

**S. 1114, THE CLEAN SPORTS ACT OF 2005,  
AND S. 1334, THE PROFESSIONAL SPORTS  
INTEGRITY AND ACCOUNTABILITY ACT**

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**HEARING**

BEFORE THE

**COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION  
UNITED STATES SENATE**

**ONE HUNDRED NINTH CONGRESS**

**FIRST SESSION**

SEPTMBER 28, 2005

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ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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**WEDNESDAY, SEPTEMBER 28, 2005**

U.S. SENATE,  
COMMITTEE COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:01 a.m. in room SH-216 Senate Hart Office Building, Hon. Ted Stevens, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. TED STEVENS  
U.S. SENATOR FROM ALASKA**

The CHAIRMAN. Good morning, I want to thank the witnesses who have come to be with us today, and the members of the Baseball Hall of Fame who honor us by coming to this hearing also. And, for those who believe that professional sports does not have an impact on the American public and our youth, I would point out an interesting fact that I just learned this morning. A member of my staff, Aaron Saunders, was named after you, Mr. Aaron, after his father witnessed your 714th home run in Cincinnati in 1974. So, we sort of have a Senate family connection to you, let's put it that way.

I thank Senator McCain for asking to chair this hearing and for his commitment to demanding fair competition at all levels of our sports world. And we welcome as a guest member of this Committee at this time, Senator Bunning whose baseball career and dedication to preserving the integrity of our national game speak for themselves.

As someone who pushed for the creation of the U.S. Olympic Committee and who has been involved with sports issues in the Senate for over 37 years, I have become increasingly concerned with the dramatic increase in doping at all levels of athletics, particularly among our youth.

In a 2003 survey of over 15,000 high school students, the U.S. Centers for Disease Control and Prevention found that more than 6 percent of high school students admitted to using non-prescription illegal steroids at some point in their lives. And that is unacceptable to us.

Doping is a stain on all levels of athletics. It taints the accomplishments of our elite athletes, creates unattainable expectations for our young athletes, and threatens their physical well-being.

I want to commend all of the leagues for addressing their drug problems over the past 18 months. There are two key elements to an effective drug policy: deterrence and credibility. Unfortunately I've got to say to you gentlemen, we would not be holding this hearing if all of your policies satisfied those threshold elements.

I look forward to working with Senators McCain and Bunning, and the rest of the Committee, and the Senate to report legislation, and consider legislation on this subject. John, thank you very much. I know there are problems in our schedules today, I don't know what you're going to do. I am going to go to that meeting at 10:30, but I thank you for taking over, I think you ought to tell us what your plans are.

**STATEMENT OF HON. JOHN McCAIN,  
U.S. SENATOR FROM ARIZONA**

Senator McCAIN. Well, thank you very much, Mr. Chairman. Thank you for your courtesy in allowing me to hold the gavel this morning, and I appreciate the many courtesies you've extended to me, but most importantly your continued involvement in this issue.

I will make a very brief statement. I would ask my colleagues also to make brief statements and then if it's agreeable, we have some special witnesses this morning that were not on the list, that perhaps I would ask to come forward to make statements as well. So again, I thank you, Senator Stevens, and we'll just press on with this hearing. Senator Bunning, welcome, and thank you for your involvement. I'll be brief.

Today's hearing is about the integrity of professional sports. It's more importantly, perhaps, about young Americans. Young Americans who believe that the only way that they would be able to perform at a Major League professional level is through the ingestion of performance-enhancing drugs. The House of Representatives, some time ago had a hearing and some of the witnesses were the family members of young people who had committed suicide while under the influence of these substances, and that's really what it's all about.

There are some people who would say Congress has no business in this issue. Well, I would make two points. One, we have not acted—professional sports have not acted. And two, we have an obligation to young people to do everything in our power to prevent them from succumbing to this terrible attraction in the belief that the only way they can perform at a Major League professional level is if they ingest these substances. Ask any high school coach in America, as I have, many high school coaches who have told me the same thing.

I want to finally say, we don't want to have to act legislatively. We know that this is a labor and management issue. But we have the additional obligations and the fact that Major League Baseball, in particular, has still not been able to act. We also need to examine what's going on with the other professional sports regarding this issue. I urge my colleagues to be brief in their opening remarks, and I would ask my friend and Baseball Hall of Fame member, Senator Bunning to be recognized.

**STATEMENT OF HON. JIM BUNNING,  
U.S. SENATOR FROM KENTUCKY**

Senator BUNNING. Thank you, Mr. Chairman. First, I want to thank Chairman Stevens and Senator McCain for the opportunity to be a guest member for this hearing. Second, I and probably most of the other Members in Congress do not relish the situation we are in.

That situation is being on the brink of possibly passing legislation to clean up something that the sports leagues and players' unions should be able to clean up on their own. But for whatever reason, you just can't get it done, and you can't get your act together.

It is impressive and amazing what you all can do. You can come to agreements on collective bargaining and salaries, and aspects of free agency and trading, and a host of other issues. But for whatever reason, some of you just cannot strike a deal on testing and penalties for illegal drug use. I, and millions of fans, think that is pathetic.

Since we cannot be in the clubhouse to try and get to the bottom of all this, we thought we would bring you into this committee room. We apologize for not having any showers in here. Lord knows we all may need a shower after this hearing to cool down, because it just might get a little uncomfortable in here.

My focus is going to be on baseball, not just because I once wore the uniform, but because that seems to be the biggest problem. Baseball's Commissioner has put forward a drug testing and penalty proposal. While I am not 100 percent in agreement with it, it is a start.

While I think the Commissioner took too long to put forward his plan, I realize he had to deal with owners and build somewhat of a consensus with them. At times I am sure it was kind of like herding cats for the Commissioner.

But the baseball players' union has not exactly been timely and pro-active in addressing the steroids issue. I know a bit about baseball players' unions because I and some of my former baseball colleagues here, helped start it. Some of them are here. Robin Roberts is here and Bob Feller and a few others. Yes, for the record this conservative Republican helped form a union. Back then, it was all about making sure players had fair salaries and fair pensions.

These were important issues to help protect active players and retirees. But now? But now whether it is true or not, the perception is that the baseball players' union is protecting players who use steroids and other illegal performance-enhancing drugs.

Believe me, that was not something we ever envisioned the players' union doing. And I hope it is not what the union is doing. I see some of my fellow Hall of Famers here. Thank you for coming. I spent part of my career in the American League and did not have to pitch to Henry Aaron very often.

I know they are concerned about steroids and not just how they affect the integrity of the game and the way they distort statistical records that took years and years for some members sitting out there to achieve.

Thank you, Mr. Chairman. I appreciate it, and I'll get with the questions later on.

Senator MCCAIN. Thank you, Senator Bunning, for everything that you do on this issue and many others. Senator Dorgan, brief remarks please, from all of my colleagues.

**STATEMENT OF HON. BYRON L. DORGAN,  
U.S. SENATOR FROM NORTH DAKOTA**

Senator DORGAN. Mr. Chairman, thank you very much. Three and half years ago when I chaired the subcommittee that dealt with among other things, sports, at your request I held the first hearing, I believe, on baseball steroids in this Committee. Let me say, that some things have happened since that time, some positive things. But Mr. Chairman, let me tell you something that I've told you before many times. Roger Maris comes from the great State of North Dakota. In 1961 he broke a 34-year record, hit 61 home runs, a record that has stood for 34 years and he did it without steroids.

And Mr. Chairman, some of us think that home run record still stands. And that's a sad comment about baseball. I regret to say that, but it's a sad comment about baseball. We held the hearing three and half years ago as I indicated. We made some progress, but I still find it unbelievable that not everyone believes the same thing. There ought not be performance-enhancing drugs in baseball. There ought not be a question about a rigorous testing program and there ought not be questions about penalties.

Let me say, Mr. Fehr, you've been here twice, and in my judgment the players' union in baseball has given ground only grudgingly, and in every circumstance only grudgingly, arguing that this is a part of collective bargaining, and it's a matter of privacy.

Mr. Fehr, you and the players have lost that argument. It is not about privacy, and it is not about collective bargaining. That issue is over. And I hope that finally this hearing will end the need for future hearings and everyone will understand there cannot be performance-enhancing drugs in professional sports. There must be aggressive testing and aggressive penalties for their use.

**STATEMENT OF HON. GORDON H. SMITH,  
U.S. SENATOR FROM OREGON**

Senator SMITH. Thank you, Chairman McCain. Gentlemen, all of you, thank you for participating in this hearing. I was a very young boy when my family moved from Oregon to Washington D.C. and soon I found myself in love with the Washington Senators. One of the earliest memories of my life was watching Mickey Mantle beat my Senators, by hitting a home run out of the park in the old Griffith Stadium. As an adult I have watched and thrilled as records have fallen by today's great players and yet now as the father of a 16-year-old, watching further records that I once watched be created. To watch them fall, with asterisks by them is very distressing.

It isn't just that. Far more important to 16-year-olds is the example which Major League players obviously are called upon to set for our young people. So I would hope, Mr. Chairman, that the leaders that are at the table today, would understand the importance of a "three strikes and you're out" policy to set a standard that will reverberate far beyond the majors, but to the little leagues as well.

Every time a player tests positive for drugs, he casts doubt not only on his own achievements but on the achievements of all players, and I do respect the players unions' obligations to defend every player. But I hope it is fully understood that when it protects cheaters it threatens the rest of the players who are playing by the rules.

I close, Mr. Chairman, by simply noting a quote from Little League Baseball's International President to Major League Baseball, and the Major League Players Association. Said he "We all must accept the fact that children are affected by the actions of Major Leaguers...tougher polices in dealing with steroids among Major Leaguers will help convey to young people the seriousness with which this problem is regarded by players and Major League baseball." All of us in baseball are counting on you to do the right thing. Thank you, Mr. Chairman.

**STATEMENT OF HON. MARIA CANTWELL,  
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman, and I may enter a longer statement in the record, but just say this.

Senator MCCAIN. Without objection.

Senator CANTWELL. Thank you, Mr. Chairman. I'm very concerned about this issue. Commissioner Selig was in Seattle in April and gave a speech at a luncheon commemorating and celebrating Ichiro Suzuki's accomplishments from the last season.

At the time, he spoke about the "three strikes and you're out" policy. And the Seattle Mariners have taken very swift action, not only with three Major League players, but eight Minor League players. I think our franchise has probably taken very decisive and swift action. But yet I'm left with the conclusion, after hearing all of this in April and seeing all these actions in April, that somehow collective bargaining is stopping us from getting real results on this issue. And it seems that only will we get movement on a negotiation between the baseball union and Major League Baseball if Congress and the United States Senate has hearings. I think we have to have more progress in this.

Currently steroids have been used not only by professional athletes but younger athletes, and the fact that so many of these younger athletes are now finding this acceptable because Major League Baseball hasn't acted and taken swift action, I think is a problem. So, Mr. Chairman, thank you for holding this hearing, and thank you for your continued leadership on this issue.

Senator MCCAIN. Thank you.

Senator Allen.

**STATEMENT OF HON. GEORGE ALLEN,  
U.S. SENATOR FROM VIRGINIA**

Senator ALLEN. Thank you, Mr. Chairman. People of America love sports, and the reason is, is that everyone's got an equal opportunity to compete and succeed based upon their own hard work, their strategies and execution.

We look at sports, and I do, and I grew up in sports, playing it, with my father's teams. But it is a meritocracy, Mr. Chairman. You don't care about someone's race, their religion, their ethnicity, all

you care about is whether they can contribute to the team effort. And I think this country loves sports because it is that meritocracy, it's what we should aspire to for our society.

There are certain elements of it, it's a level playing field. It's also something that is admired by young people. As a pup growing up, I liked Johnny Unitas, and Roman Gabriel, and Deacon Jones, and later on, Billy Kilmer and Diron Talbert. My kids admire people like Jerry Rice, and Tim Brown, and Cadillac Williams. And others in other sports, it was Jerry West and Elgin Baylor, you know you'd think of them all. Sandy Koufax, Minnie Minoso, Ernie Banks, and in hockey I loved all the Montreal Canadiens. And they didn't wear helmets then so you could see what they looked like on the ice.

The point is people look up to these players. The integrity of the sport is essential. Statistics matter, that makes it interesting, but especially young people if they see that they don't have to work hard, lift weights, run, exercise, whatever all the training is, and you can get it out of a bottle, it sends the wrong message.

Now we're going to be looking at legislation here, let's make sure that this legislation while not perfect, if the Federal Government is going to act, does not harm what some of the leagues do. Let's not stereotype every one of the leagues as being in the same situation. I look at the NFL as one who doesn't wait around for the Federal Government or the FDA to act, they work together.

Mr. Upshaw and Mr. Tagliabue, and the players and owners work well together.

Senator MCCAIN. The Senator's time has expired.

Senator ALLEN. I hope Mr. Chairman, that we're going to make sure as we work through here that this meritocracy will continue to be admired. And I thank you, and our witnesses for appearing today.

Senator MCCAIN. Senator Stevens.

The CHAIRMAN. Mr. Chairman, and the witnesses who have come, I want to apologize for my conflicts today. We're just overwhelmed with issues pertaining to Katrina and Rita, and you'll see Members come and go here while you're here. We thought about canceling this, but I think this is of overwhelming importance too, so I congratulate Senator McCain for wanting to continue. And I hope he does continue, but there's a series of meetings going on now that many of us will have to go to. I apologize for leaving.

Senator MCCAIN. Thank you, Senator Stevens.

Senator Rockefeller.

**STATEMENT OF HON. JOHN D. ROCKEFELLER IV,  
U.S. SENATOR FROM WEST VIRGINIA**

Senator ROCKEFELLER. Thank you, Mr. Chairman. I've been a baseball fan since I was six, and I still am. But I will have to say that I'm mightily disillusioned by what is taking place. I agree with Senator Dorgan, that the Major League home run record, was set by Roger Maris, and has never been broken. I don't know why it is that we have to keep doing this. We have these meetings and I, for one, am tired of them. I particularly single out baseball, and in baseball I particularly single out those who represent the players. Because I think they, as has been said, negotiate reluctantly

if at all. I think I saw a letter that was sent the day before yesterday, not to the Commissioner but to the press. Negotiating through the press, not with the Commissioner is not a very good idea, and I don't know from management's point of view, whether they knew anything about the great chase of Sosa and McGwire, and what was going on with those folks and whether they were doing that to bring baseball back to where it belonged. Because baseball had been suffering on crowds and that really did, in fact, solve the problem.

But for those of us who absolutely love the sport, who are fanatically devoted to it, and spend too much time watching it, as Jim Bunning well knows, we can't go on with this. I have no hesitation whatsoever in singling out a particular sport, or all sports. And having Federal legislation that mandates what they do. That's not what the Congress generally does with free enterprise, but if that's what it takes to get America, the way America ought to be, and have kids looking up to athletes the way they need to, and do, then I'm for it.

Senator MCCAIN. Senator's time has expired.

Senator ROCKEFELLER. So I am impatient, I am angry, I recognize that most of the sports here are doing the best they can. But baseball is not. Thank you, Mr. Chairman.

[The prepared statement of Senator Rockefeller follows:]

PREPARED STATEMENT OF HON. JOHN D. ROCKEFELLER IV,  
U.S. SENATOR FROM WEST VIRGINIA

I want to thank Senator McCain for holding this hearing today, although I am deeply disappointed that we have to hold another hearing on this topic. We have a number of Hall of Fame baseball players in attendance today and I would like to recognize their continuing commitment to baseball. I know that they care deeply about the future of the game, as do I.

Before I start, I wanted to mention again at this hearing that my son has the good fortune of being married to Commissioner Tagliabue's daughter.

Unfortunately, I am not sure that everyone here today shares our deep concerns that continuing steroid use in baseball is having a devastating impact on the game and on the next generation of athletes.

Eighteen months ago, I told almost the exact same group of people testifying before the Committee that in my opinion Roger Maris still holds the single season home run record. The news stories of the last six months certainly reinforce that view for me and millions of other fans. I will reiterate that is my view that use of steroids and other performance-enhancing drugs has no place in sports at any level, at any time.

The NFL has an aggressive testing program and significant penalties for individuals who test positive for steroids or other banned substances. The results of the NFL's policies can be seen in the very small percentage of players who test positive for banned substances. NFL players and owners recognize that their sport would be better off if everyone played by the same rules.

I know the National Basketball League and the National Hockey League have reached agreements with their respective players' unions on steroid policies. It is my understanding that these policies will go into effect during the 2006 season. I am pleased to see that these leagues have endorsed substantially more rigorous testing regimes as well as much more significant penalties for their players who test positive for illegal substances.

Unfortunately, Major League Baseball and its players have not achieved the same level of consensus on this issue, which is outrageous given the fact that baseball is the sport with the largest problem.

I will also reiterate that I place much of the blame squarely on the players, who continue to resist meaningful testing and disciplinary measures. I also blame the owners who have spent more of their energy managing the public relations aspect of steroids abuse instead of focusing their energies on cracking down on the problem.

I am a co-sponsor of legislation that would take steroids policy out of the hands of the leagues. I did not take this step lightly. It was a sign of my growing frustration with baseball and other leagues' inability to police themselves. I know the witnesses will offer a number of criticisms of the bills, many of them are valid. I certainly do not want Federal rules that are weaker than what the various leagues have adopted.

I want Major League Baseball and its players to view this hearing as the second strike. You do not want to make a third appearance before this Committee explaining why you cannot make a voluntary system work. I also want to make it clear that I will be closely monitoring how the NHL and NBA implement their new programs. Too much is at stake. Most importantly, the health of young people is at risk. You are role models. You set examples.

You must do the right thing or Congress will step in and make you do it. If it does not appear that the leagues are making any real progress in addressing this issue, I will work with Senator McCain, Senator Bunning, and others to pass legislation.

I look forward to hearing from the panel today.

Senator MCCAIN. Senator Sununu.

**STATEMENT OF HON. JOHN E. SUNUNU,  
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator SUNUNU. Thank you, Mr. Chairman, I don't have an opening statement and I appreciate the panel being here. I'm sure there are zillions of other places you would rather be. But I do appreciate the NFL and the other professional sports leagues for providing the model for testing that they have. Of course I appreciate the Commissioner and those in Major League Baseball for at least beginning the process of implementing a testing plan and look forward to hearing how the implementation of that plan has progressed, how it might be improved, and appreciate the time.

Thank you, Mr. Chairman.

Senator MCCAIN. Senator Nelson.

**STATEMENT OF HON. BILL NELSON,  
U.S. SENATOR FROM FLORIDA**

Senator NELSON. Thank you, Mr. Chairman, the consequences of what we're talking about today are enormous, because we're seeing the spread of the use of steroids among young athletes particularly in high school. Their steroid use is up, it's more than doubled among high school students from 1991 to 2003, according to the Centers for Disease Control. Last year, one school district in my state, Polk County, became the first in Florida to establish random testing for high school athletes. And then the Florida legislature tried and failed to require steroid testing for all high school athletes, the schools and the states push back by saying that it's too costly. So I'm directing our staff to draft Federal legislation that would help states with the resources they need to curb the use of steroids. It would provide Federal grants directly to the states, so that they can develop and implement steroid testing programs.

And I think in conclusion I'll say, I think it's time for all of you to get involved in these kinds of ways, and I ask each of you testifying today to begin a major multi-sport, national advertising campaign, and it could be paid for by the leagues and their players and it could be directed at young people. Thank you, Mr. Chairman.

Senator MCCAIN. Senator Lautenberg.

**STATEMENT OF HON. FRANK R. LAUTENBERG,  
U.S. SENATOR FROM NEW JERSEY**

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I want to have a few words, not strictly as a Senator, but also as a grandfather. And one of my grandsons who's 9 years old follows the New York Yankees so ardently that last spring before baseball season began, he wrote an article that assessed the Yankees chances of winning their division this year. The article was very insightful, it revealed the extent of his love for the game of baseball and his allegiance to that particular team. Any other team representation here, forgive me. He looks up to the players, and in his eyes, they truly loom larger than life. And of course there are millions of young people like my grandson, they idolize professional athletes who play baseball, football, basketball, you name it. And I would hate to have to explain to my grandson or any other young person that this respect and admiration was misplaced. I'd hate to have to break his heart by telling him that some of his heroes were cheating. And I'd hate to—

Senator MCCAIN. I'd like to remind the Senator, we have a two-minute time limit here this morning.

Senator LAUTENBERG. OK. We're just about there. And I'd hate to see a game that's inspired generations of Americans, become forever tainted by scandal. Mr. Chairman, we've come to realize that this is really a serious problem. And I commend you for holding this hearing.

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK R. LAUTENBERG,  
U.S. SENATOR FROM NEW JERSEY

Mr. Chairman,

I want to speak not as a Senator, but as a grandfather.

One of my grandsons follows the New York Yankees so ardently, that last spring, before the baseball season began, he wrote an article that assessed the Yankees' chances of winning their division this year. The article was very insightful and it revealed the extent of his love for the game of baseball and his allegiance to the Yankees.

He looks up to the players—in his eyes, they truly loom *larger than life*.

Of course there are millions of young people just like my grandson. They idolize professional athletes who play baseball, football, basketball, soccer and hockey.

I would hate to have to explain to my grandson, or any other young person, that this respect and admiration was misplaced.

I would hate to have to break his heart by telling him that some of his heroes were *cheaters*.

And I would hate to see a game that has inspired generations of Americans become forever tainted by scandal.

Mr. Chairman, I think we have all come to realize that this really is a serious problem. Now it's time to get serious and agree on a solution that we can all rally behind.

Senator MCCAIN. Thank you, Senator. Now I understand that Commissioner Selig has brought five individuals with him this morning who are amongst the most respected and admired people in America. And if it's agreeable to you, Commissioner, we'd ask them to come and sit next to you, one by one and make a brief statement since they have come here, and we'd like to begin with Hank Aaron, if that's agreeable, sir. Thank you for coming this morning, Mr. Aaron, you honor us with your presence.

Mr. AARON. Thank you very much, Mr. Chairman. This is the first time I've been a lead off though.

Senator MCCAIN. I'm sure you'll hit a home run here.

Mr. AARON. I'm used to cleaning up. But I'm here because of my involvement with the Boys and Girls Clubs for many years, and in traveling around the country I think I was saddened by some of the things that I hear from my colleagues and some things that I've heard from drug testing, and all the hearings. And I'm here this morning to support the Commissioner, and also to support tougher anti-drug action. I think that we need to be concerned with our young people because they are the ones that are the future of this country. And if we don't protect them, are we not going to protect this country. Baseball is just a small part of all of the things that we are capable of doing in this country. So I want to applaud the Commissioner, and I also just want to make sure that whatever we do, we make sure that we clean up baseball. Thank you very much.

Senator MCCAIN. Sir, may I exercise the prerogative of the Chair and ask you one question?

Mr. AARON. Sure.

Senator MCCAIN. What should be done about records that are set that are tainted by the use of steroids?

Mr. AARON. I think that's going to be—Mr. Chairman, I think that's going to be left up to the Commissioner and the rules committee. They will probably have to go back and look at some of those things that happened. That's the only answer that I can give you at this time.

Senator MCCAIN. Thank you, sir, and thank you for your magnificent work as an outstanding American.

Mr. AARON. Thank you very much.

Senator MCCAIN. Mr. Brock, welcome.

Mr. BROCK. Thank you, Mr. Chairman, my name is Lou Brock, and I'm here to represent baseball and its fight and its struggle to confront steroid use in America's sports. I believe that we have to make some radical move to get the attention of everyone. Radical, simply meaning that steroids are radical. And its movement, and it can only move if we touch it with our hands. So we need to be able to have a radical decision. A radical decision that points out and states our belief in America. And that is cheaters can't win. And steroids has put us in a position that it's OK to cheat. And I think the stiffer the penalty, the greater the message will be sent. Thank you, Mr. Chairman.

Senator MCCAIN. Thank you, very much, sir, and thank you for joining us. Mr. Sandberg. Resident of the great State of Arizona.

Mr. SANDBERG. Thank you, Mr. Chairman. I want to thank you personally for all that you do for the great State of Arizona. I enjoy living out there, and I love the golf courses, by the way.

Senator MCCAIN. We appreciate your taxes.

Mr. SANDBERG. I'm here today, because I love the game of baseball. Exactly two months ago, I gave an induction speech in Cooperstown and I reflected on my career, and I talked about players respecting the game. Players playing the game the right way. To me that's respecting the uniform they wear, respecting their team, respecting their opponents, the media, and the fans.

We do have a problem in baseball, and using steroids is not respecting the game. I'm here today in hope of a strict policy for baseball that has strict penalties for the cheaters in the game. Fifty, 100, life, is a strict policy. And what I hope for the game is players that are respectful. And we here today owe America's pastime a strict policy. Thank you.

Senator MCCAIN. Thank you very much.

Mr. Niekro.

Mr. NIEKRO. Thank you, Mr. Chairman.

Senator MCCAIN. Welcome, sir.

Mr. NIEKRO. I'm here, I had the honor to play the game of baseball 28 years, 23 in the Majors, and 5 in the Minor Leagues, I guess we just didn't have those problems back there, then. If we did, it certainly wasn't recognized. I am here to support the policy of the Commissioner of Baseball. I do believe that a first offender—50 games, sometimes I don't think that's even enough. But that is a starting point. I have been under the guidance of Don Fehr, and Marvin Miller when they first brought the union together. And they have done a lot for the players, extremely a lot. I would not be living in a house, and driving the cars, or whatever if it wasn't for the association of, basically, baseball players. But I do believe that they can step up. I know they have been meeting a lot in trying to put this problem to an end. And it is a problem. I would like to see the Association of Players come up and come to the level of 50 games, at least 50 games. And I am here to strictly back Mr. Selig's proposal of first time offender, 50 games, and sometimes I don't think that's enough. Thank you.

Senator MCCAIN. Thank you, sir. Thank you for coming today.

And finally Mr. Robin Roberts, who mentioned that his performances were far superior to Mr. Bunning's.

Mr. ROBERTS. That's not true, Mr. Chairman. That's not fair. But welcome to all of you. The last time I was here at a meeting like this, was when Senator Kefauver called me. And they were arguing about the reserve clause. And I got a—I get the same pay this time I think, Bud, don't I?

Mr. SELIG. That's correct.

Mr. ROBERTS. Jim, Senator Bunning. Pardon me, Jimmy. He mentioned that he and I were very active in starting the Players Association, and there have been a number of items that the players have fought for and I disagreed with and everything else. But I'm not in a position of helping out at all. But I think, overall, Jim and I can be proud of the fact that the Players Association and the owners have come up with a beautiful sport, followed by many great athletes still playing. And what we're talking about today is certainly something that has to be reckoned with.

Of all the things that I've agreed with, on Don and the Players Association, I disagree. I don't believe that with his power and with his—that he can no longer recognize the fact that this has got to be something, he's got to say to the Commissioner, you represent the fans, we represent the fans, the fans demand this, and I think he'll most important to go along with what the Commissioner has proposed, and not make you gentlemen waste your time anymore with that thing.

It is a terrible thing. I do think I would like to see an amnesty as far as records that have gone behind. Because nobody knows exactly who did what, and as much as I respect Roger Maris, and the rest of them. The show they put on, the fact that Barry Bonds is hitting them right now, and I know he mustn't be on them now, I don't know. But he's a phenomenal athlete, probably the greatest hitter that ever lived. And you can taint him anyway you want, but the guys playing the game today, they take better care of themselves, they're outstanding athletes, and I do think that Don is the one that can straighten this out immediately and you guys and ladies can work on other things. Thank you for having me.

Senator MCCAIN. Thank you, sir, thank you for being here. And I know that's a little unusual, but I thought it was important to hear from these individuals who have done so much for America's pastime and I appreciate the patience of our witnesses. And now our panel consists of Allan H. "Bud" Selig, Commissioner of Major League Baseball, Don Fehr, the Executive Director and General Counsel of the Major League Baseball Players Association, Paul Tagliabue, Commissioner of the National Football League, Gene Upshaw who is the Executive Director of the National Football League Players Association, David Stern, the Commissioner of the National Basketball Association, Antonio Davis who is the President of the National Basketball Players Association, Gary Bettman, who is the Commissioner of the National Hockey League—the newly resuscitated National Hockey League, and Ted Saskin, who is Executive Director of the National Hockey League Players Association. Welcome. We'll begin with you, Mr. Selig.

**STATEMENT OF ALLAN H. SELIG, COMMISSIONER, MAJOR LEAGUE BASEBALL; ACCOMPANIED BY HANK AARON, LOU BROCK, PHIL NIEKRO, ROBIN ROBERTS, AND RYNE SANDBERG, MEMBERS, BASEBALL'S HALL OF FAME**

Mr. SELIG. Thank you, Mr. Chairman. I would like to thank the Chairman, the Ranking Member and the Committee members for inviting me to testify today.

I have the distinct privilege of serving as the ninth Commissioner of Baseball. As Commissioner, the most important point I want to make this morning is that my top priority is to eradicate performance-enhancing substances from baseball. That is why I proposed last April a tough, new 50-games, 100-games, life suspension discipline schedule for cheaters who use steroids. Members of the Committee, it is time for this proposal to be accepted.

As you know now, five members of Baseball's Hall of Fame—Hank Aaron, Lou Brock, Phil Niekro, Robin Roberts, and Ryne Sandberg—have joined me today to support my proposal to toughen Major League Baseball's drug-testing program. I also have with me a letter from the President of Little League Baseball urging tougher penalties for those who use steroids.

I have often spoken about baseball's role as a social institution, and how Jackie Robinson breaking the game's color barrier on April 15, 1947, was baseball's proudest moment. As the national pastime, we have social responsibilities that we take very seriously. But meeting those responsibilities can be difficult and complex. Baseball presently has a problem with performance-enhancing sub-

stances. This is a problem for several reasons. First, players who use steroids are cheating which directly affects the integrity of the game. Second, the use of steroids presents serious health issues for those who are taking them. Third—and this directly impacts the social responsibility that the game has to its fans and to the communities in which we play—the use of steroids by our players influences the youth of America. Whether we and our players like it or not, they are role models and kids who admire them are likely to emulate what they do. If the young athletes of our country believe that taking steroids may help them become Major Leaguers, they will take those substances. This must not happen. It is my goal as the Commissioner of Baseball to eradicate the use of performance-enhancing substances from the game and I won't leave one stone unturned until that happens.

Before the BALCO investigation and before President Bush brought up the subject in the State of the Union speech, Major League Baseball had recognized the seriousness of the steroid problem and had begun to address it. We banned performance-enhancing substances throughout the Minor Leagues and began testing there. But I could not unilaterally impose testing in the Major Leagues, because drug testing is a matter of collective bargaining. The Major League Baseball Players Association had long opposed any kind of testing. During our 2002 labor negotiations, testing for performance-enhancing substances was a priority and we were successful, for the first time, in negotiating a testing program. Although it was not as comprehensive as I would have liked, it was a first step.

But we did not stop there. In March 2004, due in part to the message from the President and this Committee, we went back to the Players Association and told them that the program we had was insufficient. Last January, in an unprecedented move, Major League Baseball and the Players Association reopened the basic agreement and devised a tougher, more comprehensive drug-testing program that was much more effective.

There is no doubt in my mind that the current testing program is working. But whether or not the program is working is no longer the issue. The issue is integrity, my integrity, the players' integrity, the owners' integrity, but most importantly, the game's integrity. The integrity issue is transcendent. We must put a stop to the use of steroids and the best way is to put in place a drug-testing program that has tough discipline and independent testing. In April, I sent a letter to Don Fehr, the Executive Director of the Players Association, proposing that violators of the program be suspended for 50 games for a first offense, 100 games for a second, and a lifetime ban for a third. I also proposed an extension of testing to include amphetamines, increased random testing, and turning over the administration of the testing program to an independent authority.

I believe so strongly in this proposal that I have already implemented the "three strikes and you're out" program in the Minor Leagues for the 2006 season. At the Major League level, my staff has diligently pressed the Players Association and, in recent weeks, has negotiated—as required by the National Labor Relations Act—to effectuate the goals I articulated in my letter to Mr. Fehr. Unfor-

unately, the Players Association has yet to agree to the proposal I made to them five months ago. This week, I received a letter from Mr. Fehr that moves in the right direction, but his reply does not go far enough. Notwithstanding my impatience and profound disappointment, I refuse to give up and will continue to press to strengthen the program.

Senator John McCain and Senator and Hall of Famer Jim Bunning each has introduced legislation that would regulate drug-testing programs in professional sports. It would be preferable to handle this issue through collective bargaining, but after waiting five months I stand ready to support appropriate Federal legislation if Congress becomes convinced that the collective bargaining process will not yield an acceptable drug-testing program.

While this process continues, we have increased our efforts where we can act unilaterally. For example, in 2005, we significantly increased our drug testing in the Minor Leagues, in the Dominican Republic and Venezuelan Summer Leagues. We conducted more than 7,000 tests and imposed more than 100 suspensions in the Minor Leagues alone for players who tested positive for performance-enhancing substances. Recognizing the need to keep the science of drug testing on the cutting edge, Major League Baseball has committed to fund research by Dr. Donald Catlin, the renowned scientist who heads the World Anti-Doping Agency-accredited UCLA Laboratory, in his endeavor to create a valid urine test for Human Growth Hormone. We are also active on the educational side of this issue and have joined forces with the Partnership for a Drug Free America and the Taylor Hooton Foundation to help warn America's youth and their parents about the health dangers of steroids and performance-enhancing drugs.

There can be no question that Major League Baseball takes this issue very seriously. As I have said many times, the elimination of steroids and performance-enhancing substances from our game through a tougher and more effective testing program is essential to restoring integrity to the game. I appreciate the attention you are giving this issue and thank you for allowing me the opportunity to appear before you today.

[The prepared statement of Commissioner Selig follows:]

PREPARED STATEMENT OF ALLAN H. SELIG, COMMISSIONER, MAJOR LEAGUE BASEBALL; ACCOMPANIED BY HANK AARON, LOU BROCK, PHIL NIEKRO, ROBIN ROBERTS, AND RYNE SANDBERG, MEMBERS, BASEBALL'S HALL OF FAME

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Senator McCAIN. Thank you, Commissioner.  
Mr. Fehr.

**STATEMENT OF DONALD M. FEHR, EXECUTIVE DIRECTOR,  
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION**

Mr. FEHR. Thank you, Senator, Mr. Chairman. I guess the Chairman isn't here any longer, but other members of the Committee, I would like to make a brief opening, and ask that my written statement be offered for the record.

Senator McCAIN. Without objection.

Mr. FEHR. I'd also like to introduce Michael Weiner who's sitting behind me right there. Mike is now the general counsel of the Players Association. I haven't held that title for 18 months or a little more. He's been principally involved in both administration and particularly the negotiations that Mr. Selig has referred to, and if the matters come up in which I need to get a specific answer, I may ask him to reply on my behalf.

Very briefly, Mr. Chairman, we've made a lot of progress. I know that it isn't sufficient yet for some. But I'd like to take a moment and describe it because I think that viewed fairly, it indicates that an awful lot has been done. Initially I would like to agree with Commissioner Selig on one very important point. The program we have now is working. I don't think that there is any dispute among us in that regard. Very briefly, at the hearing that we had in 2002 to which I believe Senator Dorgan referred to in his opening statement, there were a lot of things said. There were rumors going around of very high percentages of Major League players that were using steroids. Remembering however, that a number of steroids were legal at that point in time, such as Androstenedione. We reached an agreement with the clubs, in which we would do a survey test. If positive tests exceeded a certain number we would go in 2004 to testing with disciplinary consequences. The 2003 tests resulted in just over 5 percent, much higher than I hoped, but that triggered the next step, and in 2004 there were disciplinary consequences, and the number of violations dropped to about 1 percent. There were 12 confirmed violations.

Nevertheless at the hearing in March of 2004, if I recall the date correctly, you may remember I was ill during that hearing and I don't—it may be fading a little bit. But in essence we were asked to do more. So as Commissioner Selig indicated we reopened the agreement, we worked over that season, we agreed to more tests, we agreed to off-season tests, we agreed to increase the penalties, including a suspension for a first-time positive, and as Senator Dorgan had requested, public identification of those who indicated that they had violated the program.

At the time, January of 2005, we had hoped that we had taken a significant enough step. Players certainly felt good about it. There were hearings last spring in the House in which we were asked once again to consider negotiations. The Commissioner sent me a letter that he referred to in April. I responded to him the end of that month by indicating that I would consider what he had to say, meet with the players and discuss it. We agreed at that time that any changes would be effective for 2006, and as I indicated to him at the time, I was going to spend most of the summer and did, meeting with every team, talking to every player who wanted to talk to me, hearing all views, conveying the views of this body and its members and of your counterparts in the House.

I even sent tapes of the House hearings out to all of the clubs so that players could watch it if they wanted to.

The letter that I sent to the Commissioner earlier this week, I want to make one thing clear, was not a new proposal. It was a summary of where our discussions have taken us to date. And there was nothing new in that letter to the Commissioner. Senator McCain has suggested to me that I should have said more things publicly about our position before. He and I have a disagreement about that. In the past we've been criticized for negotiating in public. But in any event, I wanted to make clear what our position was before the hearing began.

And we have reached agreement on most of the issues that are between us. We've agreed to vastly increase the number of tests, approximately doubling it to about 3,000 with every player tested a minimum of twice. Random, unannounced testing year round; we have agreed to a structure for the testing of amphetamines which was a matter raised by Senator McCain after the last agreement was reached. And we're very close on a penalty structure. I don't expect that that will be a significant issue. As the Commissioner said, we've reached agreement on moving a lot of the administrative functions to an outside entity so that questions that might be raised about that would no longer be there. And the last major issue to be resolved is steroid penalties.

And here again I think we're much closer than people ever expected us to be. On the second-time penalty we've proposed a presumptive penalty of 75 games, the Commissioner is at 100, with the possibility if there are mitigating circumstances it could be 50, if there are aggravating circumstances it could be 100. The Commissioner is at 80, 100, and 120. With respect to a third time, we've accepted in principle the "three strikes and you're out" circumstance. Or the "three strikes and you're out" framework, I guess perhaps that's a better word, with the provision that there be arbitral review of anything as severe as a lifetime sanction to look at the specifics.

Just to bring everyone up to date with matters which occurred essentially after my prepared testimony had been written on Friday, that I noticed over the weekend and I want to make certain there's no dispute about. Our proposal on a third penalty, is that the Commissioner may impose whatever penalty he believes up to and including a permanent ban as is appropriate under the facts and circumstances, that can be reviewed by an arbitrator, but it could not be reduced to less than one year.

The Commissioner's proposal is the same, except that it could not be reduced to less than two years, which as I understand it, and Bud will correct me if I'm wrong, has been the circumstance for about 60 years with someone ineligible as a result of gambling, or something like that.

On penalties, the last thing I'll say is that we believe very strongly that the purpose of penalty provisions ought to be to deter. Not to punish for its own sake. We believe that the penalty structure we have imposed has demonstrated that it will. The number of confirmed positives we have so far this year is nine and one of those was an individual in which the arbitrator found that the result had—the positive result was from a prior use, prior to 2005 for which he had already been disciplined in the Minor Leagues. I don't know if that will be nine before the end of the year. We still have tests yet to come and we have off-season testing which will begin this year. I would expect that our negotiations would continue as they have been. The atmosphere which in baseball has been for many, many years contentious on all kinds of issues as the Hall of Famers will certainly remember from the time they were there. These discussions have not be conducted in that atmosphere. It doesn't mean that we agree on everything.

In conclusion, and I don't want to over-extend my time, Mr. Chairman, we agree that the best way to solve this matter is through collective bargaining. We believe that we've made a lot of strides in the program which as the Commissioner indicated is working and we are prepared to do a lot more. I hope and expect that when our negotiations resume, which I would expect to be next week after the Jewish holidays, that we'll be able in a reasonable period of time to conclude the discussions on the issues that we have remaining.

Last thing, Senator Cantwell, I believe, referred to the decisive and swift action taken by the Seattle Mariners, in a very positive way. The point I would like to make that with respect to any of those players who were on the 40-man roster, that decisive and swift action was the result of and operated under the program that we negotiated last year. It's not something that was done independently or outside of it.

Thank you, Mr. Chairman. I hope I did not exceed my time.

[The prepared statement of Mr. Fehr follows:]

PREPARED STATEMENT OF DONALD M. FEHR, EXECUTIVE DIRECTOR, MAJOR LEAGUE  
BASEBALL PLAYERS ASSOCIATION

Thank you, Mr. Chairman. My name is Donald M. Fehr and I am the Executive Director of the Major League Baseball Players Association. I appreciate this opportunity to testify today about what our union has done and is continuing to do to combat the use of illegal performance-enhancing substances in Major League Baseball.

The last time I appeared before this Committee, on March 10, 2004, I explained how the new Joint Drug Agreement contained in our 2002 collective bargaining agreement was working. We had conducted a year of survey testing in 2003, which produced positive test results for between 5 and 7 percent of players (I believe the actual number of positive tests was in the 80s), with the result under our agreement being that in 2004 we were about to begin the random testing of individual players with disciplinary consequences. I expressed my belief that the 2004 testing program would be a significant deterrent to the use of unlawful performance-enhancing drugs, and that the number of positive tests would drop dramatically. I also pointed out that by the end of the season we would have hard data (the 2004 results) by

which to gauge whether our agreement had been effective, and whether my prediction would prove accurate.

I recognize that not everything I said that day was well received. Chairman McCain said that he did not disagree with anything in my opening statement, but nonetheless indicated he thought we needed a much stronger program. Senator Dorgan said he was disappointed that we had made so little progress since a Committee hearing in the summer of 2002, and indicated his dissatisfaction that under our 2002 agreement, players who tested positive for the first time were not suspended or publicly identified, but instead referred to treatment. Based on these and other criticisms, the Chairman urged us to commit to revisit the issue. We did.

We soon began discussions with the clubs to amend our agreement, even though we had no legal obligation to negotiate, and announced our new agreement last January. In it, we tried to address each of the major criticisms which had been leveled at our program: (1) we added additional tests, and established a program under which a player could never be certain that he would not be tested again; (2) we added off-season testing; and (3) we increased the penalties, including the public identification and suspension of a player who tested positive for the first time. While reluctant to take this last step, the players believed that public identification of those who test positive for the use of unlawful performance-enhancing drugs, with the attendant necessary consequences of widespread criticism and shame, would be a significant deterrent.

On the day of the announcement, Mr. Selig praised both the agreement and the Players Association for agreeing to an unprecedented mid-term renegotiation of a significant provision in our collective bargaining agreement. In early March, he said he was "very confident that we will effectively rid our sport of steroids" in 2005. President Bush said the new agreement was good for baseball and good for society. Some Members of Congress indicated that they hoped that more would be done, but still clearly felt that the new agreement was a very positive step. By all accounts, we had significantly enhanced our program. At about the same time we learned that the 2004 program was working well. There were twelve confirmed positive tests, out of more than 1,100 administered.

Both the new agreement we reached and the results in 2004—the hard data—constitute strong evidence of progress. And yet, only two months after the announcement of the new agreement, and before we even were able to implement it, we appeared on March 17, 2005, before the House Committee on Government Reform. Again, our program received harsh criticism. I believed then, and continue to believe, that much of that criticism was not well-founded.

A few weeks after the hearing, despite his previous emphatic support of the new program, Commissioner Selig publicly called for us to renegotiate yet again. Members of the House Government Reform Committee, as well as the House Energy and Commerce Committee which held a hearing on May 18, also asked us to do so, as did Members of the Senate. And so, yet again, we have. I informed the Commissioner that we would discuss the issues with the players, and I spent much of the summer traveling to meet with all of the players on all 30 teams to give each player an opportunity to hear and discuss these difficult issues. During and subsequent to my meetings with the players, we have been actively negotiating with the clubs to see what additional agreement we may be able to reach.<sup>1</sup>

Meanwhile, we now have results from the 2005 testing program. Some believed there might be far more positive test results in 2005 than in 2004 for one simple reason: many substances which were perfectly legal until last January are now illegal, as a result of the passage of the Anabolic Steroid Control Act of 2004. The substances covered in the bill were automatically added to our program. As a practical matter, what this meant was that a player could test positive this year merely by continuing to use something he had legally purchased as recently as New Years Day 2005. And, of course, we have a very diverse membership, some of whom live in countries in which I believe some of those products can still be legally obtained.

Those concerns were not realized. The 2005 results demonstrate that the players take our program seriously. So far this year we have conducted more than 1,400 tests. Only nine players have been suspended for testing positive, of which only five were full-time Major Leaguers in 2004, and only four of whom will have a full year of major league service in 2005. Two of the nine had no Major League service through 2004; two had less than two months. And one of the nine players suspended did not use steroids in 2005 at all. The arbitrator found that the low level detected

<sup>1</sup>Both sides agreed that it would be unfair to implement new testing rules during the 2005 season. Indeed, Mr. Selig said he thought it was unfair to do so in the Minor Leagues, where the program is unilaterally implemented by the owners. We also believed that the results of our 2005 testing program would be helpful to our discussions.

in his urine was the result of a prior use, before the 2004 season, for which this player had already been disciplined twice, under the Minor League program. It was for that reason that the Players Association believed, and still believes, that this third suspension was fundamentally unfair and inappropriate, representing a kind of double jeopardy.

Clearly these results are very encouraging, and one can hope that the final results will demonstrate that Mr. Selig's prediction (that we will effectively rid the game of steroids in 2005) will turn out to be accurate.<sup>2</sup>

Of course, as everyone here is well aware, one of the players suspended does have substantial Major League service. Senator McCain has indicated that the suspension of Rafael Palmeiro brought this issue to the forefront again. To an extent, I feel as if we are caught in a catch-22. Before the Palmeiro suspension, a primary criticism leveled at our program had been that it could not be working because no well-known players had been suspended. After the Palmeiro suspension we hear that the program cannot be working because Rafael Palmeiro was found to be in violation of the program. But you can't have it both ways. With all due respect, our program is working well. It has resulted in a dramatically reduced incidence of steroid use, and applies to all players equally, without regard to seniority, ability or status in the game. Nor does the Palmeiro suspension demonstrate that our penalties are inadequate. The consequences of making this suspension public have been devastating for the player.

Let me turn now to our current discussions with the owners. Unfortunately, as of the time that this is written, we have not yet reached a comprehensive new agreement, and, in labor negotiations, no final agreement is made until all outstanding issues have been resolved. But we have made significant progress in each of the areas of concern identified by Mr. Selig, and have reached or are very near agreement on several of the key issues which we have been discussing. We have agreed to conduct significantly more tests. The number of tests performed each year would double, and the new annual number of tests would be approximately 3,000. We have agreed upon a framework for testing for amphetamines, something that baseball has never before tried to do, and have essentially agreed on a penalty structure for amphetamine positives. We have offered to move more of our testing and administrative functions to an outside entity in order satisfy a criticism—even if, as we believe, it is uninformed—that we need to create more transparency and independence. We also have agreed to clarify the language regarding governmental investigations.

However, we have yet to reach agreement on a new penalty structure to be applicable to players who are found to have used unlawful steroids. Although the Players Association has made a proposal for enhanced penalties, we have been unable to meet the Commissioner's demands, particularly with respect to penalties for a first-time offender. Specifically, the agreement we entered into in January calls for a 10-day suspension for a first positive. The MLBPA has proposed doubling that to a presumptive 20-game suspension. The Commissioner would have the right to impose a suspension which could under certain circumstances become 30 games, and the player would be able to argue that the circumstances were such that the penalty should be reduced (but not below 10 games). Mr. Selig's proposal presumes a 50-game penalty, with the possibility that he could increase it to 60 games, and the player could argue that it should be reduced to 40. For a second violation, the current agreement calls for a 30-day suspension. The MLBPA has proposed that this be increased to a presumptive 75-game suspension, with circumstances under which the Commissioner could impose 100 games, and the player having the right to argue to an arbitrator for a reduced penalty, but at least 50 games. Mr. Selig's proposed presumptive penalty is 100 games, although he could impose up to 120 games, and the player could argue for a lower penalty of 80 games. And for a third positive test result, the current agreement calls for a 60-day suspension. We have proposed that the new agreement give the Commissioner the right to impose whatever suspension he believes is appropriate and consistent with just cause, including a permanent ban, with the player having the right to argue to an arbitrator that the penalty is not warranted under the facts of his particular case. Mr. Selig's position is that after a third violation, a player should be permanently banned, without arbitral review or any other review, or even an examination of the particular facts and circumstances of the individual case.

The clubs' position in this bargaining seems to be that the players must give the clubs what they want or an even more punitive result will follow by legislation. But,

<sup>2</sup>The incidence of positive test results is at a very low level, and while zero is our goal, it may be unrealistic to expect that it will be reached. No testing program has been entirely free of positive tests. But we are already very close to that goal.

clearly, Mr. Selig does not believe that stiffer penalties are needed in order to have an effective program. He has said on a number of occasions that the program is in fact working well, but that, somehow, this is not the issue and that does not matter.

We think it does matter. We think that the facts do matter, or they should. It is the very role and function of the Players Association, as it is of every union, to effectively represent its members to the best of its ability, and that includes individuals who will be tested and, if appropriate, punished. So we do believe, and we must believe, that fundamental fairness matters, and that the penalties should be designed for effective deterrence, not for punishment for its own sake. The penalties the clubs are asking for, and the ones provided in the bills being discussed today, do not meet that standard.

Consider our current program. While we do not have a system of absolute strict liability, we have agreed that once a player tests positive the burden shifts to the player to show why he did not violate the program. This obviously puts the player in the nearly impossible situation of having to attempt to demonstrate how something got into his body weeks or months earlier. If he did not put it there, he will not know. Clearly there may well be results which are unfair to the player. And while some will say that a system like this is necessary in order to have an effective policy, it is also a reason that first time penalties should not be overly severe—that is, more punitive than is necessary to deter use.

There is also the possibility that a player will test positive as the result of a mistake. The player may take a single pill, not knowing what it is or thinking it is something else, and test positive. And, however unlikely we hope that it is, there certainly is also the possibility of a player being set up by someone who puts something in his food or beverage. A Major League player is not in a position to do what I have heard some cyclists do, i.e., take everything he is going to consume with him whenever he travels. And there is also the question of the science, and its limitations. We may be using the best science available but, it will likely evolve. For example, we know things now that we did not know until very recently. It used to be thought that the metabolites of nandrolone were not naturally found in humans; now we know that in certain circumstances they can be. We also did not know that the metabolites could grow in a test tube; now we know otherwise. As time goes on we will likely learn other things of which we are not now aware. Scientific mistakes will be made, and a just program must account for that reality.

If this Committee does proceed to consider legislation, be it one of the bills currently before it or one of the measures under consideration in the House of Representatives, we ask that it address several issues which to date have not received serious attention. This is especially true since different legal and regulatory concerns arise when a testing program is mandated by the Federal Government as opposed to one created and administered through collective bargaining. For example, what is the basis for covering some professional athletes and not others? Will covered athletes be afforded traditional due process rights? Will covered athletes be provided the same legal protections and due process rights afforded Federal employees who are subject to random, suspicionless testing? What is the appropriate standard to judge the adequacy and effectiveness of an existing penalty structure? What is the mechanism for redressing the injuries suffered by a professional athlete who is incorrectly identified as testing positive? What scientific standards will be followed concerning the development and implementation of new testing methodologies or replacing those found to be out-dated or inaccurate? And, how will the Committee ensure a proposed program is Constitutional?

There are serious questions as to whether the bills before the Committee are consistent with the Constitution. See, for example, *Chandler v. Miller*, 520 U.S. 305 (1997). In that case the Supreme Court held unconstitutional, as a violation of the Fourth Amendment, a Georgia law requiring drug testing of candidates for public office. The Federal Government recognized the principles set forth in *Chandler* in 1999 when it clarified which Federal employees could be subjected to mandatory random drug testing. Concerns regarding public safety or national security can justify such testing, the Fourth Amendment notwithstanding. Concerns regarding public trust, reputation for integrity, honesty or responsibility, cannot.<sup>3</sup>

Clearly, the considerations which might or might not justify federally mandated testing of professional athletes may be different than those which pertain to State or Federal officials or employees, and no one can be certain what the result of any litigation would be. But given the doubt that any such legislation would be Constitutionally valid, along with the evidence that the agreement reached by the parties

<sup>3</sup> See Memorandum from the Interagency Coordinating Group Executive Committee to Federal Agencies, Guidance for Selection of Testing Designated Positions III(D)(1) (August 2, 1999). This can be found at <http://dwp.samhsa.gov/FedPgms/Files/TDFs.aspx>.

in collective bargaining is successfully dealing with the problem, legislation at this time is not warranted. Under the circumstances, the bargaining parties have a program whose effectiveness should at the very least be tested over time before Congress wrests control of this issue from private hands.

As I said, we have not yet reached final agreement with the clubs on a new program, but we have on a number of important issues. Hopefully we will be able to close on the remaining issues.

Senator McCAIN. Thank you very much.  
Welcome, Commissioner Tagliabue.

**STATEMENT OF PAUL TAGLIABUE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE**

Commissioner TAGLIABUE. Thank you very much, Mr. Chairman, Senator Bunning and Members of the Committee. The issues that the Committee is considering today are very important and clearly merit the attention of Congress. Mr. Upshaw and I last appeared before this Committee some 18 months ago, we've again submitted a joint statement because while there are issues on which we disagree in other areas, at times quite sharply, this is not one of them.

We currently have strong and effective programs in place to rid our locker rooms and playing fields of performance-enhancing drugs. These policies were put in place as long as 18 or 20 years ago. We have worked since then with leading institutions and scientists, both in and out of government and continue to do so to have very strong programs and policies to deal with these issues.

We recognize that one of the Committee's critical concerns is the extent of steroid and other substance abuse, or use among young people. We have been working with topnotch universities and medical organizations to create materials distributed on the Internet and elsewhere for some years to discourage the use of steroids, supplements and other drugs of abuse by young people. We have shared with the Committee our "Play Safe" medical series, our Coaching Academy publications and now in conjunction with the National Institute of Drug Abuse, we are airing anti-steroid advertisements on all of our network telecasts, on other programming of our network partners and on our own NFL Network.

I've been involved with youth sports my entire life. I was fortunate enough to go to college on an athletic scholarship, basketball to be specific. I wouldn't be here today, I wouldn't have the education I had if I hadn't been inspired by my heroes in basketball, football, baseball, hockey, track and field and other areas. So I fully support—and we fully support as you know, Mr. Upshaw has been involved in sports his whole life, and he's more successful than I, but we both strongly support what the Committee is doing.

I could comment on specific aspects of the bills, but I think our policies are in sync with all of the critical elements of the bills. Both bills call for random testing throughout the year; we have that. Both bills call for a comprehensive list of banned substances and methods; we have that. Both bills call for independent administration of a testing program; under our program as you know, Mr. Chairman, no representative of the League, the Players Association, or any NFL member team has any role whatsoever in determining who will be tested, when a player will be tested, or how often he will be tested. It's all institutionalized with outside par-

ties, and in large measure computerized and randomized with computer technology.

Both bills require the use of an independent certified laboratory, we do that. And we have funded those laboratories and are continuing to fund new laboratories in this field.

Both bills call for tough sanctions for violators. Our program embodies a strict liability approach under which players are strictly responsible for whatever is in their bodies that's a violation, and suspensions without pay are mandatory for all offenders.

We strongly believe in the strict liability approach rather than a subjective intent approach. Consistent with the strict liability approach a four-game suspension, 25 percent of the season without pay is an effective sanction for a first offense. We have had in the almost 20 years of our program only two repeat offenders, and both of those players retired from the game before they were suspended a second time.

I believe this is a very telling measure of the effectiveness of both our testing and our discipline.

In our prepared statement we emphasize that we fully respect Congress' desire and prerogative to legislate, and we would urge that that legislation have a certification program that would recognize in advance the effectiveness of collective bargaining programs that serve and meet the policies and goals of the statute. And that there would be—that is a feature that is in some other areas of Federal law so that we can know in advance that what we're doing complies with the Congressional mandate.

I'll be pleased to take questions, as will Mr. Upshaw, Mr. Chairman, and we thank you again for your focus on this issue.

[The joint prepared statement of Mr. Tagliabue and Mr. Upshaw follows:]

JOINT PREPARED STATEMENT OF PAUL TAGLIABUE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE AND EUGENE UPSHAW, EXECUTIVE DIRECTOR, NFL PLAYERS ASSOCIATION

Chairman Stevens, Chairman McCain, and Members of the Committee:

The issue that the Committee is considering today—the use of steroids and other performance-enhancing drugs in professional sports—is an important one that merits thoughtful attention by the Congress. It is an issue that addresses a wide range of concerns: the health of athletes who use these substances, the values that are promoted or debased by the use of these substances, and the proper roles of government and the private sector in combating their use.

In recent months this subject has commanded considerable time and attention in both Houses of Congress. It also has for us, but it is not a new subject in the NFL. For two decades, we have had very strong programs in place to rid our locker rooms and playing fields of performance-enhancing drugs, and League programs have been a positive force in helping football at all levels to address these issues. We have not had all the answers but we have worked with leading institutions and scientists, both in and out of government, to stay ahead of an ever-changing curve. Our policies, which have included prompt and stiff sanctions for violators, have addressed these issues in a firm and constructive way. And we intend to continue to have very strong policies and programs to deal with the scientific, medical, ethical and legal questions surrounding the use of these substances both within and outside of professional sports.

We last appeared before this Committee on this subject some 18 months ago. Then, as today, we submitted a joint statement. We do so because while there are issues on which we disagree—at times sharply—this is not one of them.

We have previously furnished to the Committee detailed information about the structure and operation of our program, how it works, and the results to date.

To summarize, more than 20 years ago, in 1983, Commissioner Pete Rozelle notified all NFL players that anabolic steroids fell squarely within the League's prohibition against drug abuse and that steroids had serious adverse health effects. In 1987 and 1988, the League began testing for steroids to obtain a documented understanding of the extent of steroid use among NFL players. And in 1989, the NFL instituted discipline for steroid use with suspensions on players testing positive for prohibited substances. In testimony given in May of 1989 to the Senate Judiciary Committee, Commissioner Rozelle outlined the basis for the League's more stringent approach:

"The fundamental responsibility of [the Commissioner] is to protect, as best he can, the integrity of the game he oversees and the public's confidence in it. In my view, steroid use both threatens that integrity and confidence and presents other significant problems as well.

"Our measures are designed to promote common sense, fair play, and good health. If they do no more than generate an increased awareness among athletes at all levels of the potential risks of using steroids, our program will have been a modest success . . . . [But] we hope our new measures will be a much larger success and a significant step toward eradicating these drugs from our sport."

Shortly after taking office in late 1989, Commissioner Tagliabue instituted a number of changes in the League's program, to take account of the need for greater investment in specialized resources and increasingly varied and sophisticated testing techniques to deal with a growing array of substances. Those changes included year-round random, unannounced testing for all players, new medical and scientific advisors, and moving all testing to laboratories certified by the International Olympic Committee. Since 1993, we have had a jointly administered program by the NFL and NFL Players Association. And the League and the NFLPA have met regularly to review the workings of the program and to ensure that we are continuing to be pro-active in responding to developments of science and technology, doping control research, and the policies of other organizations. For many years, we were the only professional league that tested for these substances and imposed significant discipline for a positive test. And our program, while not perfect, has worked and worked well.

In this respect, it is important to understand what a four-game suspension means in the NFL. It takes the player entirely out of the lineup for one quarter of our season. In other leagues, this would be the equivalent of a 20 or 40 game suspension. If the suspension begins late in the season, it will carry into the playoffs. Any suspended player likewise loses a quarter of his regular season salary and may also forfeit some or all of his signing or performance bonus. By any measure, it is a significant penalty, but not a vindictive one.

It is against this background that we offer comments on S. 1114 and S. 1334, the two bills presently pending before the Committee. We fully endorse the goals of these bills. In many respects, the principal points set forth in the bills have long been part of our own program.

- *Both bills call for random testing of athletes throughout the year.* Our program has relied on this kind of random, unannounced testing for more than 15 years. We currently conduct more than 9,000 unscheduled tests every year on NFL players, which occur throughout the season, during the playoffs, and during our off-season. Every player is tested, but no player knows when or how often he will be tested. Earlier this year, we increased by a factor of three the number of off-season tests to which a player is subject—at a time when the Olympic drug testing authority *cut in half* the number of off-season, or out-of-competition, tests that it performed.
- *Both bills call for a comprehensive list of banned substances and doping methods.* While our list of prohibited substances and methods may differ in some respects from the Olympic list, there can be no serious question that our list is broad and comprehensive. It is reviewed every year and frequently supplemented. We have banned substances like androstenedione, DHEA, and ephedra well before other sports or even the Federal Government did so. Indeed, when we appeared before this Committee last year it was to testify in support of a bill that would prohibit the use of certain steroids and steroid precursors—*each of which had already been banned in the NFL through our collective bargaining process.*
- *Both bills call for independent administration of the testing program.* The random selection of players to be tested in the NFL is supervised by a medical advisor retained jointly by the NFL and NFLPA, Dr. John Lombardo, who is a

recognized expert in this field. Dr. Lombardo uses a computer-based selection system specially designed for this purpose. Administration of the testing program is independent. No representative of the NFL, the NFLPA, or any NFL member club has any role whatsoever in determining who will be tested, when a particular player will be tested, or how often he will be tested.

- *Both bills require that a testing program use an independent, certified laboratory.* Our program has always complied with this requirement. All of our tests are performed at the UCLA Olympic Analytical Laboratory, which fully satisfies any standard of independence and expertise. And we have partnered with the U.S. Anti-Doping Agency to finance and develop a *second* certified lab to perform testing and research on steroids and other substances. This new lab will be based at the University of Utah and is expected to begin operations later this year.
- *Both bills call for tough sanctions for violators.* Our program embodies a strict liability approach, with mandatory suspensions for first offenders. Our sanctions are clear, significant and effective. And, consistent with both bills, we have from the beginning included a collectively-bargained appeal process.

In short, our current program satisfies all of the key requirements of the two bills pending before the Committee. We also incorporate one more significant feature that makes our collectively-bargained program superior to a government program—the ability to respond quickly to changes in substance use for doping technology. For example, when the designer steroid THG was identified in 2003, we retested more than 2,000 urine samples—every sample in our possession—to determine the extent to which NFL players may have used this drug. And our policy has from the outset incorporated a “related substances” provision, to ensure that minor chemical changes do not allow users to escape the prohibitions of our program.

This process of continual examination and improvement has continued into 2005. Before hearings began in the current session, the NFL and NFLPA agreed as part of the regular review of the program to implement the following improvements:

- To reduce the threshold for a positive testosterone test from the previous 6:1 testosterone-epitestosterone ratio to a ratio of 4:1. This is the same standard used for Olympic tests.
- To increase from two to six the maximum number of times players can be tested during the off-season.
- To add additional substances to the list of banned substances.

The development and operation of this program, and our common commitment to continual examination and improvement, has never required a prod from Congress. Rather, it reflects our shared commitment to protecting the integrity of our game, preserving the health of our players, and promoting proper values among young people.

Where we differ from the pending bills is in our belief that a Federally-imposed solution is not required in all cases. To the contrary, we believe that the government should recognize and encourage private sector solutions through collective bargaining, and that those solutions are preferable, particularly where—as here—there is a substantial track record of effectiveness. Accordingly, we do not believe either of these bills should be enacted into law without providing for a certification mechanism that permits the continued operation of collectively-bargained programs that meet Congressional policy goals.

Our specific concerns are as follows:

First, we do not believe there is any demonstrated basis for supplanting in all circumstances collective bargaining as the appropriate means for addressing these issues. Instead, we believe that any bill should expressly recognize collectively-bargained solutions and provide that effective collectively-bargained programs satisfy the requirements of the statute.

This is not a new concept. On numerous occasions, Congress has specifically recognized the wisdom of deferring to solutions reached by management and labor in collective bargaining, and has provided for specific exemptions from otherwise-applicable Federal law. These examples include the treatment of collectively-bargained employee benefit plans, overtime and severance pay, use of immigrant workers, and grievance procedures. In each of these and other cases, generally-applicable Federal law has given way to the terms of a collective bargaining agreement. And we have substantial concerns about a regulatory approach displacing and potentially weakening a demonstrably effective program.

Finally, a collectively-bargained approach will have greater player acceptance than would be the case with a government-imposed solution.

Second, a uniform system for all sports may actually lower standards in the NFL and reduce the effectiveness of our program. One obvious example is the in-season/out-of-season distinction that is drawn in the bills. This concept, which is found in the Olympic anti-doping code, may be appropriate in Olympic sports, which are almost entirely individual, and where the competition is largely limited to a number of high profile events over a two-to-four year period. In the NFL, that distinction has no place and would weaken our program in a significant way. Rather, we believe that there should be *one set of rules* that applies throughout the year. The in-season/out-of-season distinction would needlessly confuse players, send mixed messages to young people, and create significant and unnecessary administrative complexities in the program.

Another problem with a uniform regulatory regime is that it will be slower and more cumbersome than our collectively bargained approach, which allows for a more rapid and certain response to developments in doping and anti-doping technology. As one example, in 1997, the NFL and NFLPA agreed to include androstenedione as a banned substance. Players testing positive for andro were suspended. Had we been required to wait for the FTC, or for the Director of the Office of National Drug Control Policy to make this determination, NFL players might have continued to use andro without penalty.

In addition, and unlike a government program, our program is not subject to collateral court challenges. The example of ephedra is instructive here. We determined that ephedra should be a prohibited substance at the beginning of the 2001 season. The FDA eventually implemented a ban on ephedra in 2004, but its rules were sharply limited by a Federal judge's decision earlier this year. By contrast, agreements between the NFL and the NFLPA are not subject to these kinds of court challenges since the National Labor Relations Act requires courts to give great deference to these kinds of employer-employee agreements.

Regulations issued by a government body are, by nature of the notice and comment and judicial review provisions in the Administrative Procedure Act, necessarily subject to lengthy administrative procedures, court challenges, and potential revision or invalidation by a single Federal judge. And once Congress federalizes drug testing in sports, and replaces collective bargaining under the National Labor Relations Act with statutory and regulatory mandates, there can be no assurance that even agreed-upon provisions that *exceed* Federal minimums will be respected by the courts. Nor would the anti-injunction provisions of the Norris-LaGuardia Act necessarily continue to apply.

Third, the penalties required by the bills are excessive and disproportionate in the context of professional football. There is no evidence that current penalties in the NFL are too low, insufficient to deter use, or somehow perceived as insubstantial or not credible by players, teams and fans. From any perspective—financial, competitive, and reputational—a mandatory four game suspension without pay, combined with ongoing testing, is a substantial penalty that works.

The central feature of penalties in the NFL system is that of strict liability. Players are told and clearly understand that they are responsible for what is in their bodies. There are no issues of inadvertent use or tainted supplements. Questions of intent are simply not relevant. Long experience confirms that it is difficult if not impossible to administer the sort of intent-based system embodied in the proposed legislation.

The strict liability standard that we have agreed to serves a number of important purposes. It provides clarity for athletes, teams and fans. It is a simple and straightforward principle that places the responsibility where it belongs—on the player.

It also promotes fairness and even-handedness. All players are subject to the same rules and procedures, and players know that they will all be treated the same way under the program. Finally, the strict liability standard promotes efficient administration of the appeal process. Hearing officers do not have discretion to reduce the penalty. If the positive test is confirmed, the discipline follows automatically.

We believe our current system of limited suspensions and strict liability is preferable to a system of much longer suspensions combined with a series of intent-based reductions or exemptions.

*One important measure of whether a penalty structure is effective is the extent to which there are repeat offenders. In the NFL, there have only been two repeat positives in 15 years, both of whom retired from the game rather than face a longer suspension.* And the low number of repeat offenders is not because we were looking the other way. NFL players who test positive are tested as often as 24 times a year for the rest of their career, meaning that there is very little prospect of escaping detection.

Two other matters related to the scope and effectiveness of the League's testing programs also deserve mention.

*The first is the subject of human growth hormone ("HGH").* We have prohibited this substance since 1991. Currently, there is no readily available test or testing laboratory in the United States for HGH, and there is still no urine-based test for growth hormone. A blood test was first used at last summer's Olympic games in Athens, where 300 of the more than 11,000 athletes who competed in the Games were tested. No athlete tested positive. We are currently evaluating our next steps with respect to growth hormone and will continue to consult with experts in the field, including those associated with government and other leading sports organizations. When scientific developments warrant, we will act quickly to adjust our own policies as we have consistently done in the past.

*The second is testosterone,* which we are addressing in two respects. First, to take account of the evolving consensus as to test protocols for the testosterone-epitestosterone ratio, we have lowered the threshold for a positive test from a ratio of 6:1 to a ratio of 4:1. Second, we have developed procedures to review player tests over time to identify unusual changes in player test ratios, even when below the 4:1 threshold, which would then result in more detailed medical review, reasonable cause testing, and discipline.

We recognize that one of the Committee's primary concerns is the extent to which young people are using steroids today. As Commissioner Rozelle's remarks to the Senate Judiciary Committee more than 15 years ago demonstrate, this has been one of the primary factors underlying the NFL's program as well.

Among athletes and coaches, where we can influence behavior, we make an aggressive effort to discourage the use of steroids, supplements and drugs of abuse. As one example of this, we have worked with leading institutions in medicine and sports to create reliable guides on fitness, nutrition, safety and conditioning—entitled the "Play Safe! The NFL Youth Football Health and Safety Series." This four-volume series gives players, coaches, parents and the public general information on football-specific health and safety issues in a clear, easy-to-understand format. Needless to say, this series emphasizes that the use of performance-enhancing substances, and/or other drugs of abuse, is unacceptable.

By partnering in the publication of this series with leading academic and public service organizations, we have sought to ensure that this series will be regarded as definitive and independent and also widely distributed and used. The series editor is the Director of Sports Medicine at Yale University Health Services and Clinical Professor of Pediatrics at Yale University School of Medicine, Dr. Barry Goldberg. The series is produced in partnership with the American College of Sports Medicine, the American Red Cross, the National Athletic Trainers' Association, and the Institute for the Study of Youth Sports at Michigan State University.

Two of the four volumes of this series deal with the matters of direct interest to this Committee. One volume specifically discusses "Strength and Conditioning" and offers practical, step-by-step techniques to build strength, endurance and flexibility; improve performance; and decrease risk of injury—all without steroids or other illegal substances. Another volume in the series, entitled "Health Concerns for Young Athletes" includes an entire section on substance abuse and specific warnings about steroids, including the following:

"There should not be any controversy about steroid use in sports; nonmedical use is illegal and banned by most, if not all, major sports organizations."

"The use of anabolic-androgenic steroids to enhance performance is not only illegal, it is dangerous."

This series has been distributed nationwide in both print and on-line editions and has been furnished to the Committee. It has been furnished to all high school football programs, and to our NFL National Youth Football Partners network, which includes the Boys and Girls Clubs of America, Jewish Community Centers Association, Police Athletic Leagues, Pop Warner, and the YMCA, among others. The entire series is available free of charge on NFLHS.com, a high school football website presented by the NFL. The site also includes articles and Q&A sessions between a former NFL coach and high school players on various topics, including the dangers of steroids and drug use. Among these messages: "Coaches: Please Know What Your Athlete is Taking." NFL representatives and other professionals also address these issues at our annual NFL Youth Football Summit, and high school and youth football coaches throughout the country receive our NFL Coaching Academy Playbook. This publication includes a chapter devoted to health and safety issues that gives specific advice to football coaches on the dangers of steroids and steps coaches can take to detect and deter drug use by their players. This, too, has been furnished to the Committee.

USA Football, a not-for-profit advocacy and educational organization jointly endowed by the NFL and the NFLPA, has made a wide array of resources available

to parents, coaches and players across the Nation. The USA Football website contains articles on steroids and drugs of abuse, and USA Football made this a key focus of its health and safety efforts for 2005, including at its Huddle 2005 national conference last June. The message is always the same—to play football in a way that is safe, within the rules, and without use of artificial performance-enhancing products.

In conjunction with the National Institute on Drug Abuse, we have also produced a series of “anti-steroids” public service announcements, which are being shown during telecasts of NFL games throughout the season.

In sum, Mr. Chairman, we support the goals of the legislation. Our record over the last 15 years makes that clear. We will continue to work closely with each other, with this Committee, and with those outside of the NFL to keep our game as free of performance-enhancing substances as we can. Our challenge going forward will be to ensure that our research is current, that adequate resources are available to support programs proven to be effective with young people, including non-athletes, and that football organizations maintain their commitment to *clean* competition at all levels. We recognize that there are significant challenges ahead and we are prepared to do our part to meet them, along with you and this Committee and others in Congress who are concerned about this issue.

Thank you for inviting us to appear today and we will be pleased to answer any questions.

Senator McCAIN. Thank you very much, Commissioner.  
Welcome back, Mr. Upshaw.

**STATEMENT OF GENE UPSHAW, EXECUTIVE DIRECTOR,  
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION**

Mr. UPSHAW. Thank you, Mr. Chairman. I join with the Commissioner, and we submitted a joint statement, simply to emphasize how strongly we feel about this. And why there is really no disagreement whatsoever when it comes to this issue of steroids and performance-enhancing drugs.

I would only like to add a couple of points to the Commissioner’s statement and that is, the players in the National Football League strongly endorse this program, support this program, and continue to believe that this program has been effective as it relates to the National Football League. We looked at the legislation, and when we see one-size-fits-all we see that the legislation should really address each individual sport, but also allowing the collective bargaining process to come up with a solution that works. If it meets with what Congress has, as the Commissioner stated, we think we’re doing a very good job in the National Football League. We have stayed on the cutting edge of change and changed our program. We do not wait for anyone else to act. We want it off the field because our players believe that anyone that uses drugs are really cheaters. There is no room for cheaters in sports. And it also affects the integrity of the game and integrity of the contest. We do not want cheaters in our sport, and will do whatever we have to do to keep it out. We have had unanimous support from players on this issue. Anytime that a player has tested positive, you can’t find one player in the National Football League, and I’ll challenge you to do that, that supports having a cheater in the sport.

I will be welcome and here to answer any questions that you might have. Thank you.

Senator McCAIN. Thank you, sir.  
Welcome, Commissioner Stern.

**STATEMENT OF DAVID J. STERN, COMMISSIONER, NATIONAL BASKETBALL ASSOCIATION**

Commissioner STERN. Thank you, Mr. Chairman and other Members of the Committee for focusing on this very important problem. I appeared before two different House committees, with my counterpart from our Players Association in May, and we represented to them that we were in the midst of collective bargaining and although we didn't know, didn't think, and our knowledge was that this was not a major problem, we understood our obligation as a sport that had role models. Out of that collective bargaining, and really the least contentious part of it, came an agreement that may sound—begin to sound—familiar to you, that has four random unannounced tests, that has an expanded list of prohibited substances, all of those that were declared illegal by Congress, plus additional ones that the World Anti-Doping Association has put on the list. We clearly decided that it was better and more effective to turn this over to a third party so that the League and the Players Association have nothing to do with the randomized unannounced tests and of course the results will be provided by a WADA approved laboratory and they will be announced, with respect to the player and the drug, if there are any positive tests.

Our penalties were moved up to 10 games, 25 games, a year and you're out. We think that the strict liability that we impose actually is stricter than the liability under WADA, which allows for appeals and other delays and omission of penalty. And we think that collective bargaining has been effective for us. If you nevertheless find it necessary to legislate in this area, my statement which I submit for the record lists some areas that we think could bear some additional focus, and we look forward to either your acceptance of the collective bargaining process, or such legislation as you care to propose. And we think that your focus on this has been very helpful to us, as has the House's focus on this. And we thank you for your attention.

[The prepared statement of Mr. Stern follows:]

PREPARED STATEMENT OF DAVID J. STERN, COMMISSIONER, NATIONAL BASKETBALL ASSOCIATION

Chairman Stevens, Chairman McCain and distinguished Members of the Committee:

On behalf of the National Basketball Association ("NBA"), I appreciate the opportunity to testify before the Committee regarding S. 1114, the "Clean Sports Act of 2005," and S. 1334, the "Professional Sports Integrity and Accountability Act."

The NBA supports the efforts of this Committee and the Congress to confront and address the issue of steroids and performance-enhancing substances in professional sports. These drugs undermine the fundamental integrity of all athletic competition; they pose serious health risks to the players involved; and their use in major league sports sends a harmful and potentially destructive message to countless young fans who emulate professional athletes. Steroids and performance-enhancing drugs have no place in the NBA.

The NBA has appeared before Congress twice this year in connection with this issue. On those occasions, we made clear our intention to work with the players' union during then-ongoing collective bargaining negotiations to strengthen our existing drug program. Those negotiations have now concluded, with the successful execution of a new labor contract in July 2005. As part of that new contract, the NBA and the Players Association did in fact agree to substantially strengthen and expand our drug program, particularly with respect to steroids and performance-enhancing substances.

Important elements of this program now include the following:

- All players (veterans and rookies) will be tested at random 4 times during the season, from October 1 through June 30 (a period that includes, but is not limited to, training camp, the regular season and the playoffs). Players also remain subject to reasonable cause testing at any time.
- Penalties for violators have increased as follows: first offense—10-game suspension; second offense—25-game suspension; third offense—1-year suspension; and fourth offense—dismissal and disqualification from the NBA.
- The list of banned substances has been expanded to include all steroids made illegal by the Anabolic Steroids Control Act of 2004, plus additional steroids, stimulants and other performance-enhancing drugs banned by WADA, and a provision has been added requiring that any substance declared illegal by Congress will automatically be added to the NBA's banned substances list.
- Random drug tests will be scheduled by, and the urine specimens will be collected by, an independent testing organization, without notice to the NBA or the Players Association.
- When a player is suspended for a violation of the Program, the substance for which he tested positive will be publicly announced. (Previously, only the player's suspension was publicly announced.)
- The program maintains the involvement of a Prohibited Substances Committee, which is comprised of three independent experts in the field of performance-enhancing substances, and one representative from both the NBA and the Players Association. The Committee is charged with meeting twice per year to review the list of Prohibited Substances and propose any additions or changes.
- Other technical changes have been made to the program, such as lowering the threshold for a positive testosterone test from a ratio of 6:1 to a ratio of 4:1, as WADA did earlier this year, and changing the NBA's testing laboratory to one accredited by WADA in order to take advantage of the most advanced laboratory science.

As a result of these changes, the NBA and the Players Association now have in place a comprehensive, effective, and fair policy for steroids and performance-enhancing substances. Further, because the parties arrived at this policy by agreement—through the traditional collective bargaining process—we are both invested in its success. The NBA, therefore, does not believe that legislation in this area is necessary or appropriate. Nevertheless, if this Committee and the Congress feels that legislation must be enacted, we offer the following observations on the specific proposals contained in the Clean Sports Act of 2005 and the Professional Sports Integrity and Accountability Act.

First, while we believe it is important to prohibit a broad list of steroids and performance-enhancing substances and, as a result, have agreed with the Players Association to significantly expand our list of banned drugs, we do not believe that the entire WADA list of prohibited substances is appropriate for the NBA. The sport of basketball emphasizes a specialized set of physical abilities—particularly quickness, agility, and basketball skill—that are distinct from those required in a number of other sports. Accordingly, illicit substances that could assist athletes in strength sports (such as weightlifting or football), power sports (such as baseball), or endurance sports (such as cycling or marathon running) are not likely to be of benefit to NBA players. We therefore do not believe it would be appropriate to require the NBA to test players for these substances, or for the NBA to be required to incur the substantial cost of such testing.

Second, while stiff penalties are necessary for the legitimacy of any anti-drug program, we believe that the penalties contained in our new labor contract—and not the more excessive penalties set forth in the proposed Acts—are fair and appropriate for our sport. A first-time offender of our steroids and performance-enhancing drugs policy will be suspended from his team for ten games. Because the average NBA player now earns approximately \$4.5 million per season, a ten-game suspension would result, on average, in a financial penalty to the player of more than \$400,000. In addition, the player's suspension and the prohibited substance used by the player will be publicly announced, which will appropriately diminish the player's reputation and off-the-court financial prospects. A second offense will result in a suspension of 25 games, resulting in an average financial penalty of over \$1 million, and significantly affecting a player's ability to obtain any performance-based bonuses in his contract or prove his value for purposes of obtaining a subsequent contract. For the third offense, the player will be suspended for one year. As noted above, that would result in the average loss of income of \$4.5 million and the loss of one year in a career that, on average, lasts for less than 5 years. After the fourth strike, the player would be dismissed and disqualified from the NBA.

The foregoing penalties, we submit, are strict enough to punish violators appropriately, deter the use of steroids and performance-enhancing drugs in the NBA, and provide fair opportunities for players to conform their conduct.

In addition, the Professional Sports Integrity and Accountability Act, like the NBA's current drug policy, contains a "strict liability" standard—that is, a player can commit a violation unknowingly by, for example, ingesting a tainted nutritional supplement that is legally sold over the counter. Under those circumstances, a two-year ban (if the violation was the player's first) or a lifetime ban (if the violation was the player's second) are unduly harsh. Indeed, even the WADA Code does not provide for strict adherence to the penalties proposed in the bill, and instead makes clear (in Section 10.5 of the Code) that special circumstances—such as a contaminated supplement—should be taken into account and could result in a reduced (or even no) penalty. Fundamental fairness to athletes whose livelihoods are at stake should require no less.

Third, both Acts would require that testing for steroids and performance-enhancing substances be "independently administered." While we believe the NBA's drug program would meet this standard—because the scheduling of tests and collection of samples for all players will now be handled by a third-party testing organization without the participation of the NBA or the Players Association—that conclusion is not completely clear. The parties, of course, must pay for the services performed by the third-party testing organization, and neither Act indicates whether this fact would compromise the "independence" of the relationship. In addition, the NBA and the Players Association will continue to have an active role in overseeing our drug program, monitoring the testing, providing input for testing protocols, imposing discipline, and making improvements—a role that fosters confidence among NBA players that the program is legitimate, impartial, and fair, which in turn helps the program run smoothly. The NBA would oppose any legislation that did not allow for this continuing involvement.

Fourth, neither Act clearly indicates the forum for the adjudication of player appeals. (The Clean Sports Act suggests, but does not state, that the forum would be the Court of Arbitration for Sport, which is used by USADA. The Professional Sports Integrity and Accountability Act suggests, but does not state, that the forum would be selected by each professional sports league.) In the NBA, any disputes arising under the drug program are to be heard and resolved by an independent grievance arbitrator, and we believe that practice should be continued.

Fifth, while both Acts set forth certain baseline standards regarding testing, substances, and penalties, the particulars of those standards are left up to the Federal Trade Commission. Without knowing the specifics of the regulations, of course, it is not possible for us to react fully to the proposed legislation, or to anticipate its effect on the NBA.

Sixth, Section 4(b)(7)(B) of the Act authorizes lesser penalties for players who provide information about the steroid or performance-enhancing drug use of other players. We respectfully submit that this is an inappropriate policy in a team—or any—sport.

Seventh, both Acts include the concept of a "therapeutic use exemption" for players with valid medical prescriptions. Currently, the NBA handles this issue through the medical review process, which takes place after an adverse analytical finding is reported by the laboratory, not prior to the collection of a sample as is required by WADA. Such a medical review process is used by employers nationwide, including the Federal Government. In addition, we believe that the adoption of a WADA-like therapeutic use exemption may conflict with the Americans with Disabilities Act.

Finally, Section 5 of the Act sets forth penalties that would apply only to professional sports leagues if they fail to implement drug testing programs that meet or exceed the applicable minimum standards. We assume, therefore, that the bill would allow a sports league simply to impose such a program without bargaining its provisions with the players' union or otherwise complying with the Federal labor laws. If that is not the case, we would suggest that the penalties contained in the Act be made applicable to both management and labor, thereby providing incentives for both parties to reach an agreement in collective bargaining that meets the proposed Federal standard.

In summary, the NBA believes it has a strong and effective drug testing program in place for steroids and performance-enhancing substances, and does not perceive a need for Federal involvement in this area. If Congress nonetheless sees fit to establish minimum standards for such a program, we suggest that they be flexible enough to account for characteristics that distinguish one professional sport from another, reasonable with respect to penalties, and consistent with all other applicable laws. In all events, we appreciate the Committee's effort and attention to this

important matter, and look forward to providing any additional information or assistance as necessary.

I thank the Committee for considering the views of the NBA on this legislation.

Senator MCCAIN. Thank you, Mr. Commissioner.  
Mr. Davis, welcome.

**STATEMENT OF ANTONIO DAVIS, NBA PLAYER AND  
PRESIDENT, NATIONAL BASKETBALL PLAYERS ASSOCIATION**

Mr. DAVIS. Thank you, Mr. Chairman and Members of the Committee. As President of the National Basketball Players Association, I accept this invitation from Chairman Stevens to testify in place of our Executive Director, Billy Hunter, who is recovering from surgery.

As a professional athlete for over 15 years, I am appreciative of the Committee's concern about the use of steroids by professional athletes and others, particularly young adults and children, as evidenced by the legislation introduced by several members of this Committee.

I would like to begin by clearly stating the position of the NBPA. While we are confident in our belief that the use of steroids and other performance-enhancing drugs is virtually non-existent in the NBA, we are committed to ensuring that the use of these drugs does not ever become an issue or concern.

To that end, in the recently concluded negotiations for the current Collective Bargaining Agreement between the NBPA and NBA, we greatly strengthened the testing protocol for steroids, masking agents and performance-enhancing drugs that was established in the 1999 Agreement.

It is vitally important that the list of banned substances for which players are tested remains current. Accordingly, in our program that list is updated regularly by our Prohibited Substances Committee, and comprised of three independent drug testing experts and a representative from both the NBPA and NBA.

While our anti-drug program has always had a strong emphasis on education and treatment rather than punishment, with a standard of progressive discipline for violators, the program does provide for substantial penalties, which have been significantly increased under our new agreement, for those who are caught using steroids and other performance-enhancing drugs.

In addition to severe penalties and increased frequency of testing, our anti-drug policy is focused on education, treatment and counseling. During each season, every NBA player is required to attend and participate in meetings where the dangers of steroid and performance-enhancing drug use are discussed by drug counselors. Also, all rookie players are required to attend a week-long Rookie Transition Program, before the start of their first NBA season.

Finally, the program's Medical Director supervises a national network of medical professionals, located in every NBA city, available to provide counseling and treatment to players.

We wanted to, and feel that we have, sent a strong and unequivocal message to society in general and our young fans in particular that we do not condone, support or accept the use of steroids and performance-enhancing drugs in our sport. Our will-

ingness to significantly increase the frequency of testing that our players undergo, and increase the penalties imposed upon violators shows the utmost concern that we have for this societal problem.

We continue to believe that a collective bargaining agreement is the most appropriate forum for the resolution of these issues and are confident that the changes made address in a meaningful way the concerns of the Committee, as embodied in the pending legislation.

Congress has long given deference to parties operating under collective bargaining agreements to develop their own solutions to problems, properly recognizing that the parties bound by a collective bargaining agreement have a longstanding relationship with unique problems and problem-solving methods that are often difficult to comprehend by those outside the relationship.

While we fully believe in and support the Committee's and Congress's goal of eliminating the use of steroids and performance-enhancing drugs in sports, we believe this goal is best accomplished by the leagues and players working together to accomplish this universal objective. We think that the players, supported by the leagues, are best able to demonstrate to everyone, especially our young fans, that the only way to become a professional athlete is by cultivating and nurturing their talent, determination, and desire, and by working harder than everyone else.

I thank the Committee for the opportunity to appear before you today.

[The prepared statement of Mr. Davis follows:]

PREPARED STATEMENT OF ANTONIO DAVIS, NBA PLAYER AND PRESIDENT, NATIONAL BASKETBALL PLAYERS ASSOCIATION

Mr. Chairman and Members of the Committee:

My name is Antonio Davis and I am the starting power forward for the Chicago Bulls as well as the President of the National Basketball Players Association, the labor union that represents all NBA players in collective bargaining. I appear today in response to the invitation of Chairman Stevens to testify.

As a professional athlete for over 15 years, I am appreciative of the Committee's interest in and concern about the use of steroids by professional athletes and others, particularly young adults and children, as evidenced by the legislation, S. 1114 and S. 1334, introduced by several members of this Committee.

I would like to begin by clearly stating the position of the NBPA. While we are confident in our belief that the use of steroids and other performance-enhancing drugs are virtually non-existent in the NBA, we are committed to ensuring that the use of such drugs does not ever become an issue of concern.

To that end, in the recently concluded negotiations for the current Collective Bargaining Agreement between the NBPA and NBA we greatly strengthened the testing protocol for steroids, masking agents and performance-enhancing drugs that was established in the 1999 Agreement. Our new Agreement signed two months ago today provides for random testing for all players of up to four (4) times during the NBA season, which covers the period from the start of training camp in October through the NBA Finals in late June. This new testing protocol is a significant change from the prior policy, which provided for random testing of all incoming players four (4) times during their rookie season and testing of veteran players once during the training camp period.

Additionally, all players remain subject to reasonable cause testing at any time. If an independent expert finds reasonable cause to believe that a player is using steroids the player may be tested up to four (4) times during the following six week period. The testing during this period may be administered at any time, without any prior notice to the player.

It is vitally important in the efforts to control the usage of steroids and other performance-enhancing drugs that the list of banned substances for which players are tested remains current. Accordingly, in our Program that list is updated regularly

by our Prohibited Substances Committee, comprised of three independent drug testing experts and a representative from both the NBPA and NBA. The Committee may be convened at any time to ban a substance that is either declared illegal by the Federal Government or is or reasonably likely to be physically harmful to players and is or is reasonably likely to be improperly performance-enhancing. I believe you will find our list of prohibited substances to be extremely comprehensive.

While our Anti-Drug Program has always had a strong emphasis on education and treatment rather than punishment, with a standard of progressive discipline for violators, the Anti-Drug Program does provide for substantial penalties, which have been significantly increased under our new agreement, for those who are caught using steroids and other performance-enhancing drugs. A first time offender is automatically suspended for ten (10) games and is required to enter an education, treatment and counseling program established by the Program's Medical Director. For a second violation the player is suspended for twenty-five (25) games and required to re-enter the education, treatment and counseling program. For a third violation, the player is suspended for one (1) year from the date of the offense and is again required to enter the education, treatment and counseling program. If there is a fourth violation, the player is immediately dismissed and disqualified from the NBA. Also, any player who is disciplined for conduct involving steroids, performance-enhancing drugs or masking agents, will have his identity, the particular drug used, and the penalty publicly disclosed.

In addition to severe penalties and increased frequency of testing, our Anti-Drug Policy is focused on education, treatment and counseling. During each season, every NBA player is required to attend and participate in a meeting where the dangers of steroid and performance-enhancing drug use are discussed by drug counselors. Also, all rookie players are required to attend a week long Rookie Transition Program, before the start of their first NBA season, during which numerous topics are addressed in detail, including the dangers of using steroids and performance-enhancing drugs. Finally, the program's Medical Director supervises a national network of medical professionals, located in every NBA city, available to provide counseling and treatment to players.

Since testing for steroids and other performance-enhancing drugs was instituted in 1999 there have been approximately 4,200 tests conducted, with only 23 initial laboratory positive tests (less than one (1) percent). Of the 23 tests that were initially laboratory positives, only 3 satisfied the additional steps that are required for a sample to be confirmed as positive under our Anti-Drug Program, either because the player was terminated from employment prior to confirmation of his test result or because the Medical Director found a reasonable medical explanation for the test result. The three (3) players who had confirmed positive tests were immediately suspended.

Recognizing the increased scrutiny that steroid and other performance-enhancing drug use has received in society, and particularly in professional sports, since our ground breaking agreement was reached in 1999, we have implemented significant and wholesale modifications in our new Anti-Drug Program to deal with the growing societal problem of the use of steroids and other performance-enhancing drugs. We wanted to, and feel that we have, sent a strong and unequivocal message to society in general and our young fans in particular that we do not condone, support or accept the use of steroids and performance-enhancing drugs in our sport. Our willingness to significantly increase the frequency of testing that our players undergo, and increase the penalties imposed upon violators evidences the utmost concern that we have for this societal problem.

We continue to believe that collective bargaining is the most appropriate forum for the resolution of these issues and are confident that the changes made address in a meaningful way the concerns of the Committee, as embodied in the pending legislation, S. 1114 and S. 1334. Congress has long given deference to parties operating under collective bargaining agreements to develop their own solutions to problems, properly recognizing that the parties bound by a collective bargaining agreement have a longstanding relationship with unique problems and problem solving methods that are often difficult to comprehend by those outside the relationship. While we fully believe in and support the Committees' and Congress' goal of eliminating the use of steroids and performance-enhancing drugs in sports, we believe this goal is best accomplished by the leagues and players working together to accomplish this universal objective. We think that the players, supported by the leagues, are best able to demonstrate to everyone, especially our young fans, that the only way to become a professional athlete is by cultivating and nurturing their talent, determination, and desire, and by working harder than everyone else.

I want to thank the Committee for the opportunity to appear before you today.

Senator MCCAIN. Thank you, Mr. Davis, an excellent statement. Thank you.

Commissioner Bettman.

**STATEMENT OF GARY BETTMAN, COMMISSIONER, NATIONAL HOCKEY LEAGUE**

Commissioner BETTMAN. Thank you, Mr. Chairman, Members of the Committee, the National Hockey League appreciates being given the opportunity to offer comments regarding the proposed legislation. The NHL will cooperate in any way it can with the effort to eliminate performance-enhancing drugs from professional and amateur athletics.

While it is the leagues' firm belief that the performance-enhancing drug issue is not a problem in the NHL, the league is committed to providing its fans with outstanding athletic competition with the assurance that our game is being conducted in an environment free of performance-enhancing substances. The NHL's active pursuit of this objective is reflected in the creation of a program we just incorporated into our new collective bargaining agreement.

The primary elements of this program focus on the education of players regarding the health risk posed by the use of prohibited performance-enhancing substances, the treatment of players who have used prohibited substances, and the deterrence and prevention of such use through random, no-notice testing up to twice per season for the substances designated on the out of competition list compiled by the World Anti-Doping Agency. In addition, the program provides for "reasonable cause" testing of players. Players who test positive will incur severe disciplinary penalties. A first positive test results in a suspension of 20 games, one quarter of the season, without pay. A second positive test results in a suspension of 60 games, three quarters of a season, without pay. And a third positive test results in a permanent suspension without pay. A player so suspended can apply for discretionary reinstatement after a minimum period of 2 years.

In the experience of the doctors who administer our program, the primary alleged benefit of steroid use, significant large muscle development, is not consistent with playing our sport at the highest levels. The bulkiness attributable to steroid use simply is not a desired characteristic of NHL players. To the extent there might be some limited usage of performance-enhancing substances in the NHL, we believe that our program will eradicate any such use.

For this reason the NHL does not see the need for the proposed legislation as it applies or relates to our sport. However, should Congress proceed along the lines contemplated by the legislation, we have set out our comments in my written statement and we are certainly prepared to cooperate.

I would like to briefly make the following points. We believe that minimal doping control standards, testing protocols, and processes should be established by the Director of the Office of National Drug Control Policy, in consultation with the National Institute on Drug Abuse, NIDA, which has particular expertise in addressing substance abuse, the United States Department of Transportation, which is one of the largest workplace-testing entities in the world, the United States Anti-Doping Agency, USADA, which has exper-

tise in the non-workplace testing area, to be specific, amateur competitions, and the subject sport's professional league. This process would provide the Director with the information, resources and practical experience necessary to develop an appropriate workplace, and this is a workplace, testing policy for each of the sports.

As pertaining to the NHL we'd ask the Committee to please bear in mind that we have certain unique issues. A third of our players come from outside of North America, 85 percent of our players come from outside the United States, so issues relating to which physicians need to be licensed by which jurisdiction, where testing might be legal or illegal in the off-season, therapeutic use exemptions, and testing labs are all things that we think need to be reconciled, particularly with Canada, as it relates to the fact that we play over 200 of our games there. And so with respect to off-season testing and the like, we think that indicates why a one-size-fits-all solution doesn't work. We believe that the USADA model of penalties of 2 years for a first test violation, and lifetime for a second violation are unduly harsh when applied in the context of the players in the NHL. Unlike International sports events, such as the World Championships and Olympics which are generally conducted on an annual or bi-annual or quadrennial basis, the NHL season consists of 82 regular season games, plus playoffs. Identical penalties in these two distinctly different environments would result in a disparate and unduly harsh impact on NHL players.

Finally, in the event this legislation is passed, we also recommend that players are provided in-person education and training on an annual basis regarding prohibited substances, the nature and application of the testing program and the penalties associated with violations.

The NHL believes the public is entitled to have confidence in the integrity of our sport and to be assured that our athletes are not using performance-enhancing drugs. Every professional athlete does serve as a role model and with that comes a corresponding responsibility.

Thank you for your attention to this important matter.

[The prepared statement of Mr. Bettman follows:]

PREPARED STATEMENT OF GARY BETTMAN, COMMISSIONER, NATIONAL HOCKEY LEAGUE

On behalf of the National Hockey League, and in response to the request of the Senate Committee on Commerce, Science, and Transportation (hereinafter the "Senate Committee"), this shall constitute my written statement regarding the NHL/National Hockey League Players' Association performance-enhancing Substances Program and S. 1114 and S. 1334. At the outset, I would like to express the NHL's appreciation for being afforded the opportunity to provide the Senate Committee with our comments regarding the proposed legislation. The NHL undertakes to cooperate in any way it can in the effort to eliminate the use of performance-enhancing drugs in professional and amateur athletics.

**NHL/NHLPA Agreement Regarding Future Testing for Performance-Enhancing Drugs "**

It is our conviction that, as a general matter, performance-enhancing drugs are not a pervasive problem in the NHL. Nevertheless, we believe that fans in particular, and the public at large, are entitled—and deserve—to have confidence that our games are being played in a steroid-free environment. Accordingly, the NHL and its Players' Association have recognized the need for a modernized drug testing and performance-enhancing substances control policy that is specifically directed to the prevention of the use of performance-enhancing drugs in our sport and, in con-

junction with the recently concluded Collective Bargaining Agreement between the NHL and the NHLPA, have established a jointly-administered performance-enhancing Substances Program (the “Program”).

The primary purposes of the Program include:

- the education of Players regarding the health risks posed by the use of prohibited performance-enhancing substances (“Prohibited Substances”);
- the treatment of Players who have used Prohibited Substances; and
- the deterrence and prevention of such use through education, random no-notice testing and the imposition of disciplinary penalties where appropriate.

(Attachment I—2005 CBA, Section 47.1) The CBA provides that the Program shall be jointly administered by a Program Committee comprised of representatives of the League and the NHLPA, and consulting expert doctors.<sup>1</sup> The responsibilities of the Program Committee include:

- (a) to establish a comprehensive educational program for Players on the dangers of Prohibited Substances and the nature of the Program;
- (b) to select, and contract with, an appropriate sample collecting authority;
- (c) to select, and contract with, an appropriate testing laboratory;
- (d) to review the WADA list of prohibited performance-enhancing substances and make recommendations to the NHL and NHLPA as to which performance-enhancing substances on the WADA list are relevant to the sport of hockey and should be deemed Prohibited Substances under the Program;
- (e) to develop Player and Club notification procedures for positive test results;
- (f) to oversee the administration of Player evaluation and treatment following positive test results; and
- (g) to establish standards for the administration of “reasonable cause” testing. (Attachment I—2005 CBA, Section 47.2)

Based on the recommendations of the Program Committee, the NHL and the NHLPA have agreed that NHL players will be subject to testing under the terms of the performance-enhancing Substances Program for the performance-enhancing drugs designated on the WADA out-of-competition list. It is our view that this list reflects those drugs that could theoretically affect the integrity of our competition, our paramount concern. A copy of the list of banned performance-enhancing substances is attached hereto. (Attachment II—Prohibited List) The Program provides for up to two (2) no-notice tests during the period from the start of Training Camp through the end of the Regular Season.<sup>2</sup> Positive tests for performance-enhancing substances will result in mandatory discipline as follows:

- (1) for the first positive test, a suspension of twenty (20) NHL Games without pay, and mandatory referral to the SABH for evaluation and possible treatment;
- (2) for the second positive test, a suspension of sixty (60) NHL Games without pay, and mandatory referral to the SABH program for evaluation and possible treatment;
- (3) for the third positive test, a “permanent” suspension without pay, although a Player so suspended may reapply for discretionary reinstatement after a minimum period of two (2) years by making an application to the Committee.

(Attachment I—2005 CBA, Section 47.7) The Program also provides an opportunity for a Player to challenge the imposition of any discipline in the event he is able to establish an applicable therapeutic use exemption, a testing error, mistaken use, or the use of a tainted supplement or other product (*i.e.*, where the Player could not have reasonably ascertained the presence of the Prohibited Substance). (Attachment I—2005 CBA, Section 47.8)

<sup>1</sup>The League and the NHLPA have retained Dr. Dave Lewis of Visions Residential Treatment Program, California, and Dr. Brian Shaw of Toronto Hospital and the Hospital for Sick Children, to serve on the Committee as consulting expert doctors. Drs. Lewis and Shaw have extensive experience in treating problems related to substance abuse, including among professional athletes, and have served as the NHL/NHLPA Substance Abuse and Behavioral Health (“Substance Abuse Program” or “SABH”) Program Doctors since the inception of the SABH Program in 1995.

<sup>2</sup>Given the relatively short time frame between the ratification of the new CBA and the start of the 2005/2006 NHL season, the NHL and the NHLPA have agreed that, with respect to the 2005/2006 season only, players will be subject to testing beginning on January 15, 2006, after the consulting expert doctors have provided all Players with an orientation session regarding the Program.

The Program incorporates a mandatory educational component which provides that the Players shall receive: education on Prohibited Substances and the nature of the Program each League Year during Training Camp, *provided, however*, that no testing shall take place and no discipline shall be imposed under the Program until the Committee has provided a Player with an orientation session regarding the Program, which shall include an in-person presentation on the Program and the distribution of informational materials describing all relevant aspects of the Program, including the list of Prohibited Substances, testing procedures and disciplinary penalties. Education and training on the details of the Program will also be provided to Club Athletic Trainers and Club physicians. Over time, and to the extent feasible, the Committee will endeavor to develop an “approved list” of nutritional supplements, which will have been tested and certified as being free of Prohibited Substances.

(Attachment I—2005 CBA, Section 47.4) This provision reflects the comprehensive nature of the Program, and the belief of the NHL and the NHLPA that education regarding the dangers of illegal substances (both performance-enhancing and otherwise) is, perhaps, the most effective tool in preventing use and abuse.

#### **NHL/NHLPA Substance Abuse and Behavioral Health Program**

Prior to the creation and implementation of the Program, the NHL and the NHLPA addressed problems of substance abuse (including abuse of performance-enhancing substances) through the NHL/NHLPA Substance Abuse Program (Attachment III),\* which was jointly developed and implemented in 1995 in conjunction with the parties’ prior collective bargaining agreement. The Substance Abuse Program was designed to be a “comprehensive effort to address substance abuse among NHL players and their families, to treat those with a substance abuse problem in a confidential, fair and effective way, and to deter such abuse in the future.” (Attachment III, SABH Program Section 1) In order to accomplish these goals, the Substance Abuse Program incorporates education, counseling, inpatient and outpatient treatment, follow-up care, and where appropriate, punitive sanctions, up to and including permanent suspension from play in the League. On a going-forward basis, those players who are found to be using performance-enhancing substances will be subject to mandatory discipline as outlined above under the performance-enhancing Substances Program, and will also be referred to the Substance Abuse Program for evaluation and treatment.

Historically, the players who have been treated under the Substance Abuse Program have exhibited problems associated with alcohol and/or “recreational” drug use, rather than steroid (or steroid precursor) use. The experience of our Substance Abuse Program in this regard is not surprising when one considers that primary of the alleged benefits of steroid use—significant large muscle development—is not consistent with playing hockey at the highest levels of the sport, and the resulting bulkiness attributable to steroid use simply is not a desired characteristic of skilled NHL players.<sup>3</sup> Nevertheless, in the event NHL players were to exhibit symptoms associated with abuse of performance-enhancing drugs, the Substance Abuse Program was broad enough in scope to provide treatment (and if appropriate, discipline) for such players and the Substance Abuse Program Doctors were empowered to intervene in any manner they felt was appropriate.

#### **Drug Testing of NHL Players in International Hockey Competitions**

The frequent and consistent participation of NHL players in international competitions, and the drug testing NHL players undergo in connection therewith, provide objective support for our belief that the use of performance-enhancing drugs by NHL players is negligible, to the extent it exists at all.<sup>4</sup> Over the past ten years, NHL players have represented their nations of origin annually in connection with the IIHF World Championships, twice in Olympic competitions in 1998 and 2002, and just this past year in the 2004 World Cup of Hockey, which the NHL and the

\*The information referred to has been retained in Committee files.

<sup>3</sup>Our belief that steroid use is not desired by or prevalent among skilled hockey players is seemingly confirmed by the fact that there have been only eight positive results in approximately 3,100 tests of NHL and non-NHL players administered at the World Hockey Championships (conducted by the International Ice Hockey Federation (“IIHF”)) since 1993/94.

<sup>4</sup>We are aware of recent statements by Dave Morissette and Andrew Peters regarding their use of performance-enhancing drugs, but for the reasons set forth above, do not believe that their experiences are representative of the vast majority of NHL players. Indeed, Dave Morissette played in only 11 NHL games in his career. We further note that Mr. Peters’ assertion that he stopped taking andro after the U.S. Department of Health and Human Services issued a report about the health risks associated with taking the substance provides further support for our assertion that it is essential to provide training and education on the dangers of performance-enhancing drugs.

NHLPA organized and sponsored. In connection with international play, the NHL and its players are held to and abide by the international standards of the World Anti-Doping Agency (“WADA”), which have been adopted by the IIHF.

In the past ten years, of the nearly 1,000 NHL players who have participated in the IIHF World Championships, the Olympics, and the World Cup of Hockey competitions, and were subject to drug testing in connection therewith, we are aware of only three positive tests for performance-enhancing drugs.<sup>5</sup> And of the three, one of the players tested positive for salbutamol, a drug that is also used for asthma as a Proventil inhaler, and which may be used with a Therapeutic Use Exemption. A second player tested positive for tramadol, a substance which is designated as an “allowed narcotic” (*i.e.*, a prescribed painkiller). The third player established a “mistaken use” defense in connection with his use of over-the-counter nutritional supplements.

#### **S. 1114, The Clean Sports Act of 2005**

The National Hockey League has reviewed the proposed Clean Sports Act of 2005 and, as stated above, is supportive of a program featuring mandatory testing and discipline imposed in connection with an athlete’s use of performance-enhancing drugs. The NHL remains of the belief that, given the mandatory and effective Program agreed to by the NHL and the NHLPA, which has been designed to eradicate the use of all performance-enhancing drugs from our game, we do not see a need for the proposed legislation as it would relate to the NHL. However, should Congress decide to proceed in this area and legislate along the lines that this proposed legislation contemplates, the NHL’s specific comments regarding the provisions of the proposed legislation are as follows:

- The proposed legislation provides that professional sports leagues shall be subject to the minimum doping control standards established by the United States Anti-Doping Agency Protocol (“USADA”) for Olympic Movement Testing, and shall consult with USADA in the development of its test distribution plan, its drug testing protocols, and its adjudication process. We believe that the Director of the Office of National Drug Control Policy shall be responsible for establishing minimum doping control standards for each sport, as well as test distribution plans, testing protocols and adjudication procedures, and that the Director shall establish the foregoing after consultation with: (1) the National Institute on Drug Abuse (“NIDA”), which has particular expertise in addressing substance abuse; (2) the United States Department of Transportation, which is one of the largest workplace-testing entities in the world; (3) USADA, which has expertise in the non-workplace testing arena of amateur competitions; and (4) the subject professional sports league. We believe that the foregoing entities together would provide the Director with the information, resources, and practical experience necessary to develop an appropriate workplace testing policy and procedure applicable to the employees (*i.e.*, the players) for each professional sport. We do not believe it is appropriate for the standards set by USADA to set a floor for the minimum requirements applicable for the professional sports leagues, by default. (*See* Section 4(b)) We believe that the foregoing process shall also apply in the context of the annual certifications outlined in Sections 4(b)(2) and 4(b)(3).
- Section 4(b)(1)(A) of the proposed legislation provides for “each professional athlete [to be] tested a minimum of 5 times each calendar year that such athlete is competing in games organized by the major professional league.” Section 4(b)(1)(B) provides that each athlete shall be tested “(i) at least 3 times, each with no advance notice, during each season of play; and (ii) at least 2 times, each with no advance notice, during the off-season.” The National Hockey League plays its games in two different countries and features athletes hailing from twenty-two countries around the globe. One-third of NHL players are from outside of North America and eighty-five percent are from outside the United States. For this reason, and giving appropriate consideration to the fact that the NHL does not have a pervasive problem with its players using performance-enhancing substances, in-season testing makes particular sense. While we do not

<sup>5</sup> In connection with international competitions in which NHL players have participated over the past ten years, the Program Doctors along with the USOC administered the pre-competition drug testing for the Olympics, and the IOC administered the in-competition testing. The Program Doctors administered the out-of-competition and in-competition testing for the World Cup of Hockey. The IIHF administered the in-competition testing for the World Championships. With respect to the tests administered by the IIHF, the IOC and the USOC, it is our understanding that no NHL player had a positive test result for performance-enhancing drugs; however, we do not have access to specific data or testing results.

object to subjecting NHL players to random no-notice testing during the off-season, we would not advocate that it be mandatory for sports leagues in general, and the NHL in particular, to conduct off-season testing given the logistical difficulties that would arise in connection with testing players scattered throughout the world. The standard adopted by the NHL and the NHLPA, requiring up to two (2) in-season tests, was designed to insure the effectiveness of the Program while recognizing the realities of professional hockey. In the event legislation is passed requiring more than two tests per calendar year, we would advocate that there be no more than four tests required annually, and that it be permissible to evenly distribute such tests once per calendar quarter.

- Section 4(b)(4) provides that “a major professional league may make exceptions for any prohibited substances that have been properly prescribed by a doctor of medicine licensed in the United States for legitimate and documented therapeutic purposes.” We would recommend that this provision be clarified to provide that the exception may be granted retroactively by a medical review officer, after a player has tested positive for a banned substance in the event an investigation reveals that the substance was properly prescribed for a legitimate and documented therapeutic purpose. In addition, the fact that there are six (6) Canadian-based NHL teams would necessitate that Canadian licensed physicians also be authorized to prescribe medications qualifying for a therapeutic use exemption.<sup>6</sup>
- Section 4(b)(5) provides for the samples to be analyzed by a laboratory approved by USADA. We would recommend that Canadian-based laboratories approved by the World Anti-Doping Agency (“WADA”) also be authorized to analyze the samples.
- Section 4(b)(6) provides that a “refusal by a professional athlete to submit to a test or a failure of a professional athlete to submit to a test without compelling justification shall also be considered a positive test.” If the requirement regarding mandatory offseason testing is maintained, we would recommend that the legislation address the testing of players in foreign countries (of course, any such testing, if allowed at all, would need to be performed in accordance with applicable laws in the local jurisdiction), or alternatively, recognize as a compelling justification the absence of a player from the United States at the time of a requested test, thus recognizing the international makeup of NHL players and the fact that many such players return to their native countries during the off-season.
- Section 4(b)(7) of the proposed legislation provides for a minimum suspension of two (2) years for an athlete who tests positive for their first violation, and for the “lifetime ban of the professional athlete from all major professional leagues” for an athlete who commits a second violation. The NHL agrees that a player who tests positive for performance-enhancing drugs should be subject to a significant punishment, and further agrees that progressive discipline should be imposed for a player who tests positive more than once. We believe that the USADA model penalties are unduly harsh when applied in the context of professional hockey players in the National Hockey League. The proposed legislation incorporates a significant and meaningful penalty of a two-year ban for a first-time offender in the context of international “amateur” competitions that take place relatively infrequently, as compared to NHL games. In the international sports environment, events are generally conducted on an annual, bi-annual or quadrennial basis (*e.g.*, Olympics, World Championships), while in the NHL, there are 82 regular season games each season in addition to playoff games for eligible clubs. Imposition of identical penalties in these two distinct environments would result in a disparate, and in our opinion, unduly harsh impact on NHL players. Further, given the limited career length of a professional athlete, we believe a two (2) year suspension for a first-time offender is too harsh, resulting in an excessive impact on the athlete’s ability to earn a “livelihood.”
- Section 4(b)(9) of the proposed legislation provides that a positive test shall result in the public disclosure of the “identity of any professional player who has tested positive as well as the prohibited substance or prohibited method for which he tested positive not later than 30 days after receiving the test results.” The NHL agrees that it would be appropriate to publicly disclose the name of

<sup>6</sup>Canadian NHL team physicians also may treat and prescribe medications to visiting teams’ players—including United States-based teams—who suffer an injury while playing in one of the 246 NHL games played in Canada.

an athlete who has tested positive for the use of a performance-enhancing drug, but believe that prior to such disclosure—and even in the event an appeal is not filed—it would be prudent to implement a process that would require a medical review officer to contact the player who tested positive to determine whether there is an legitimate medical explanation<sup>7</sup> for the player’s use of the banned substance. If so, and the player has a proper medical prescription authorizing the use of the substance, the positive test results should be considered cancelled, penalties should not be imposed, and no public disclosure of the test result should be made. If, however, a legitimate medical explanation for the player’s use of the banned substance does not exist, it would then be appropriate to make the positive test results public and impose discipline, in addition to providing counseling and treatment.

- Section 6 of the proposed legislation provides that the Commission may seek a civil penalty of not more than \$1,000,000 for each violation of section 4. We would advocate that any such penalty be assessed to the parties administering the collective bargaining relationship.
- In the event legislation is passed regarding performance-enhancing substances, we would recommend that such legislation include an obligation on the professional sports leagues to provide in-person education and training to its players on an annual basis regarding prohibited substances and the nature of the applicable testing program, including the penalties associated with violations of the program.

#### **S. 1334, Professional Sports Integrity and Accountability Act**

To the extent S. 1334 has provisions identical to S. 1114, the NHL’s comments regarding the proposed legislation are set forth above. The NHL’s specific comments regarding the provisions of S. 1334 that are materially different from S. 1114 are as follows:

- Section 5(d)(1) of the proposed legislation provides for “each professional athlete [to be] tested for the use of prohibited substances and methods no less than 3 times in each calendar year that the athlete competes in a professional sports league.” Section 5(d) further provides for tests to be conducted “at random intervals throughout the entire calendar year . . . .” As stated above, in-season testing makes particular sense for the NHL. The proposed legislation seems to permit such testing to occur at random intervals in each “third” of the calendar year, thus effectively addressing the impracticalities associated with off-season testing of non-North American based NHL players. We would recommend that each team’s entire roster of players be tested at the same time during the NHL season on a no-notice basis.
- Section 5(e) of the proposed legislation provides that a professional sports league shall publicly disclose the name of any violator, the penalty imposed, and a description of the violation “not later than 10 days after receiving notice of a violation . . . .” As stated above, it is our view that public disclosure would not be appropriate until after a medical review officer has contacted the player who tested positive to determine whether there is a legitimate medical explanation for the player’s use of the banned substance, and any appeal process has been fully adjudicated.

The public is entitled to have confidence in the integrity of competition in the game of hockey and in all professional sports, and to watch the exceptional athletes of today compete on a level playing field, free of the influence of performance-enhancing drugs. Every professional athlete serves as a role model, and with that comes a corresponding responsibility to engage exclusively in conduct that will bring honor to himself, his team, and the game in which he earns his livelihood. For these reasons, we support the requirement that the NHL and the other professional sports leagues conduct mandatory testing on athletes for performance-enhancing drugs.

#### **ATTACHMENT I—ARTICLE 47—PERFORMANCE-ENHANCING SUBSTANCES PROGRAM**

**47.1 Introduction.** The parties agree to the establishment of a jointly-administered performance-enhancing Substances Program (“Program”), which shall have as its primary purposes the education of Players regarding the health risks posed by the use of prohibited performance-enhancing substances (“Prohibited Substances”); the

<sup>7</sup>See 49 CFR § 40.137 (2003) (Department of Transportation Procedures for Transportation Workplace Drug Testing Programs).

treatment of Players who have used Prohibited Substances; and the deterrence and prevention of such use through education, random no-notice testing and the imposition of disciplinary penalties where appropriate.

*47.2 Program Committee.* The Program shall be jointly administered by a Program Committee (“Committee”) comprised of an equal number of League and NHLPA representatives and one (1) consulting expert doctor nominated by each party. The responsibilities of the Committee shall include, among other things:

- (a) to establish a comprehensive educational program for Players on the dangers of Prohibited Substances and the nature of the Program;
- (b) to select, and contract with, an appropriate sample collecting authority;
- (c) to select, and contract with, an appropriate testing laboratory;
- (d) to review the WADA list of prohibited performance-enhancing substances and make recommendations to the NHL and NHLPA as to which performance-enhancing substances on the WADA list are relevant to the sport of hockey and should be deemed Prohibited Substances under the Program;
- (e) to develop Player and Club notification procedures for positive test results;
- (f) to oversee the administration of Player evaluation and treatment following positive test results; and
- (g) to establish standards for the administration of “reasonable cause” testing.

The Committee shall endeavor to render unanimous decisions with respect to matters committed to it pursuant to this Article. In the absence of a unanimous decision, a decision by the majority of Committee members shall govern. When a majority decision cannot be reached, the two (2) consulting expert doctors shall select an *ad hoc* expert doctor who shall cast the deciding vote with respect to the matter at issue.

*47.3 Scope of Program.* The Program shall be limited to addressing the testing for and use of prohibited performance-enhancing substances (Prohibited Substances). All other forms of “substance abuse” and behavioral and domestic issues requiring employee assistance will continue to be handled through the NHL/NHLPA Program for Substance Abuse and Behavioral Health (the “SABH Program”).

*47.4 Educational Initiatives.* Players shall receive education on Prohibited Substances and the nature of the Program each League Year during Training Camp, *provided, however,* that no testing shall take place and no discipline shall be imposed under the Program until the Committee has provided a Player with an orientation session regarding the Program, which shall include an in-person presentation on the Program and the distribution of informational materials describing all relevant aspects of the Program, including the list of Prohibited Substances, testing procedures and disciplinary penalties. Education and training on the details of the Program will also be provided to Club Athletic Trainers and Club physicians. Over time, and to the extent feasible, the Committee will endeavor to develop an “approved list” of nutritional supplements, which will have been tested and certified as being free of Prohibited Substances.

*47.5 Prohibited Substances.* The NHL and the NHLPA shall be responsible for maintaining the list of Prohibited Substances (the “Prohibited Substances List”). Upon receiving the Committee’s recommendations made pursuant to Section 47.2(d) above, the parties shall confer and agree upon the Prohibited Substances to be included on the List. Changes to substances on the List may only be as negotiated by the NHL and the NHLPA. There shall be no retesting of samples based on newly discovered substances not included on the Prohibited Substances List at the time of the original testing.

*47.6 Testing Procedures.* Every NHL Player who has participated in an orientation session pursuant to Section 47.4 will be subject to up to two (2) no-notice tests during the period from the start of Training Camp through the end of the Regular Season. All such tests will be conducted at the Clubs’ facility on the day of a scheduled practice, as opposed to on a game day.

*47.7 Disciplinary Penalties.* Positive tests for performance-enhancing substances will result in mandatory discipline as follows:

- (a) for the first positive test, a suspension of twenty (20) NHL Games without pay, and mandatory referral to the SABH Program for evaluation and possible treatment;
- (b) for the second positive test, a suspension of sixty (60) NHL Games without pay, and mandatory referral to the SABH Program for evaluation and possible treatment;

(c) for the third positive test, a “permanent” suspension without pay, although a Player so suspended can reapply for discretionary reinstatement after a minimum period of two (2) years by making an application to the Committee.

**47.8 Appeal Procedures.** The NHLPA may, on a Player’s behalf, appeal a positive test to the Impartial Arbitrator on an expedited basis, utilizing the procedures set forth in Article 17 of the Agreement. A strict liability standard will be employed with respect to all positive tests. Notwithstanding the above, the Player shall be entitled to challenge the imposition of any discipline in the event he is able to establish an applicable therapeutic use exemption (as described in Section 47.9 hereof), a testing error, mistaken use, or the use of a tainted supplement or other product (*i.e.*, where the Player could not have reasonably ascertained the presence of the Prohibited Substance). To the extent a Player successfully establishes a defense to a positive test, he may avoid the mandatory suspension, but will in all cases be referred to the SABH Program for evaluation and possible treatment. A Player who files a timely appeal may not be suspended pursuant to Section 47.7 until a decision on the appeal has been rendered by the Impartial Arbitrator.

**47.9 Therapeutic Use Exemption.** A Player may apply to the Committee for a therapeutic use exemption with respect to a particular Prohibited Substance. The Committee shall consider and act upon such Player’s application expeditiously and approval of the application shall not be unreasonably withheld.

**47.10 Confidentiality.** Test results will be kept confidential, subject to the following limited exception: once a positive test has been confirmed after appeal to the Impartial Arbitrator, or if no appeal is taken, the Player suspended will be identified, and it will be announced that the Player “has been suspended for violating the terms of the NHL/NHLPA Program for performance-enhancing Substances.”

**47.11 Program Funding.** Any salary forfeited by a Player by reason of a suspension imposed pursuant to Section 47.7 will be utilized to help defer the costs of both the Program and the SABH Program. All costs of administering the Program, including the costs associated with mandatory no-notice testing, shall be the responsibility of the NHL.

**47.12 Mandatory Legislation.** The parties agree that to the extent mandatory and binding legislation goes into effect that requires material changes to the Program, the provisions of the Program will become null and void and the parties will endeavor to collectively bargain over a revised Program that complies with such legislation and that is agreeable to both parties.

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ATTACHMENT II—THE 2005 PROHIBITED LIST—WORLD ANTI-DOPING CODE (VALID 1 JANUARY 2005)

The Use of Any Drug Should be Limited To Medically Justified Indications

**Prohibited Substances**

**S1. Anabolic Agents**

Anabolic agents are prohibited.

**1. Anabolic Androgenic Steroids (AAS)**

a. Exogenous\* AAS, including:

18 $\alpha$ -homo-17 $\beta$ -hydroxyestr-4-en-3-one; bolasterone; boldenone; boldione; calusterone; clostebol; danazol; dehydrochloromethyl-testosterone; delta1-androstene-3,17-dione; delta1-androstenediol; delta1-dihydro-testosterone; drostanolone; ethylestrenol; fluoxymesterone; formebolone; furazabol; gestrinone; 4-hydroxytestosterone; 4-hydroxy-19-nortestosterone; mestanolone; mesterolone; metenolone; methandienone; methandriol; methyldienolone; methyltrienolone; methyltestosterone; mibolerone; nandrolone; 19-norandrostenediol; 19-norandrostenedione; norbolethone; norclostebol; norethandrolone; oxabolone; oxandrolone; oxymesterone; oxymetholone; quinbolone; stanozolol; stenbolone; tetrahydrogestrinone; trenbolone and other substances with a similar chemical structure or similar biological effect(s).

b. Endogenous\*\* AAS:

androstenediol (androst-5-ene-3 $\beta$ ,17 $\beta$ -diol); androstenedione (androst-4-ene-3,17-dione); dehydroepiandrosterone (DHEA); dihydrotestosterone; testosterone.

and the following metabolites and isomers:

5 $\alpha$ -androstane-3 $\alpha$ ,17 $\alpha$ -diol; 5 $\alpha$ -androstane-3 $\alpha$ ,17 $\beta$ -diol; 5 $\alpha$ -androstane-3 $\beta$ ,17 $\alpha$ -diol; 5 $\alpha$ -androstane-3 $\beta$ ,17 $\beta$ -diol; androst-4-ene-3 $\alpha$ ,17 $\alpha$ -diol; androst-4-ene-3 $\beta$ ,17 $\alpha$ -diol; androst-4-ene-3 $\beta$ ,17 $\beta$ -diol; androst-5-ene-3 $\alpha$ ,17 $\alpha$ -diol; androst-5-ene-3 $\alpha$ ,17 $\beta$ -diol; androst-5-ene-3 $\beta$ ,17 $\alpha$ -diol; 4-androstenediol (androst-4-ene-3 $\beta$ ,17 $\beta$ -diol); 5-androstenedione (androst-5-ene-3,17-dione); epi-dihydrotestosterone; 3 $\alpha$ -hydroxy-5 $\alpha$ -

androstan-17-one; 3 $\beta$ -hydroxy-5 $\alpha$ -androstan-17-one; 19-norandrosterone; 19-noretiocholanolone.

Where a Prohibited Substance (as listed above) is capable of being produced by the body naturally, a Sample will be deemed to contain such Prohibited Substance where the concentration of the Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. A Sample shall not be deemed to contain a Prohibited Substance in any such case where the Athlete proves by evidence that the concentration of the Prohibited Substance or its metabolites or markers and/or the relevant ratio(s) in the Athlete's Sample is attributable to a physiological or pathological condition. In all cases, and at any concentration, the laboratory will report an Adverse Analytical Finding if, based on any reliable analytical method, it can show that the Prohibited Substance is of exogenous origin.

If the laboratory result is not conclusive and no concentration as referred to in the above paragraph is found, the relevant Anti-Doping Organization shall conduct a further investigation if there are serious indications, such as a comparison to reference steroid profiles, for a possible Use of a Prohibited Substance.

If the laboratory has reported the presence of a T/E ratio greater than four (4) to one (1) in the urine, further investigation is obligatory in order to determine whether the ratio is due to a physiological or pathological condition, except if the laboratory reports an Adverse Analytical Finding based on any reliable analytical method, showing that the Prohibited Substance is of exogenous origin.

In case of an investigation, it will include a review of any previous and/or subsequent tests. If previous tests are not available, the Athlete shall be tested unannounced at least three times within a three month period.

Should an Athlete fail to cooperate in the investigations, the Athlete's Sample shall be deemed to contain a Prohibited Substance.

2. Other Anabolic Agents, Including but not Limited to: Clenbuterol, Zeranol, Zilpaterol.

For purposes of this section:

\*"exogenous" refers to a substance which is not capable of being produced by the body naturally.

\*\*"endogenous" refers to a substance which is capable of being produced by the body naturally.

### *S2. Hormones and Related Substances*

The following substances, including other substances with a similar chemical structure or similar biological effect(s), and their releasing factors, are prohibited:

1. Erythropoietin (EPO);
2. Growth Hormone (hGH), Insulin-like Growth Factor (IGF-1), Mechano Growth Factors (MGFs);
3. Gonadotrophins (LH, hCG);
4. Insulin;
5. Corticotrophins.

Unless the Athlete can demonstrate that the concentration was due to a physiological or pathological condition, a Sample will be deemed to contain a Prohibited Substance (as listed above) where the concentration of the Prohibited Substance or its metabolites and/or relevant ratios or markers in the Athlete's Sample so exceeds the range of values normally found in humans so that it is unlikely to be consistent with normal endogenous production.

The presence of other substances with a similar chemical structure or similar biological effect(s), diagnostic marker(s) or releasing factors of a hormone listed above or of any other finding which indicate(s) that the substance detected is of exogenous origin, will be reported as an Adverse Analytical Finding.

### *S3. Beta-2 Agonists*

All beta-2 agonists including their D- and L-isomers are prohibited. Their use requires a Therapeutic Use Exemption.

As an exception, formoterol, salbutamol, salmeterol and terbutaline, when administered by inhalation to prevent and/or treat asthma and exercise-induced asthma/broncho-constriction require an abbreviated Therapeutic Use Exemption.

Despite the granting of a Therapeutic Use Exemption, when the Laboratory has reported a concentration of salbutamol (free plus glucuronide) greater than 1000 ng/mL, this will be considered as an Adverse Analytical Finding unless the athlete

proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol.

*S4. Agents With Anti-Estrogenic Activity*

The following classes of anti-estrogenic substances are prohibited:

1. Aromatase inhibitors including, but not limited to, anastrozole, letrozole, aminoglutethimide, exemestane, formestane, testolactone.
2. Selective Estrogen Receptor Modulators (SERMs) including, but not limited to, raloxifene, tamoxifen, toremifene.
3. Other anti-estrogenic substances including, but not limited to, clomiphene, cyclofenil, fulvestrant.

*S5. Diuretics and Other Masking Agents*

Diuretics and other masking agents are prohibited. Masking agents include but are not limited to: Diuretics\*, epitestosterone, probenecid, alpha-reductase inhibitors (e.g. finasteride, dutasteride), plasma expanders (e.g. albumin, dextran, hydroxyethyl starch).

Diuretics include: acetazolamide, amiloride, bumetanide, canrenone, chlortalidone, etacrynic acid, furosemide, indapamide, metolazone, spironolactone, thiazides (e.g. bendroflumethiazide, chlorothiazide, hydrochlorothiazide), triamterene, and other substances with a similar chemical structure or similar biological effect(s).

\*A Therapeutic Use Exemption is not valid if an Athlete's urine contains a diuretic in association with threshold or sub-threshold levels of a Prohibited Substance(s).

**Prohibited Methods**

*M1. Enhancement of Oxygen Transfer*

The following are prohibited:

- a. Blood doping, including the use of autologous, homologous or heterologous blood or red blood cell products of any origin, other than for medical treatment.
- b. Artificially enhancing the uptake, transport or delivery of oxygen, including but not limited to perfluorochemicals, efaproxiral (RSR13) and modified haemoglobin products (e.g. haemoglobin-based blood substitutes, microencapsulated haemoglobin products).

*M2. Chemical and Physical Manipulation*

The following is prohibited:

Tampering, or attempting to tamper, in order to alter the integrity and validity of Samples collected in Doping Controls.

These include but are not limited to intravenous infusions\*, catheterisation, and urine substitution.

\*Except as a legitimate acute medical treatment, intravenous infusions are prohibited.

*M3. Gene Doping*

The non-therapeutic use of cells, genes, genetic elements, or of the modulation of gene expression, having the capacity to enhance athletic performance, is prohibited.

Senator McCAIN. Thank you.  
Mr. Saskin.

**STATEMENT OF TED SASKIN, EXECUTIVE DIRECTOR,  
NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION**

Mr. SASKIN. Mr. Chairman, and Committee Members. I want to at the outset, clearly and emphatically state to this Committee that the NHLPA membership and officials in our organization, including myself, are strongly opposed to the use of performance-enhancing substances by anyone in our sport. There are three main reasons for this position. First, the NHLPA is keenly concerned with protecting its members personal health. Second, NHLPA members want to protect the competitive integrity and fairness of their

sport. And third, because NHLPA members are seen by young aspiring hockey players and fans around the world as important role models, they want to leave no doubt about their opposition to performance-enhancing substances.

To further the Committee goal today to obtain information through testimony in an efficient manner, I will avoid further describing details of our new program. It has been adequately explained by Commissioner Bettman, I support everything he has said in describing our program.

I would, however, refer you to our written submissions which have some additional background on that. However, I think it would be appropriate to make just a few comments on your proposed legislation, because—and this is given with the greatest of respect to the good intentions behind the legislation, it is an area in our view that is best left for individual sports leagues and players associations to address as we have recently done through our collective bargaining process, particularly so that the specific and different circumstances of each sport can be taken into account.

There are a number of points I've detailed in my written submission from how to address frequency of testing when over 85 percent of our members are not American citizens and how that relates to off-season testing. There are other points with respect to the actual list of prohibited substances, the WADA code, which we've had much experience with when we participate in the Olympics, has specific provisions for hockey, and you have to look at what is particular to hockey, which our program doctors have recently done in developing our program.

On the therapeutic use exemptions, there is a reference to American doctors being the ones who have to provide those use exceptions. With six clubs in Canada, and Canadian doctors, allowances would have to be made so that Canadian doctors properly registered medical practitioners could provide those therapeutic use exemptions for Canadian players.

In short, the one-size-fits-all aspect of the legislation would be very problematic for hockey with the international nature and constitution of our membership.

Those are my comments, thank you.

[The prepared statement of Mr. Saskin follows:]

PREPARED STATEMENT OF TED SASKIN, EXECUTIVE DIRECTOR, NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION

Mr. Chairman and Members of the Committee:

My name is Ted Saskin and I serve as the Executive Director and General Counsel of the National Hockey League Players' Association (NHLPA). I appreciate the opportunity to provide this Committee with our perspective on the proposed S. 1114 Clean Sports Act of 2005 (S. 1114) and S. 1334 Professional Sports Integrity and Accountability Act (S. 1334).

Given that this is my first opportunity to appear before your Committee, I thought it would be useful for me to spend a few minutes providing some background on how we have addressed substance abuse and the use of steroids and other performance-enhancing drugs in our sport. I will then provide my comments on your proposed legislation.

However, before I address those two matters I want to clearly and emphatically state to the Committee that the NHLPA membership, and officials in our organization including myself, are strongly opposed to the use of performance-enhancing substances by anyone in our sport. There are three main reasons for this position. First, the NHLPA is keenly concerned with protecting its members' personal health. Sec-

ond, NHLPA members want to protect the competitive integrity and fairness of their sport. Third, because NHLPA members are seen by young aspiring hockey players and fans around the world as important role models, they want to leave no doubt about their opposition to performance-enhancing substances.

#### **NHLPA/NHL Performance-Enhancing Substances Program**

The strong commitment of the NHLPA membership to keep hockey free of performance-enhancing substances is best evidenced by the testing program that was recently adopted as part of the new Collective Bargaining Agreement (CBA) between the NHLPA and the National Hockey League (NHL). The performance-enhancing Substances Program (the Program), which went into effect with the execution of the CBA on July 15, 2005, is the first attempt to deal specifically with the issue of performance-enhancing substances through a system of testing and discipline. It is my firm belief that when this Program is fully developed and operational, it will serve as an effective deterrent to the use of performance-enhancing substances. The Program features a comprehensive educational component, the prohibition of substances that would actually enhance performance in the sport of hockey and strong sanctions designed to rid the sport of these substances. We believe that by tailoring the Program to the specific circumstances of professional hockey, including the unique realities of playing in the NHL and the international nature of the sport, we have significantly enhanced the Program's effectiveness.

To further the Committee's goal today to obtain information through testimony in an efficient manner I will avoid further describing details of the Program's purposes, design and operation. Instead I will refer you to the NHL's submission on the Program because I understand that information to be accurate.

#### **NHLPA/NHL Substance Abuse and Behavioural Health Program**

While the Program represents a dramatic and important new step in dealing with performance-enhancing substances, it should be noted that the NHLPA and the NHL have a long-standing commitment to addressing the issues of substance abuse and the use of performance-enhancing substances. In 1995, in conjunction with the negotiation of our previous CBA, the NHLPA and NHL jointly implemented the "NHL/NHLPA Substance Abuse and Behavioral Health Program (SABH Program). The SABH Program was broadly designed to address any potential substance abuse among NHL players and their families and to treat those problems in a confidential, fair and effective way. The SABH Program incorporates education, counseling, inpatient and outpatient treatment and testing, follow-up care and, where appropriate, punitive sanctions, up to and including permanent suspension from play.

Our SABH Program has worked very well for the purposes it was designed for. Both the NHLPA and NHL have been pleased with its operation and results. However, over the past 10 years, and particularly in recent years, the issue of performance-enhancing drugs in sport has become more prominent. In response to this change, our SABH Program Doctors developed and presented educational materials to the players specifically highlighting the dangers of steroid use in at least 4 of the last 7 years. Our SABH Program Doctors have confirmed to us that there is virtually no steroid use in hockey, which is not surprising when one considers that the alleged benefits of such steroid use (enhanced bulk muscle mass) do not benefit elite hockey players.

The purported benefits of steroid use are simply not applicable to skilled NHL players. This viewpoint is strongly supported by the fact that we are not aware of a single instance over the last 10 years in which an NHL player has tested positive for performance-enhancing drugs during any of the many International Ice Hockey competitions our players have participated in where there has been mandatory testing.

Specifically, in the past 10 years, hundreds of NHL players have participated in the International Ice Hockey Federation World Championships, the 1998 and 2002 Olympics and the 2004 World Cup of Hockey Competition. These NHL players were subject to the drug testing protocols in connection with their participation in these events. These protocols utilized a substance list and testing procedures equivalent to the current WADA Code. We are aware of only 3 positive tests for performance-enhancing drugs. Of these 3, one of the players tested positive for Salbutamol, a drug that was being used for asthma as a Proventil inhaler and may be used with a therapeutic use exemption. A second player tested positive for Tramadol, a substance which is designated as an "allowed narcotic." The third player established a "mistaken use defense" in connection with his use of over the counter nutritional supplements.

In short, we have been fortunate to have no issue to date with the use of performance-enhancing drugs by elite hockey players. Having said that, I can give this

Committee my complete assurance that our new Program is designed to prevent the use of performance-enhancing substances by any Players, however rare and isolated those cases may be. We fully recognize the importance of an effective Program. The players I represent see no place for the use of performance-enhancing substances in our sport and are sensitive to their position as role models to many aspiring hockey players and fans around the world.

**Comments on S. 1114, The Clean Sports Act of 2005 and S. 1334, The Professional Sports Integrity and Accountability Act**

My initial comment, which is given with the greatest of respect to the good intentions behind the proposed legislation, is that this is an area that is best left for the individual sports leagues and player associations to address through collective bargaining so that the specific and different circumstances of each sport can be taken into account. We believe that the recently adopted NHLPA/NHL Program offers strong support for the proposition that collective bargaining is the appropriate avenue for producing effective and workable programs in professional sports.

Now, with respect to the specifics of the proposed legislation, I would make the following comments:

*Frequency of testing.* Consistent with the NHL/NHLPA Program, both S. 1114 and S. 1334 provide for random, no-notice testing. With respect to testing frequency, Section 4(b)(1)(A) of S. 1114 mandates 5 tests in each calendar year that a player competes and Section 5(d)(1)(A) of S. 1334 mandates 3 such tests. These requirements would not be practicable in our sport given the unique nature of hockey and the way Players pass in and out of the League over the course of a season. For example, during the 2003–04 season there were 1,433 Players under contract to an NHL Club, but only 1,105 actually competed in an NHL game. Of these Players, 32 played in only one game, 145 played in 5 or less games and 205 played in 10 or less games. These numbers reflect the reality that Players under NHL contract may spend the entire season in the Minor Leagues, play only a handful of NHL games or come up to play in a single game as a fill-in before flying right back to the Minor League club the next day. It is difficult to see how a program mandating three to five tests for such Players could be implemented. It is with this reality in mind that the NHLPA and NHL adopted a more flexible policy on frequency of testing—a policy that will allow regular NHL Players to be tested with sufficient frequency to ensure the effectiveness of the Program.

*Timing of testing.* With respect to timing, both pieces of proposed legislation mandate testing during the off-season, with Section 4(b)(1)(B)(ii) of S. 1114 requiring at least 2 such tests. Once again, the reality of NHL hockey would render these requirements unworkable. More than four fifths of NHL Players are from outside the United States and many of these Players return to their home countries in the off-season, making year-round testing impracticable. In addition, we believe that timing parameters should take into account the scheduling difficulties faced by Players and Clubs. For example, it can often times take several hours to provide a urine sample after a player has become dehydrated following completion of a hockey game. Travel requirements to upcoming games will often require that players leave an arena within one hour of completing a game to board a flight to their next city. The newly adopted NHLPA/NHL Program prohibits game day testing in recognition of these hockey-specific challenges.

*Prohibited substances.* Section 4(b) of S. 1114 and Section 5(b) of S. 1334 specify that the list of prohibited substances should be equivalent to the list established by the United States Anti Doping Agency (USADA). It is our view that the list of substances prohibited in the NHL should be developed on a basis that is relevant to the particular sport and not simply by adopting the list formulated by USADA or the World Anti Doping Agency (WADA) for Olympic competitions. Some of the substances prohibited on the USADA/WADA lists are not performance-enhancing and should not be included as part of any testing regimen governing hockey players.

*Penalties.* Section 4(b)(7)(A)(i) of S. 1114 and Section (5)(e)(1)(A) of S. 1334 contemplate a minimum 2 year suspension for a first offense. We believe that 2 years is an unreasonably long punishment for a professional hockey player. Unlike the Olympics, which take place every 4 years, and are mainly a forum for amateur athletes, the National Hockey League represents a career opportunity that can only be obtained after many years of hard work and a substantial amount of good fortune. A 2-year suspension would effectively end a hockey player's career, stripping him of his livelihood on the basis of a first offence. We agree that meaningful punishment is an important part of any testing regimen and we believe that our recently adopted Program finds the correct balance. The prescribed 20-game suspension for a first-time offender, coupled with the negative public coverage such an individual will receive, will have a significant effect on the offender's future behavior and the

behavior of all players. In addition, the 60-game suspension for a second offense and the lifetime ban for a third offense are very substantial penalties that should operate to prevent repeat offenses.

*Public Disclosure.* Both pieces of legislation call for public disclosure of an offending player's identity within a defined time period from the date of a positive test or notice of a positive test (30 days under Section 4(b)(9) of S. 1114 and 10 days under Section 5(e)(2)(A) of S. 1334). We believe that in the interests of due process, no disclosure should be made until the applicable appeal process has run its full course. A Player who is able to exonerate himself should not be subject to premature and possibly mistaken identification as an offender.

*Therapeutic use exemptions.* Both pieces of proposed legislation provide for therapeutic use exemptions (TUE's), which are also an important component of the NHLPA/NHL Program. However, Section 4(b)(4) of S. 1114 and Section 5(d)(3)(B)(iii) of S. 1334 require that the substance in question be prescribed by a doctor licensed in the United States. This requirement would not be appropriate for the NHL, where the six Clubs based in Canada employ Canadian doctors, who administer to mostly Canadian and European Players. These Players should be able to seek TUE's on the basis of their Canadian doctors' prescriptions. Once again, we believe that the collective bargaining process provides parties with the ability to achieve the same goals as the proposed legislation, but in a manner that is consistent with the unique realities of their sports.

To close I want to again share the NHLPA members' sentiment that they want to do their part to maintain the public's confidence that our sport is free of the use of performance-enhancing drugs.

Thank you for inviting us to appear today.

Senator McCAIN. Well, Mr. Saskin, if they play in the United States of America, if they're paid in the United States of America, and it's Americans that patronize their games, I am not sympathetic to some problem that may be caused by the fact that they live overseas. I don't think anyone has put a gun to their heads and asked them, or forced them to come and play here. If they're going to play in the United States of America, they should play by our rules.

Mr. Fehr, you and I have known each other for many years, and we have been friends for many years. It was April 25th, more than 5 months ago that Commissioner Selig made his proposal. More than 5 months ago. And you came here today and said well, we're close but we have to observe the Jewish holidays and we hope to have an agreement by then. Are you and the players living in such a rarified atmosphere that you do not appreciate that this is a transcendent issue. It was also intimated in your remarks that this is tied to other collective bargaining issues. Don't you get it? Don't you get it, that this is an issue which is greater than the issue of collective bargaining as I tried to say in my opening statement? It's about young Americans who are tempted to take these substances and some of them commit suicide.

Don't you understand that this is an issue of such transcendent importance that you should have acted months ago? There should have been some agreement months ago. We wouldn't be having this hearing I believe, the Palmiero case aside, if you had come to some agreement. The patience of this body, reflected by our constituents, is at an end. Now could you give me a definitive date when you will reach a final agreement with Mr. Selig, not associated with any other collective bargaining issue?

Mr. FEHR. A number of things, Mr. Chairman. First of all, we have known each other and been friends for many years, and I certainly hope that will continue.

Second, our bargaining is not tied to other issues if I inadvertently made that suggestion that was incorrect and I was not speaking precisely. I was referring to a process of bargaining in prior years, and criticism about whether we said things publicly or whether we didn't, with the press around the negotiations.

Third, after the hearings on the House side in March, and after receiving the Commissioner's letter, we had discussions both before and after that. There was an agreement at the beginning that it would be unfair to have a change in the middle of the season. That's why the Commissioner had the Minor League changes take effect in 2006.

Senator MCCAIN. Did that preclude you from reaching an agreement?

Mr. FEHR. No, no. Let me finish Mr. Chairman, please. I then went—sent the tapes of the hearings to all of the players and I have an obligation to meet with them all. Which I did. It was always known and understood that we would get back to it. There were ongoing discussions all summer long. And although more intensively after my meetings with the players ended. Now in answer to your specific question about a time deadline. Can I give you a precise date, no. Do I expect to know within the reasonably near future whether that will be done, yes. Would I expect it to be by the end of the World Series, I would certainly hope so.

Senator MCCAIN. Well, the last thing that the Senator from Kentucky and I and members of this Committee want to do, is pass legislation. But we're at the end of the line, Mr. Fehr. We're at the end of the line here. How many more Rafael Palmieros are there going to be? How many statements by David Wells saying that "I'm sure that there are still plenty of guys in this game using steroids?" We're at the end here, and I don't want to do it, but we need an agreement and we need it soon. It's not complicated. All sports fans understand it. So I would, in all due respect to the Jewish holidays, or any other logistical problems you might have, I suggest you act, and act soon.

Commissioner Tagliabue, there was a program called "Costas Now" on HBO. On August 12, 2005, they interviewed Dr. James Shortt. Dr. James Shortt said that he gave a number of NFL players anabolic steroids according to Arman Keteyian, who was the one who interviewed him. "The NFL laws are such that it's prohibited to take anabolic steroids while you're playing in the NFL. Are you aware of that?" "Yes, absolutely." "But were you aware of it at the time were you prescribing anabolic steroids to NFL players?" "Possibly at some point." "How many NFL players did you work with?" "Let's say one to two dozen." Arman Keteyian says, "I've heard 18, Dr. Shortt." "That would be somewhere in that range. (Smile.)" If that's true why haven't we had some detection of this kind of anabolic steroid use, Commissioner?

Commissioner TAGLIABUE. Well, those players, Mr. Chairman, were engaged in a course of conduct to evade detection. This is a unique substance, testosterone, it's a naturally appearing substance, with a very complicated test. And they were staying under the radar screen, in effect. And we have a report on this, a comprehensive report done by our investigators. We'd be glad to give

it to you. Dr. Shortt has now been indicted. We are now addressing the other issue that comes up in that situation which is——

Senator MCCAIN. Including the players that were implicated in BALCO. There were a number of baseball players that were implicated there as well.

Commissioner TAGLIABUE. You mean football?

Senator MCCAIN. I mean football players.

Commissioner TAGLIABUE. Yes, that was a substance for which there was no test known at the time. As soon as the test was known, we applied the test not only to current players, but to one year's worth of samples, I believe that we had been holding from the prior year and we found no other violations of that THG substance. We were very aggressive there in going back to tests that were taken, I believe, as long as a year earlier.

Senator MCCAIN. Senator Bunning.

Senator BUNNING. Thank you, Mr. Chairman. First of all, if you wonder why we're really pushing this, this letter will indicate to you why. This is from a Boy Scout, from the State of Kentucky. "My name is Joseph Mattingly. I am a Boy Scout from Troop 327. At this year's summer camp, I am working on a merit badge that requires me to write a letter to a Member of Congress, representing my state, Kentucky. This letter was required to be about a national issue which I share the same view with you. I wrote to you because I am a fan of Major League Baseball and would agree that Congress should get involved in the steroids scandal. I say this for many reasons. One is that Major League Baseball needs some help. If they can't clear up this problem, Congress could. Another reason is that taking performance-enhancing drugs is cheating. Cheating should not be the American way of doing things. A third reason is that steroids are drugs. Performance-enhancing drugs should be made illegal without a prescription." And then it goes into the Hall of Fame and things like that. That's the reason that we're here today. Whether you like it, or whether you don't like it. Now, Don Fehr, I've known you for longer than John McCain has.

Mr. FEHR. That's certainly correct, probably about a decade longer.

Senator BUNNING. Now do you believe that there is a problem with steroids and amphetamines in baseball?

Mr. FEHR. I believe with respect to steroids that there has been, the data we compiled in 2003 demonstrated that. I believe it is well on the way to being eradicated. And I think that the agreement that I hope to be able to reach and that I'm certain that the players will ratify will make that beyond question.

Senator BUNNING. Do you think players who use steroids are cheaters?

Mr. FEHR. I was asked and answered that question affirmatively at the Government Reform Hearing last month.

Senator BUNNING. Do you think cheaters should be allowed to stay in the game?

Mr. FEHR. I think that with respect to penalties, two things have to apply. That you have to look at the facts and circumstances of every case. You have to make a judgment as to what level of penalty should be applied in every case, and the players should have

an opportunity to tell his story if he thinks there are mitigating circumstances—

Senator BUNNING. Even though they test positive?

Mr. FEHR. Yes. And that's—and I don't understand Senator one thing, with respect to a lot of the criticism. It's traditional in this country that when someone is accused of something that they have an opportunity to tell their story, to a neutral. To somebody who's—

Senator BUNNING. That's why an independent—

Mr. FEHR. That's right, to a neutral, to an independent. And to say, this is why you shouldn't find that I did whatever it is they're accused of and if you find that I do, this is why it shouldn't be treated as seriously as you otherwise might. And the prosecutor, or in our business, the clubs, the Commissioner's office would certainly have the right to say, well that evidence isn't very persuasive, but not only that, we think the penalties ought to be increased beyond the presumptive penalty. And the structure we've proposed, does that.

Senator BUNNING. Let me ask both of you, Commissioner Fehr and you—

Mr. FEHR. I don't quite have the title, but thank you.

Senator BUNNING. Commissioner Selig, and you, Don. It's obvious to everyone in this room that baseball and the players only act when Congress threatens you. Unless we hit you, you don't do anything. So why should we believe you're serious now, instead of just passing a new law and making a meaningful drug test for your players and for the integrity of baseball.

Mr. FEHR. Let me respond first, since it was directed at the players, I think. And I would say two things. First of all we've renegotiated a number of times in response to specific criticisms and to changing events and we're in the process of doing it again. Second, within the reasonably foreseeable future, I believe we will have a new agreement and that can be judged on its own merits. Third, in the end, you and your colleagues, and your colleagues in the House will make a decision as to whether or not its sufficient. Part of the reason, although far from the only reason that I went to meet with the players this summer was to explain to them, and to every one of them individually that wanted to come to the meetings exactly what the reaction—

Senator BUNNING. Do they understand how serious a problem it is in the public?

Mr. FEHR. I think they do, although as you know like with any group—

Senator BUNNING. You're taking all my time, and I don't have time.

Mr. FEHR. I apologize.

Senator BUNNING. That's OK.

Mr. FEHR. I apologize.

Senator BUNNING. But in your written statement, your legalese in your written statement, there are serious questions as to whether the bills before the Committee are consistent with the Constitution. And then you cite *Chandler versus Miller*, a case in which the Supreme Court held unconstitutional as a violation of the Fourth

Amendment. I think that's very interesting. Commissioner, would you like to answer that?

Commissioner SELIG. Thank you, Senator Bunning, I would. There's no question that from the late 1990s when I began to believe that there was a problem I think we did everything we could, and I know people have said that we've been slow to react and that's a fair criticism. Although, as I look back retrospectively, I'm not sure there's any more we could have done. The Minor League program is now five years old. We're testing all over everywhere we can. In 2002 we got the first drug testing program the sport had ever had, albeit not strong enough. And I made a conscientious decision at that time at 6:30 in the morning that the sport couldn't take another lockout or strike. And while I wanted a tougher program, it wasn't there. There's no question that I wish we were in a different position than we're in today. I've meant what I've said here, I've said it all over the country. I think Senator Cantwell heard me say this in Seattle. This is an integrity issue.

Senator BUNNING. You'll have a chance to prove yourself by the end of the World Series according to the Director.

Commissioner SELIG. Well, you know I have been as everybody around me knows very restless, it's been five months. Some people have even been critical that these penalties aren't severe. But I think they fit our sport. I really do. I think the independent testing is important. Frankly I'm anxious to get our people out of it. There should never be a scintilla of doubt whether the program is working—I've said this many times but just sitting here again, just the fact that we're sitting here and discussing this, we need to have tougher penalties, independent testings, so we have established once and for all that we are really serious about this.

Senator MCCAIN. Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you. Mr. Fehr, you appeared at the hearing I chaired in 2002, and many of the same points of discussion occurred then, and I indicated in my opening statement I think obviously there's been some progress. But Mr. Fehr, you still speak as if this is negotiable. I submit, that if you listen carefully to Senator McCain's opening statement and other statements from the House and Senate, I think this is non-negotiable at this point. I think you waited too long.

And by that I simply mean that we've gone way past the point now of no return. It's quite clear, Congress is simply going to slap on a routine here, or an approach to testing, and penalties unless the Commissioner and you do it first, and so you might respond to this, but you still sound this morning as if this is something that's part of your negotiation. I submit, I think it's non-negotiable at this point.

Mr. FEHR. Senator, first of all I appreciate your comments and the sense of the hearings that you've referred to. Some other ones on the House side have been conveyed to the players, it's part of what I did. In some fashion when tapes are available of this hearing, I'm going to make those available to the players too, although it will be the off-season and a little more difficult to reach everybody. I think that the majority of the players understand what the sense of the Congress is, I can't speak for every single one, but that's my sense meeting with them. That's why we're engaged in

this process. And when I use the term negotiation, what I mean by it is this. My obligation as a representative of the players, both generally and under the National Labor Relations Act, is to negotiate on their behalf what they believe to be an appropriate and fair agreement under all circumstances, and that's what I'm trying to do.

Senator DORGAN. Well, then, perhaps I was too personal. Maybe it's just the message to the players, that they've waited too long. They've waited too long. It's over. I mean this is not in my judgment negotiable. And I think that Chairman McCain and others have made that point. Let me just ask Commissioner Selig. As I understand it, you have a Minor League program that you put in place.

Commissioner SELIG. Yes, that is correct.

Senator DORGAN. And tell me about that program, just a thumbnail sketch very quickly.

Commissioner SELIG. We put it in effect in 2001, and it has worked well. I've toughened the penalties up once I began to really understand the dimension of the integrity problem. So next year the very penalties that I'm asking the Major League Players Association to do, are in effect in the Minor Leagues and everybody is tested.

Senator DORGAN. Why did you put that in place in 2001, in the Minor Leagues?

Commissioner SELIG. Because I was very concerned, I thought that baseball already had a very significant problem.

Senator DORGAN. And you had the authority unilaterally to do that in 2001?

Commissioner SELIG. I did have the authority to unilaterally do it.

Senator DORGAN. Minor League only?

Commissioner SELIG. In the Minor Leagues, yes Senator.

Senator DORGAN. And did you propose that to the Major League Ball Players in the—

Commissioner SELIG. It was the last very contentious issue in the 2002 negotiation and I, of course, yes, I was very hopeful we could do that. But as I said to Senator Bunning, I made a decision, which I think I would make again as tough as it was, that we couldn't get that program. We got the first testing program, but obviously it didn't have the same teeth, and it wasn't able to produce what we know we must pursue.

Senator DORGAN. If you could have imposed it unilaterally as you did for the Minor Leagues, would you have for the Major Leagues?

Commissioner SELIG. Oh, of course I would have, absolutely.

Senator DORGAN. Same program?

Commissioner SELIG. Same program absolutely.

Senator DORGAN. Mr. Chairman, you know this is the third hearing we've had and frankly, with all sports I think we had some pediatric physicians testify at the first hearing, talking about 12, 13, 14 year old kids that are out looking for things that will build their bodies and enhance their performance. Why? Because they read about others doing it. So this has a profound influence in our country, the issue of drugs and sports. And I know some of the other professional sports have taken great strides. Mr. Upshaw made the

point that I'd written down somewhere that the football players believe taking these drugs is cheating and they want cheaters out of football.

I would assume that baseball players would feel exactly the same way and if they don't, I'm surprised. If they do feel the same way, it's strange that we haven't gotten to the point where this is solved, so that you don't have to come to the Congress about it, or that we don't have to call you in.

Mr. FEHR. Would you like me to respond?

Senator DORGAN. Yes I'd be happy to.

Mr. FEHR. Thank you, Senator. A couple of things, first of all, the players of course feel that way, they always have. That's why we have been engaged in this process. That's why I was given the authority to enter into the negotiations. I don't have that authority on my own.

Senator DORGAN. But you see my point, sorry for interrupting you, but now you're talking about your negotiations. My point is, I think it's over. So you're still negotiating on what this might be. I think the Commissioner and the owners have told you what it has to be, the Congress has told you what it has to be, and you're still negotiating. That's why I think the game is up here. I'm sorry to interrupt you.

Mr. FEHR. Senator, I will certainly convey your feelings as I have in the past and your colleagues in the House, and the other members of this body. That's something that I not only do I have an obligation to do, but is very important to do. And very important for everybody to understand.

As I indicated in my opening statement. I think we're very close to an agreement. I'll be surprised if we can't work it out. You'll be in a position to make judgment as to the appropriate role of the Congress when you see the results of that.

Senator DORGAN. Mr. Chairman, as my final comment let me just say that I am thrilled as a young boy from a town of 300 people to see these Hall of Famers here today. And I hope every baseball player in America, every baseball player in America, from little kids on up to the Major Leagues will understand what they said. This is an important and really interesting national pastime. It's a wonderful game. They said it very clearly. The first five statements made to this Committee said it all. And I hope everyone takes notice of that.

Senator MCCAIN. Thank you, Senator.

Senator ALLEN.

Senator ALLEN. Thank you, Mr. Chairman. I want to commend the NBA, and the NHL for your recent strong action against and putting in a program to combat drugs, the NHL in particular in the midst of all sorts of other negotiations. The model, if you look at past performance, is the National Football League and the joint statement of Mr. Upshaw and Mr. Tagliabue points that out. As I understand it, and I'll address you, too, Mr. Upshaw and Commissioner Tagliabue, as I understand it, the NFL banned Andro, they banned Ephedra, before the FTC, before the Office of Drug Control Policy, before the FDA, or most recently we passed a law last year, which I've co-sponsored on Ephedra, but you did that before Congress, or all these agencies acted. And isn't that true?

Commissioner TAGLIABUE. Yes, we banned Andro seven years before it was banned by the Federal Government. We banned Ephedra years before it was banned by anybody else, and we have maintained our ban in light of Federal court rulings that have challenged the FDA's ban. So we have been very proactive in those areas and others.

Senator ALLEN. In your testimony, your joint testimony, you talked about this legislation that in this legislation could actually lower the standards in the NFL and reduce the effectiveness of your drug program, could you elaborate specifically how this legislation could weaken it.

Commissioner TAGLIABUE. Well, I feel as I said earlier, that the strict liability approach is very important here. And a player is responsible for anything in his body. And any approach which gets into I didn't know, I didn't intend, I was told otherwise, I felt the doctor was reliable, fill in the blank, is very problematic. I've been in hearings over the years where it was my sister the registered nurse who doped the NyQuil or it was my girlfriend who put the Ephedra in my beer. It was this guy who came into my apartment to rob my stereo who put the Andro in my Wheaties. You can't have that. And I notice that Commissioner Stern referred to their program as a strict liability program and that's what our standard is, you are charged with knowing its wrong. Kids know it's wrong, high school coaches know it's wrong, college people know it's wrong. You're obligated as an NFL player getting paid hundreds of thousands of dollars a year to know it's wrong. And that's what are penalties are geared to, and I think that is the most effective approach and I think we can mesh our approach with the legislation. And that's why we've suggested that a program like ours could be certified hopefully if it served all of the purposes, even though maybe every individual element might not be exactly the same. But we are comfortable with this legislation on the basis set forth in our statement.

Senator ALLEN. Your statement, Mr. Upshaw, your joint statement said a concept, I assume it would be like what we've done in welfare reform, Mr. Chairman, to set certain standards and states meet it and they're certified, so they do their own approach and those who do not meet the standard would be under the Federal laws and dictates. Is that your understanding of not wanting to lower your standards, because you all feel in the NFL that you exceed what's in this legislation?

Mr. UPSHAW. I think our statement points that out, that we would be very comfortable with a certification procedure that allowed us to continue doing what we do, because we strongly feel that it's working. So if we met all of the standards, we should be able to be certified out of it.

Senator ALLEN. I heard your motivation previously and why you all wanted to act, let me finish off here with Mr. Fehr, and Major League Baseball, and this is the main reason that we're here and looking at legislation. We've heard from the NFL and others and why they want to do this, their motivations in a variety of ways of acting before Congress acts. I read on page five of your testimony you say that you've now banned—one reason that you waited, is that there were perfectly legal substances until last January,

now illegal as a result of the passage of the Anabolic Steroid Control Act of 2004. And before then they were legal, and then they were illegal, and then you banned them. Note what Mr. Upshaw was working with Mr. Tagliabue, Commissioner Tagliabue have done. For the sake of the players health—in other words their point is they didn't wait for Congress, or the Federal Drug Administration to act, they realized that it was not a level playing field it was cheating, they banned it. Now for the sake of the health of the players, for the integrity of the game, the message it sends to young people, and there's a matter of your attitude and motivation, Mr. FEHR? Why can't you be more like Gene Upshaw?

Mr. FEHR. Well, let me say a couple of things. First of all, I would love to have been able to play any sport at the level that he did.

Senator ALLEN. I was saying attitude and motivation, I don't expect you to be an offensive tackle.

Mr. FEHR. I grew up in Kansas City, Senator, and Mr. Upshaw had the pleasure I'm sure from his standpoint, of making my rooting for the Kansas City Chiefs miserable on numerous occasions, and so I am very familiar with him, both before and now. Let me just say two things about what you've said. First of all, given what has transpired, would we have made the same judgments retrospectively about Androstenedione that were made at the time, I'm not sure. But I think there is a respectable and important argument that a lot of players felt should be seriously considered. And I just basically want to mention what it is. It was that if the Congress of the United States and the appropriate Federal agencies in their wisdom say that Androstenedione is perfectly legal, that anyone can go into the store and buy it. There isn't even an age restriction on it. Then the question becomes, should someone because he's employed in this particular industry be prohibited from doing that which any other person in the country could do. You may disagree with it, as I said in retrospect I'm not sure we would have the same view, but I don't think it's an inappropriate view. One of the things that I liked very much—

Senator MCCAIN. Senator Cantwell.

Mr. FEHR. I apologize, Mr. Chairman.

Senator CANTWELL. Thank you, Mr. Chairman. Mr. Fehr, that, I've read your letter, I've read it several times. It seems to me that Major League Baseball has gotten the message. But the players union hasn't. And when I read your letter I don't think you're so close to an agreement. It seems to me that Major League Baseball is saying clearly, "three strikes and you're out." You're saying "three strikes and you might be safe."

Mr. FEHR. No, I don't think that's right.

Senator CANTWELL. Can I finish?

Mr. FEHR. I apologize.

Senator CANTWELL. My colleagues here, on the Committee and other committees are saying it should be two strikes and you're out. If you go to the individual issues at debate here, first time offense, Major League Baseball is saying 50-game ban. You want less than that, a 20-game ban. My colleagues are saying 2 years. You go to the second time, again Major League Baseball has a 100-game ban, again my colleagues here are saying that's it. You're

done. So to me it seems like you are at a much different place. It seems like Major League Baseball said we're serious about this, and they went out and got serious about it in this proposal. This response that we just got, I'm assuming it just came out in the last couple of days. So we had 5 months of not hearing a lot, now we have this proposal. And so I don't get it—I don't understand what is your sticking point about "three strikes and you're out." I don't understand how you want to carve something out, that guess what, you might have violated it, but now you can stay in Major League Baseball, because the whole point here is a zero-tolerance policy that we want to get to. And it's very hard to get to a zero-tolerance policy. You can't have one and 16 teenagers using illegal steroids and say that the Major League Baseball philosophy is "three strikes and you still might be able to play baseball."

Mr. FEHR. Let me try and respond succinctly. I don't want to respond to everything you said. I'm sure that would be far too long for purposes of this hearing. But I'll be glad to talk with you at a later time if you would hope, or if you would like me to. Basically we have accepted the framework of "three strikes and you're out." Our proposal is and this is not—because the specific proposal is not reflected in that letter. Our proposal on the table at the moment is—

Senator CANTWELL. So this letter that just came out on September 26th, does not reflect the current proposal?

Mr. FEHR. That letter was a summary of bargaining positions that have been taken over the summer. As I indicated in my opening statement, the current proposals on the table are these, for a third violation the Commissioner may impose whatever penalty he believes is appropriate, that the facts and circumstances justify. Provided it's reviewed, the player has an opportunity to tell his story and indicate why he believes it shouldn't be, and that includes permanent ineligibility. The difference between us at the moment is this. The Commissioner believes that an arbitrator should not be able to reduce the penalty below 2 years, our position is that the arbitrator should not be able to reduce it below 1 year. One year for a third violation is the penalty in some of the other sports that you have heard today.

When I indicated in my opening statement that I thought we were very close to an agreement, I think that's an indication of it.

Senator CANTWELL. Mr. Selig, does that sound like an agreement to you? It seems to me if the primary premise here is to say that we're going to have a zero tolerance, and your third time of using a substance that is banned you're supposed to be gone from Major League Baseball, it's pretty hard to say, well you know what we'll have somebody and they can decide at their discretion. Those are two different approaches.

Commissioner SELIG. Well, Senator Cantwell, as you know, I have been very specific all over this country in the last 5 months about my proposal and I really believe—it is that. Thus 50 games, 100 games, and life. And anything less than that I don't believe deals with the integrity problem of the sport which I've described before. The independent testing, it also cleans up that. But the penalties have to be severe enough, not because I don't believe the current program is working. I think we've established that. But for

people to understand that we really get it. And that this is an integrity question, and as far as I'm concerned this and I've said this to our own people and I've said it to the owners who are very supportive, there's no dissent at all. One of the few subjects in my long tenure where there's no dissent, that it's 50, 100 and life. And that's exactly what it is.

Senator CANTWELL. Well, I may have a little chip on my shoulder because when I get up in the morning I can't always find the Seattle Mariners sports scores. But I can tell you that we've had some very positive sports news in the Northwest, when Ichiro broke an 84-year single hit record, and we retired a Seattle Mariner who spent his entire life, not shopping around for higher salaries, but his entire life playing for the Seattle Mariners, Edgar Martinez, and had a very great career, a seven time all-star who won two batting titles. But those stories don't get coverage, this story is what gets coverage. It's very frustrating that we're not moving faster. And I'd love to see Mr. Fehr, your latest, but I just have a feeling that you're a lot farther apart on this than your letter or even your testimony will acknowledge today. Thank you, Mr. Chairman.

Mr. FEHR. Well, I hope that turns out not to be true.

Senator MCCAIN. Senator Lautenberg.

Senator LAUTENBERG. Thanks, Mr. Chairman. And I hope that something I might ask not be redundant and if it is please call it to my attention so we don't waste any time. Mr. Fehr, there used to be an old song, "I Stand Alone." You obviously are standing alone in the face of what looks like an easy one for me. Because your resistance suggests that well, this isn't so severe after all. I mean the problem isn't really that violent. That it scares all of us who worry about the future generations and about the sport that all of us are committed to. I'm old enough that I'd be embarrassed to tell you the players that I knew in my day. One of them I went to high school with was Larry Dobie, from Patterson and he's a great hero. But so why is there any resistance? This sounds like a reasonable thing. It's punishment fits the crime, period. And rather than ask the Commissioner of Baseball, whoever that might be at the time, to levy a punishment, how does the Commissioner feel when, if he's got a hitter who's broken all the records, and has his team up on the edge, why shouldn't it be a pro forma, perfunctory kind of thing that says, that's it, brother, there's no question about it.

Mr. FEHR. Let me just say a couple of things in response to that, and try and articulate our position. I'll try again not to repeat my prior comments also. I'm mindful of your suggestions about redundancy. Fundamentally we believe this. That where someone is accused of wrongdoing there needs to be an examination of what happened. Not generally, not in the abstract, but in the individual case. And we believe you should have a presumptive penalty. That's our proposal and that structure is the one the Commissioner's office is working with. But that if the player can demonstrate to an arbitrator, that you know in my circumstance there are things which you don't know, which aren't apparent, which I think ought to influence a decision, could be reduced a little bit. If the Commissioner believes there are things which aggravate it, it could be increased. In terms of the other sports and in standing

alone, let me just say as follows: I think if you look at the penalty levels under our proposal, putting aside the Commissioner's proposal for a moment I don't think that's accurate. Our proposal is for a presumptive 20-game penalty. Twenty-game suspension for a first positive. That's the fractional equivalent of 10 games in the National Basketball Association because they half as many games as we do. Our proposal that a presumptive 75 games for a second penalty exceeds I believe by some percentage, with the possibility of 100 games what the NFL's is for second, and we have if the facts warrant it, the possibility of a lifetime ban on a third, which I believe is sooner than in some of the other sports.

Senator LAUTENBERG. You know, Mr. Fehr, I think the question revolves around, whether or not this is a serious thing that we're discussing. And instead of trying to arbitrate, well, is this one tough, or is that one tough. Why not give it the maximum penalty required? It looks like baseball has gotten the message over the years and why not just close that door once and for all. I ask—

Mr. FEHR. I'm sorry.

Senator LAUTENBERG. Well, I'd like to ask the other—

Mr. FEHR. Mr. Chair, I have a specific comment I'd like to make if I may?

Senator MCCAIN. OK.

Mr. FEHR. OK. I'll be brief and I apologize, but let me draw a deliberately grossly exaggerated analogy for purposes of making the point, and perhaps this will inform you as to what our thinking is on this matter.

Suppose you have two individuals, with a first violation. One of them is a 36-year-old with a college degree, who went and sought out Jose Conesco, and asked who is your supplier and got his stuff that way, and the other one is a 19-year-old who was hurt and ended up taking something that somebody gave his mother that she gave him, because they thought it would help him rehabilitate faster. I'm not sure those two people ought to be treated the same way. And they ought to have an opportunity to tell their story. I don't know why we're afraid to have people tell their story and let somebody decide.

Senator LAUTENBERG. Well, I assume that there isn't a single person doing the test that's saying, hey, this guy had this, this guy had that. If the 19-year-old that you talk about is top drawer enough to play in the Major Leagues with the accompanying salary, with the accompanying opportunities, he ought to know darn well the difference between right and wrong.

Mr. FEHR. I agree. Let me read to you the standard we have.

Senator LAUTENBERG. No, but I think what you want to do is kind of negotiate around the edges. And in my view that doesn't sound like it's a real assessment of how serious this problem is.

Senator MCCAIN. Senator's time has expired.

Senator LAUTENBERG. Just when I was getting so interesting. Thank you, Mr. Chairman.

Mr. FEHR. Thank you, Senator.

Senator MCCAIN. Mr. Fehr, you say you want to probably get an agreement by the World Series. One of your excuses for not doing it is that players are spread all over the world. Are you going to be able to do that?

Mr. FEHR. One of the things that came about as a result of my meeting with the players is I think I know what agreement will be passed and be ratified, and I would expect to do that, get the executive order to ratify it. And then work on some sort of a procedure to get the players to ratify it off-season. Obviously that will be more cumbersome than in season.

Senator MCCAIN. So in the intervening 5 months we have been unable to reach an agreement. And by the way, Commissioner Selig, I don't agree with your decision that you made at the last round of bargaining to discard the steroid performance-enhancing drugs issue. I think it was a mistake. Commissioner Stern, why have you decided not to conduct random testing in the off-season?

Commissioner STERN. Senator, because as Commissioner Bettman has said, it was also our belief that the muscle mass and bulking up that steroids provide was not a problem in our sport, it wasn't an issue in the NBA and that explained why we didn't have an issue. We've also—we've been so accused of having the longest season. Which we do. We concluded with our players that testing within the nine-month season, rather than chasing the players all over during the summertime was an appropriate response to the level of our concern.

Senator MCCAIN. Your policy allows for discretionary reinstatement after a fourth positive test. What's the rationale for that?

Commissioner STERN. Well, you know, we always been of the view that the quality of mercy is never strained.

Senator MCCAIN. Well, that's an interesting statement but it's—I don't think—

Commissioner STERN. Well, Shakespeare I think made it first, and I just associate myself with it. It's been our experience that the suspension—a lifetime suspension with the possibility of reinstatement has usually been a lifetime suspension. But if there is some exception, some example for the world, for the kids, for the very reasons that we're talking about, we don't want to rule out the possibility that it's appropriate in the precise circumstances.

Senator MCCAIN. The organization that has great credibility with those who are familiar with the all aspects of this issue as you sought, is the United States Anti-Doping Agency. By the way, before I say that, the Congressional Research Service has reported the anti-doping policies for the Olympic movement are more independent of the sports they regulate, than are the policies of Major League Baseball, NBA, and the NFL. They didn't include the NHL because they didn't have any regimen at that time. USADA argues that in order to have a truly independent and therefore truly effective performance-enhancing drug testing policy, four basic components are necessary: one, independent development and management of the drug testing program; two, independent sample collectors; three, independent analysis of the samples; and four, an independent adjudication. All of you have some elements probably. The NFL may argue that they have all those components. I'd like you to respond in writing as to how you are in compliance with those four criteria for the Committee and I would appreciate that. I've kept you here way too long. Mr. Fehr, when you contact your players you might include a letter that was written to you and to Commissioner Selig, by the President of Little League Baseball, and I

quote from this letter. "We all must accept the fact that children that are affected by the actions of Major Leaguers. In the vast majority of cases professional athletes provide fine role models, but as we have seen, a few highly publicized cases can cause the public to perceive a stain on the national pastime." I hope you will include that letter, along with the testimony of these five initial witnesses we had before this Committee and perhaps it can motivate you to act in a more expeditious fashion than you have in the last five months.

Senator BUNNING.

Senator BUNNING. Thank you, Mr. Chairman. You know Congress has had within its power to do something that nobody really wants to do, and that is to bring up the fact that Major League Baseball has had an exemption, for over I guess 80 years now, from the Sherman Antitrust Act. The only part of it that is not exempt is labor negotiations. The use of collective bargaining in labor negotiations is under the Sherman Antitrust Act, by mutual agreement. You both agreed that. You look puzzled.

Mr. FEHR. I look puzzled Senator, because I guess, three things. The Major League Baseball has long had the exemption, the Congress changed that with respect to players and said that our players have the same rights that players in the other professional sports do in the late 1990s, in the Curt Flood Act, but then the Supreme Court in the middle 1990s, I believe it was the Brown case essentially said, that if you're operating as a union, the antitrust laws have no role. That's my understanding of the current state of the law.

Senator BUNNING. But you did have a mutually-bargained agreement between owners and players to exempt all labor negotiations?

Mr. FEHR. We don't get to determine what the law is, as you've been reminding us all morning. That's the general law applicable as I understand it to all labor negotiations.

Senator BUNNING. But you did collectively bargain that? Wrong or right?

Mr. FEHR. We bargain collectively—

Senator BUNNING. Because I was with Bob—

Mr. FEHR.—under the National Labor Relations Act, yes.

Senator BUNNING. Donald, do you really believe that after a third positive test, there's a chance that a player is not using some banned substances?

Mr. FEHR. I think two things. I think it's very unlikely, and I think the stipulation we have that even that would apply to a first case on what the strict liability is demonstrates our view on that. Which I'll be glad to share with you, or read into the record. Second, however, in response to your direct question, I believe that when anyone is accused of wrongdoing he has to have an opportunity as every American does anywhere to tell his side of the story, and to say if he believes—

Senator BUNNING. You've made that perfectly clear to everybody on the panel.

Mr. FEHR. That's my view.

Senator BUNNING. Mr. Selig, or Mr. Commissioner, do you think it's possible to work something out before the end of the World Series?

Commissioner SELIG. I think it's imperative, Senator Bunning, I hope we can, this has been a long journey, and I'm hopeful that we can because frankly, the consequences of not doing it are really troubling. And you've articulated it and so has Senator McCain, but I've worried about that, so the answer is that I don't see that we have a choice. But I would say this to you again—

Senator BUNNING. Well, we're watching with bated breath almost.

Commissioner SELIG. And nobody understands that better than I do.

Senator BUNNING. You talked about international positions of your players. What do you think we have at the Major League Baseball level? We have Japanese, we have Puerto Rican, we have Dominicans, we have Venezuelans, we have Nicaraguans, we have all kinds of different nationalities represented at the Major League Baseball level. So your exceptions fit Major League Baseball also. And we don't think that has a darn thing to do with exceptions to the laws of this country.

Mr. BETTMAN. Actually I don't think we're seeking to be exempt from the laws of this country. I think it's more a question of the practicalities of administering the testing in the off-season.

Senator BUNNING. They have the same problem and they have made a commitment to make sure that they can test in the off-season in those various countries.

Mr. BETTMAN. Although 85 percent of our players are from outside of the United States.

Senator BUNNING. I don't know what the numbers are anymore at the Major League Baseball level, but there are more and more international players.

Commissioner SELIG. A very significant number, yes.

Mr. BETTMAN. Senator, the only point that I was seeking to make that as the possibility of legislation moves forward, individual circumstances of the respective leagues.

Senator BUNNING. We would love to make the one size not fits all. If the penalties involved fit the problem.

Mr. BETTMAN. We support that view. Our program has stiff penalties. We're not looking to exempt our players from the penalties because of national origin, although we do have a practical issue in terms of the proposed legislation limiting, for example, the therapeutic use exemption to licensed U.S. physicians since our players play as home teams and visiting teams in Canada. We think Canadian doctors, licensed Canadian physicians, should be able to submit the therapeutic use exemption. We think that a WADA-sanctioned lab in Canada should be appropriate as a WADA-sanctioned U.S. lab is appropriate for testing. Again we're not looking to exempt ourselves from the legislation, we want to hopefully be in a position where it makes sense because our business needs are a little bit different than the other sports.

Senator BUNNING. Thank you, Mr. Chairman.

Senator MCCAIN. Senator Allen.

Senator ALLEN. Thank you, Mr. Chairman and Senator Bunning for your leadership on this issue, it's one that I share your concern with. I thank all our witnesses for being here, the bottom line is that there are different ways that that each of these leagues oper-

ate, and I don't know how many of the Major League Baseball players, while they may come from the Dominican Republic, or Panama or Venezuela, or other countries, how many become U.S. citizens versus those that are Canadians, or Czechs or Swedes. Regardless, here's the message that all of you—I think most of the leagues have understood this, and I think the Commissioner's understood it in Major League Baseball and that is, that you ought to care as union leaders for the health of your players. For the image, the integrity, the honesty, of a level playing field over your sport, you should care about that. And I know the leagues are all trying to get young people interested in every one of your sports. And it is important for a lot of these young folks and to the extent that you are international, recognize that it is also affecting a lot of young people. And they look at sport as a ticket out of the situation they're in. It's an opportunity to live a better life. Not only to get a home for themselves, but actually maybe buy a home for their mother, and so it is very important when you understand the competitiveness of sports, the motivation of athletes, that if you told athletes that if you didn't sleep, you'll be better, they would try to stay awake all night long. Some of them do for the fun of it, but regardless the point of the matter is you do have a responsibility, and I think three of the four leagues here are addressing it, and I hope that, Mr. Fehr, you understand, that as far as this Committee and the patience, and I'm not one who likes the Federal Government meddling in things that are best decided by the private sector and collective bargaining should be respected. There's going to be a third strike for you all, if you don't listen to what Hank Aaron and Robin Roberts, and Lou Brock said. Those are powerful words from the greats of the sport. And as far as Hank Aaron is concerned, if a certain player breaks his home run record, it's not a question of an asterisk, there's going to be a lot of debate. There probably ought to be an Rx next to it, if Hank Aaron's record is broken by a certain individual. But thank you, Mr. Chairman, for this hearing, I hope the pressure will be on, we'll be watching the World Series not just for the—on the diamond, but hopefully getting a reasonable drug testing program for Major League Baseball. Thank you.

Senator MCCAIN. I know that all the witnesses who came here today had very busy schedules. We're very appreciative that you would take the time to be with us, and I sincerely hope that this is the last hearing that we will ever have on this particular issue. And again, I am very appreciative of a lot of the progress that has already been made. And I look forward, being an eternal optimist, that we will soon see a resolution of this issue without necessity or requirement of legislation. I thank the witnesses for being here today. And this hearing is adjourned.

[Whereupon, at 12:05 p.m., the hearing was adjourned.]

## A P P E N D I X

PREPARED STATEMENT OF FRANK D. URYASZ, PRESIDENT, THE NATIONAL CENTER FOR DRUG FREE SPORT, INC.

My name is Frank D. Uryasz, President of The National Center for Drug Free Sport, Inc.

Drug Free Sport, a private company based in Kansas City, Missouri, administers sports drug-testing programs throughout the United States. Our staff also provides drug and dietary supplement education programs for high schools and colleges and sponsors a “drug information hotline” through our Resource Exchange Center (REC) ([www.drugfreesport.com/rec](http://www.drugfreesport.com/rec)).

I have been involved in managing national drug-testing programs for athletes for nearly 20 years. In July 1986, I was hired by The National Collegiate Athletic Association (NCAA) to establish its first drug-testing program. While at the NCAA, I was also responsible for administration of all collegiate health and safety programs under the guidance of the NCAA’s medical committee. Under my guidance, the NCAA drug-testing program grew from a post-season program involving about 1,200 tests per year to a year-round, short-notice testing program that included about 10,000 tests annually.

In the late 1990s, I was also serving on the U.S. Olympic Committee Anti-Doping Committee, which was looking for a new model for Olympic drug-testing program administration. This preceded the formation of the World Anti-Doping Agency (WADA) and the U.S. Anti-Doping Agency (USADA). The impetus for a new model was the desire for sports organizations to avoid the actual and perceived conflicts of interests that existed by operating their own testing programs. Critics believed such testing programs when operated in house were lacking the necessary impartiality that would prevent preferential treatment of high-profile athletes. Some embarrassing cases involving sports stars supported this belief. It was at this time that sports drug testing began to embrace concepts such as harmonization, externalization and transparency and independent entities such as USADA and WADA were formed.

In 1999, I left the NCAA to start The National Center for Drug Free Sport. The NCAA externalized its drug-testing program to Drug Free Sport that year. At that time, many colleges and universities also began to see the value of outside administration for their drug-testing programs. Today, Drug Free Sport runs the NCAA’s testing programs, testing programs for over 150 colleges and universities, testing for AAU Powerlifting and as of March 2005, the testing for the Minor Leagues through Major League Baseball.

When Drug Free Sport administers an organization’s testing program, the organization agrees to allow Drug Free Sport to select when and where athletes will be tested and agrees to follow our strict protocol on collection and management of positive results.

The National Football League and Major League Baseball (for the Minor Leagues) utilize Drug Free Sport’s “drug hotline” for its athletes and medical personnel.

Drug Free Sport supports the Committee’s desire to deter the use of banned anabolic steroids at all levels of sport. The public debate of the anabolic steroid use problem in the United States has prompted many communities to begin a dialogue on how best to keep young people from using these drugs. I have been involved in community forums in Texas, Illinois and other states, which would never have occurred if Congress hadn’t brought the problem to a greater level of awareness. The National Federation of State High School Associations developed an excellent steroid-education campaign. This, too, grew out of Congress’ actions to bring attention to the fact that high school students use steroids to enhance their appearance and to improve athletic performance.

There is no question in my mind that the Federal Government has an important role to play in helping sport deter the use of anabolic steroids and other performance-enhancing drugs such as growth hormone. My twenty years of experience in athletics drug-use deterrence has convinced me that the government’s resources are

best utilized in two areas: reducing access to and the supply of anabolic steroids and other performance-enhancing drugs in the U.S. and funding research into the detection of growth hormone and other dangerous banned drugs.

Despite the best intentions of members of this Committee, the provisions of S. 1114, the Clean Sports Act of 2005, and S. 1334, the Professional Sports Integrity and Accountability Act, are flawed. Although the *intent* of this proposed legislation—drug free professional sports—is laudable and no doubt supported by anyone who cares about sport and the athletes who participate, the legislation itself will not lead to the desired outcome.

Sport drug-testing programs are complicated to operate. The drugs change, the patterns of use change, athletes can be hard to find, some athletes try to cheat, high profile athletes surround themselves with people who enable their drug use and an entire industry exists to develop performance-enhancing drugs that cannot be detected. All of this can be managed, but this management requires approaches that are appropriate to the population of athletes being served. What works for the colleges probably doesn't work for the Olympic athletes and what works for Olympic athletes in all likelihood will not work for the pros.

It is not possible for me within the constraints of this written statement to thoroughly outline what needs to happen in the U.S. to rid all levels of sport of the use of performance-enhancing drugs including steroids. However, I hope the members of this Committee consider the following as they proceed with Federal legislation to deter athletes' use of drugs:

1. We lack evidence that the drug-testing models implemented in Olympic sport over the past five years have reduced the use of drugs in that population. It is simply too soon to tell and to my knowledge there is no known plan to measure this.
2. The creation of WADA and USADA have ameliorated many of the problems associated with adjudication of Olympic doping cases but their processes and protocols are extremely expensive to operate and to use them as a model for other levels of sport will lead to fewer resources being used for testing and research.
3. The goal of a sports drug-testing program is to deter drug use. The achievement of this goal cannot be measured by the number of people "caught." Sports entities should be required to develop tools to measure whether their testing programs are reducing drug use and should be required to publish this information.
4. It is too soon to evaluate the effectiveness of MLB's revised drug-deterrence programs and to force an Olympic testing model on that population at this point is without merit.
5. Although we do not know with certainty the extent of growth hormone use at the collegiate and professional sport level, we know that it is being used. The Federal Government must get research dollars directly to the scientists who can best solve this problem quickly.
6. My extensive experience with college football players has convinced me that the NCAA's and NFL's steroid testing programs have significantly reduced the use of anabolic steroid use in the college football population. The NCAA's published national drug use studies support my position.
7. Even after working in the sports drug-testing field for nearly twenty years, I remain uncomfortable with the title "sports drug-testing expert" when associated with my name. However, there are many people who enjoy having this term associated with their work, even though they have never run a sports drug-testing program, have never collected a urine specimen from an athlete, have never done the analytical work on a urine or blood specimen from an athlete, have never spent a week in a courtroom trying to explain to a judge the complexities of steroid chemistry nor have they done any original research in the anti-doping field. These so called "experts" criticism of existing drug-testing programs in sport undermine the public's trust in what we do and the Federal Government should be careful when considering the accuracy of what they say.
8. The Federal Government must help sport by reducing the supply of anabolic steroids and growth hormone. The flow of anabolic steroids and growth hormone across the borders and their availability for purchase over the Internet are problems sport cannot solve.

Thank you for the opportunity to get my thoughts before the Committee.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV  
TO ALLAN H. SELIG

*Question 1.* Commissioner Selig, it occurs to me that you may be a late convert to the anti-steroids fold. In the last 10–15 years, when players who had never hit more than a few home runs a year suddenly were hitting 30, 40, or more home runs, didn't Major League Baseball look the other way at what could very well have been evidence of the abuse of performance-enhancing drugs?

Answer. The change in home run totals became obvious in the 1990s. Baseball followers, including members of the media, offered a number of explanations for the change, including expansion, weak pitching and smaller ballparks. There was little or no mention in the press or otherwise of performance-enhancing substances as a possible cause. Late in the 1990s, Baseball—as a result of the McGwire revelations of Andro use and other developments—became concerned that drugs might be a factor. At that time, Baseball, under my leadership, began an aggressive effort to deal with steroids. My staff gathered information on steroids and how they worked. Educational programs were developed at the Major and Minor League level. We also developed and implemented the industry's first Minor League testing program. Progress at the Major League level was slower due to our collective bargaining obligations, but Baseball was certainly not “looking the other way.” In fact, in 2002, Baseball was able to negotiate our first ever drug testing program for the Major Leagues by making that topic a key priority in collective bargaining.

*Question 2.* What do you have to say about MLB's marketing during that period? Did you market the home run? Didn't you use the McGwire-Sosa home run race to “save” Baseball? Did it ever occur to you to make sure that all these home runs—and I don't mean to single out just these two players—but did it ever occur to you to make sure that the numbers people were putting up were not tainted?

Answer. As an initial matter, it is important to point out that Baseball had no centralized marketing effort based on the popularity of the home run. The home run race occurred, it captured the imagination of our fans, and therefore, generated tremendous interest. The great growth of the game in recent years is due to an array of reasons more fundamental than the appeal of home runs.

In terms of investigating whether home run numbers were tainted, one must begin with the proposition that the only way to determine accurately steroid use is through testing. In 1998, Baseball was in the middle of a collective bargaining agreement that did not allow random testing for steroids.

*Question 3.* Even if it was the official policy of MLB to ban steroids and other performance-enhancing drugs—if you weren't technically condoning their use—why isn't it fair for observers to accuse you of being willfully blind to what was going on?

Answer. Major League Baseball cannot fairly be accused of being willfully blind to steroid use. In the 1990s people were not talking or writing about steroid use in Baseball. Over the period in question, Baseball gradually became aware of the problem with steroids. As that awareness grew, Baseball took steps to combat the problem. Educational materials were prepared outlining the dangers of steroid use. Major and Minor League players were required to attend training sessions on steroids. Major League Baseball developed and implemented the first ever drug policy covering Minor League players.

Federal labor laws, of course, prevented Baseball from unilaterally implementing a similar policy at the Major League level. Consistent with its collective bargaining obligations, Baseball proposed a new policy in the next round of bargaining that occurred in 2001–2002. That policy was ultimately agreed upon in 2002 and, for the first time, Baseball had testing. The policy has been improved twice since that time.

Baseball believes that this course of conduct is inconsistent with an assertion of willful blindness.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO  
ALLAN H. SELIG

*Question 1.* Isn't there an advantage to having uniformity in testing for all the major league sports teams?

Answer. It is very difficult to develop a uniform program that is applicable to all sports because each sport has unique issues. For example, on penalties, a fixed period has different ramifications in different sports. In track and field, a two-year ban would probably cause the athlete to miss less than 10 important competitions. In Baseball, a two-year ban would cover at least 324 games, not including the post-season. A better approach would be collectively bargained policies designed to ad-

dress the unique circumstances of each sport, assuming the policies are each strong enough to deter use.

*Question 2.* The current testing method doesn't detect all performance-enhancing substances. Why don't you use blood tests which are better at detecting substances like human growth hormone?

Answer. The short answer is that the Major League Baseball Players Association has been unwilling to agree to blood tests. Blood testing is obviously more intrusive than urine testing and, in fact, urine testing is very accurate for all substances, except human growth hormone. Major League Baseball has funded a three-year grant for Dr. Donald Catlin, of the UCLA Laboratory, directed at developing a urine test for human growth hormone. It is also important to note that there is no definitive proof as to scientific validity of the available blood test for human growth hormone. No governing body of a sport has disciplined an athlete based on that test.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV  
TO DONALD M. FEHR

*Question 1.* In your testimony before this Committee in 2004, you stated that the Players Association "neither condones nor supports the use by players, or by anyone else, of any unlawful substance..." In your testimony this year, you seem to imply the only reason that the MLB Players Association agreed to negotiate a stronger steroids testing regime was because of Congressional pressure. I do not get the feeling that you believe that steroid or unlawful substance abuse constitutes a real problem. Mr. Fehr, your previous testimony before this Committee and your written statement today hardly gives a strong impression that the Players Union is particularly concerned about illegal substance use and its impact on the game. What is the Players Association doing internally to prevent its members from cheating? I know it is a strong word, but let's call it what it is. What are the union's internal policies to prevent use of illegal substances before it occurs?

Answer. It is simply counterintuitive to suggest that anyone or any entity cares more about the health of the players than those people who have dedicated their professional careers to their protection. We have long been concerned with the potential consequences of illegal substances. Indeed, it was our concern with the use of substances Congress said can be legally purchased that led to our groundbreaking study of androstenedione, a copy of which was provided to the Committee in conjunction with prior testimony. Every year, the Players Association meets with its constituents during spring training to talk about, among other things, information concerning the use, abuse and potential consequences of steroids, nutritional supplements, and other substances believed to augment or enhance training routines or performance. In addition, every year each player is given written materials, prepared in cooperation with Major League Baseball, concerning these substances. To ensure our information is as current as possible, we also employ the services of a highly qualified, licensed medical practitioner to review existing medical literature that may be pertinent to our members. Moreover, at meetings with players, during spring training and throughout the year, we also discuss with players the importance of exercising care before taking any substance reported or claimed to improve training capacity, to increase strength and endurance, or to improve performance. Finally, players are reminded that they can contact the Association at any time if they have questions about a product, our program, or where they can receive additional information if needed.

*Question 2.* In your testimony, you do not even mention the impact that your players' conduct has on younger athletes. In fact, your testimony does not even condemn the use of these illegal substances as all of the other player's testimony does. Given the fact that so many young baseball players are taking steroids, do you not feel an obligation to lead on this issue rather than be obstructionist?

Answer. That is not the record. I have repeatedly made it clear that we are committed to dispelling any notion that the route to becoming a Major League athlete somehow includes taking illegal performance-enhancing substances like steroids. I have stated in both written and oral testimony before Congress that playing Major League Baseball requires talent, drive, intelligence, determination, and grit, and that steroids have no place in the equation. As I have noted in past testimony to this same Committee, neither the Players Association nor its constituents condone nor support the use of any unlawful substance, nor do they support or condone the unlawful use of any legal substance. We recognize our role in this issue and have repeatedly taken, and continue to take, steps to eliminate the presence of illegal substances in our sport and to dispel the myth that steroids and other illegal performance-enhancing substances are the key to athletic success. We also believe we

have a responsibility to our members and those who hope to play baseball in the future to ensure that our testing program is as accurate as is scientifically possible, that its administration is fair and just, and that the penalties are designed to deter use and prevent repeat offenses, as opposed to simply punishing for punishment's sake.

*Question 3.* Isn't your strong opposition a potent signal to young baseball players that these products are not really harmful and imply that they may even be necessary?

Answer. Our testing program and our members' support for it are, in fact, evidence that we strongly oppose the use of illegal performance-enhancing substances by anyone, especially young people. We do believe, however, that eliminating the presence of performance-enhancing substances in professional sports is only part of what needs to be done to combat the growing use and abuse of both legal and illegal substances by our Nation's youth. I hope the Committee will not limit its attention to a top-down review of just testing programs, but will also focus on other components of the problem. For example, attention needs to be given to the unfortunate reality that for many young people, steroids are still only a mouse click away on the Internet. We are now seeing that use of these products is not limited to individuals seeking athletic success. And, as I have testified before, it is unfortunate that our culture does not have a uniformly negative image of steroids, as evidenced in the marketing campaigns of corporate giants like 3-M and Saab, or by the promotion of the new video game, Blitz: The League. I hope Congress will focus on these issues as well.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO  
DONALD M. FEHR

*Question.* What is it about baseball players that justifies more lenient penalties for taking steroids than athletes of other sports?

Answer. Nothing. The penalties in baseball are not more lenient. They are simply tailored, as they are in other leagues, to the particular circumstances in the sport. The Players Association believes the goal of our program is—and should be—to deter use of illegal substances and to prevent repeat offense. Today, in baseball, our players are tested throughout the year on an unannounced, random basis, which is not the case in other sports. They are tested for all the substances that the United States has determined to be illegal steroids and steroid precursors. The tests are administered by independent, qualified experts. The evidence so far indicates that our current penalties are sufficient to deter initial use and repeat offenses without destroying careers. Nonetheless, as evidenced by our current negotiations, we are continuing to work to strengthen our program. The penalty structure for steroids we have proposed to the owners, and shared with the Committee, is more restrictive than the NFL's program with regard to repeat offenders, and it is either equal to or more stringent than the existing programs for steroids in the NBA and the NHL.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO  
PAUL TAGLIABUE

*Question 1.* Isn't there an advantage to having uniformity in testing for all the major league sports teams?

Answer. As *between the member teams* of an individual sports league, we strongly agree that there is an advantage to uniformity and that is a key element of the NFL's program. No individual team selects players for testing, conducts or schedules tests, reviews test data, represents the player on appeal, or makes disciplinary decisions. This centralization of administration is critical in ensuring that the testing program operates fairly and consistently for all teams and all players.

As *among sports leagues*, there is substantial consistency in testing but there are important differences among the sports that warrant tailored administration. For example, some leagues have adopted a distinction between so-called "in season" and "out-of-competition" testing. Under that model, certain substances are prohibited *only* when used during a particular competition, and athletes are free to use those substances, *without fear of penalty*, during the "off-season" in that sport. The NFL has never embraced that distinction, believing instead that a single set of rules should apply to all players throughout the year. Accordingly, our testing program insists upon uniform testing for all substances on our prohibited list throughout the year, both in season and out-of-season. Indeed, at a time when the Olympic testing program has reduced its out-of-competition testing program by as much as fifty percent, the NFL and NFL Players Association have agreed to increase—by a factor

of three—the number of off-season tests to which NFL players are subject. We believe that within certain parameters, leagues should be able to determine the testing program that best fits the needs of that particular sport.

*Question 2.* The current testing method doesn't detect *all* performance-enhancing substances. Why don't you use *blood* tests which are better at detecting substances like human growth hormone?

Answer. Until the 2004 summer Olympic Games in Athens, human growth hormone was not tested for in any sport—amateur, professional or Olympic. At the Athens Olympics, 300 athletes—out of more than 11,000—gave blood samples that were tested for human growth hormone. No positives were reported. We have reviewed closely the results of those tests and other efforts to identify testing methods for growth hormone and other substances. Our own advisors, many of whom have consulted closely with the Olympic movement and other sports organizations for years, do not believe that the blood test used last year is sufficiently validated and reliable to use on a widespread basis in the NFL. Moreover, no lab in the United States is yet certified to perform the blood test used at the Athens Olympics. We do not believe it would be sound policy to extract blood samples from NFL players and ship them across the ocean for testing in a lab in Australia or Europe. Moreover, blood test results have often been highly controversial and at times inconclusive. One example is the recent suspension of American cyclist Tyler Hamilton, whose appeal was lengthy, contentious and subject to continuing debate.

Equally important, converting to blood testing would not strengthen the overall effectiveness of doping policies. With respect to the vast majority of performance-enhancing drugs including steroids and stimulants, urine testing is scientifically more accurate, efficient and reliable. The arguable benefits of blood testing relate only to growth hormones and blood doping. Notwithstanding, we will continue to work both independently and in conjunction with the United States Anti-Doping Agency and other organizations to develop better methods of testing for performance-enhancing substances, including human growth hormone. As part of that effort, we have partnered with USADA to fund the development of a new laboratory, the Sports Medicine Research and Testing Laboratory, which is based at the University of Utah.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO  
DAVID J. STERN

*Question 1.* Isn't there an advantage to having uniformity in testing for all the Major League sports teams?

Answer. The NBA does not believe that a "one-size-fits-all" approach is sensible for a drug testing policy. NBA players are different from athletes in other sports. Their bodies are different (tall and lean); their skill sets are different (quickness, leaping ability); their training regimens and schedules are different. Substances that may be of substantial advantage to athletes in other sports—such as football or baseball players—may provide no advantage to basketball players.

A drug testing regime that was designed for, among others, cyclists and weightlifters (such as the WADA Code) is certainly not appropriate for basketball players.

There are also other relevant differences between the sports. For example, some leagues (such as the NBA) have longer seasons than others, making off-season testing less important. Some leagues play games every day; some only play once a week. Each individual league needs the flexibility to design a drug policy and testing program that is correctly tailored to its unique circumstances.

The NBA believes that collective bargaining is the best method for accomplishing this. The parties to the collective bargaining relationship—here, the NBA and the National Basketball Players Association—are most knowledgeable about their particular issues and needs. Moreover, a policy that is the product of agreement is almost always superior to one imposed from the outside, as the parties will be invested in its success. This is certainly true in the NBA, where the collective bargaining process has led to a strong and effective policy against steroids and performance-enhancing drugs in our sport.

*Question 2.* The current testing method doesn't detect all performance-enhancing substances. Why don't you use blood tests which are better at detecting substances like human growth hormone?

Answer. Blood testing is more invasive than urine testing, and it raises health and safety issues that are not present with urine testing. Further, blood testing is only useful for a select number of specialized substances, such as EPO. (It is our understanding that there is no universally accepted blood test, for example, for

human growth hormone.) Urine testing picks up all of the substances on the NBA's broad list of prohibited drugs. Since there is scant evidence of even minimal use of steroids and illicit performance-enhancing drugs in the NBA, much less any evidence of the use of EPO, there no substantial justification for changing our accepted method of drug testing.

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NATIONAL HOCKEY LEAGUE  
October 25, 2005

Hon. John McCain,  
Senate Committee on Commerce, Science, and Transportation  
Washington, DC.

RE: NHL DRUG TESTING PROGRAM

Dear Senator McCain:

Commissioner Bettman requested that I respond to your request for an explanation as to whether the National Hockey League/National Hockey League Players' Association's performance-enhancing Substances Program (the "Program") features the following four basic components:

**1. Independent Development and Management of the Drug Testing Program:**

The Program will be managed by an independent entity that will be responsible for hiring independent collectors and determining when random no-notice testing will occur. The independent entity will also coordinate with a WADA-certified testing laboratory to create reports of the test results.

The Program was developed jointly by the NHL and the NHLPA, and is jointly administered by a Program Committee comprised of an equal number of League and NHLPA representatives and two (2) consulting expert doctors, one (1) nominated by each party. (The Program Committee determined that an independent entity shall manage the Program, as described above.) The NHL and the NHLPA strongly believe that our collective knowledge regarding our sport, including but not limited to our intimate familiarity with our schedule (in-season and off-season, game day and non-game day), the international make-up of our player population, and the history (or lack thereof) of performance-enhancing drug use had enabled us to develop an effective and meaningful Program. We also believe that our active management of the Program will enable us to jointly monitor its effectiveness and to modify it, as necessary, over time, to ensure that it functions to address and eliminate the use, however negligible, of performance-enhancing substances in our sport.

**2. Independent Sample Collectors:**

The Program will provide for independent, third-party sample collectors.

**3. Independent Analysis of the Sample:**

The samples will be independently analyzed by a WADA-approved laboratory.

**4. Independent Adjudication:**

The Program provides for the independent adjudication of appeals of positive test results. Specifically, the Program provides the "NHLPA may, on a Player's behalf, appeal a positive test to the Impartial Arbitrator on an expedited basis, utilizing the procedures set forth in Article 17 of the Agreement." Article 17 of the Collective Bargaining Agreement between the National Hockey League and National Hockey League Players' Association provides for the parties to jointly appoint an Impartial Arbitrator who serves for a period of at least one (1) year and hears and issues decisions regarding disputes involving the CBA.

We appreciate the opportunity to express our views regarding the issues and questions set forth above. We look forward to continuing to work with you on this important matter.

Sincerely,

WILLIAM L. DALY,  
Deputy Commissioner

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NATIONAL HOCKEY LEAGUE  
October 25, 2005

Hon. Frank R. Lautenberg  
Senate Committee on Commerce, Science, and Transportation,  
Washington, DC.

## RE: NHL DRUG TESTING PROGRAM

Dear Senator Lautenberg:

Please accept this letter as the National Hockey League's response to the following questions raised by you regarding testing for performance-enhancing substances:

*Question 1.* Is there an advantage to having uniformity in testing for all the Major League sports teams?

Answer. We believe that it would only be advantageous to impose uniform standards on all major league professional sports if such standards were to appropriately recognize and reflect the unique circumstances and traits applicable to each particular sport, without unduly lowering or raising the bar applicable to all sports. The major league professional sports are not "uniform," and indeed, have numerous and significant differences in, *inter alia*, the length of and number of games in their playing seasons and the corresponding length of their off-seasons, the national or international make-up of their players and teams, the average age and career length of each league's players, and significantly, the history of problems associated with the use of performance-enhancing drugs in the sport. For example, with respect to NHL players, the applicable standards would need to recognize and reflect the practicalities and legalities that would arise from mandatory off-season testing of NHL players, given that our players come from twenty-two (22) countries across the globe, and eighty-five (85) percent of our players come from outside the United States, many of whom return to their country of origin during the off-season. Other sports simply may not need to address these circumstances. In addition, while it may be appropriate to spend the financial resources necessary to test players five (5) times during the calendar year in a sport that has a suspected or confirmed history of performance-enhancing drug use, it may not be necessary or appropriate to do so in a sport such as hockey which has no such historical experience.<sup>1</sup> Reducing the attributes of the testing program to the least common denominator may result in an insufficient program in certain sports, and rising to the highest common denominator may be unduly burdensome on other sports, without justification. For these reasons, we are not convinced that it would be advantageous to impose uniform standards on all sports.

*Question 2.* Why doesn't the League use blood tests, which are better at detecting substances like the human growth hormone?

Answer. First, we have not seen scientific evidence that the blood tests currently administered do, in fact, materially enhance the ability to accurately and reliably detect substances such as the human growth hormone. Second, we believe that administering 3,500 blood tests annually (five tests per player for 700 NHL players) would be excessively invasive, costly and time-consuming. Notably, WADA will conduct a total of only 88 in-competition blood tests during the 2006 Olympic Games, which involve numerous different competitions and many hundreds of athletes. To the extent blood tests are used at all outside of the context of international athletic competitions, we believe it is similarly appropriate to do so only in very limited circumstances.

We appreciate the opportunity to express our views regarding the issues and questions set forth above. We look forward to continuing to work with you on this important matter.

Sincerely,

WILLIAM L. DALY,  
*Deputy Commissioner.*

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<sup>1</sup>Our belief that steroid use is not desired by or prevalent among skilled hockey players is seemingly confirmed by the fact that there have been only eight positive results in approximately 3,100 tests of NHL and non-NHL players administered at the World Hockey Championships (conducted by the International Ice Hockey Federation (IIHF)) since 1993/1994.