGO's records, over the

last fifteen years, there have been only four suspension actions and zero debarment actions of these 100 contractors. This is alarming, especially when you consider that there have been a total of 686 incidents of contractor-related misconduct that resulted in almost $19 billion in total fees, restitution, and other criminal and civil penalties paid by these contractors.

Large corporations are often better able to identify, isolate, and correct misconduct when it occurs, and that may be part of the reason we have such a low rate of suspensions and debarments of our largest contractors. But I don't think that is the entire story. An agency should never be in a position where it is so dependent on a contractor to perform certain functions that it cannot take appropriate actions to suspend or debar that contractor. Several federal agencies have recently awarded new contracts to companies that are the subject of multiple criminal indictments or have pled guilty to serious criminal charges. This raises serious questions about agency independence and capacity.

I do not believe we should let corporations become "too big to fail," and I think the same should be true for our contractors. If they can't be trusted to run their businesses with integrity and to use U.S. taxpayer dollars honestly, then they should not be eligible to receive new contracts. We need to hold government contractors to a high standard, and I do not think that large corporations should be given a free pass for behavior that would typically result in the debarment of a smaller corporation.

Agencies should conduct evaluations of our contractors to determine if there are any areas where we are dependent on companies with poor track records, and if so, they should immediately work to develop internal capacity to perform these functions. I understand that the Office of Federal Procurement Policy is conducting a similar review and is considering when we may need to in-source certain security and intelligence functions. I hope all agencies will conduct a similar internal review.

The Government Accountability Office has also documented numerous instances of suspended and debarred companies continuing to receive federal contracts. In one case, a company that had been debarred for attempting to ship nuclear bomb parts to North Korea continued to receive millions of dollars from an Army contract. In another case, a contractor that had been suspended after one of its employees was found to have sabotaged repairs on an aircraft carrier was awarded three new contracts a month after the incident. This is unacceptable. It demonstrates that we need to be doing more to keep tabs on the companies that receive federal contracts, which is why I introduced the Federal Contracting Oversight and Reform Act of 2010, S. 3323, with Senator Coburn earlier this year. This bill will help ensure that private companies that we have determined are ineligible to receive government contractors do not receive contracts.

Mr. Chairman, thank you again for holding this important hearing. I look forward to working with you in the coming year to improve agency accountability and transparency.