Statement of Donald M. Fehr,

Executive Director,

Major League Baseball Players Association,

before the House of Representatives Committee on Government Reform

March 17, 2005

Mr. Chairman and Members of the Committee:

My name is Donald M. Fehr, and I serve as the Executive Director of the Major League Baseball Players Association. I appear today in response to the Chairman's and Ranking Member's March 3 invitation to testify.

I appreciate the Committee's interest in and concern about the unlawful use of steroids, which led to this hearing. Let me begin by re-stating the MLBPA's position, which I articulated before the Senate Commerce Committee in June 2002, and again a year ago. Simply put, the Major League Baseball Players Association does not condone or support the use by players, or by anyone else, of any unlawful substance, nor do we support or condone the unlawful use of any legal substance. I cannot put it more plainly. The use of any illegal substance is wrong.

Lest there be any question on the subject, I should add 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 am not a

doctor, but one does not have to be a physician to understand that steroids are powerful drugs that no one should fool around with. This is particularly true for children and young adults, as the medical research makes clear that illegal steroid use can be especially harmful to them.

Playing Major League Baseball requires talent, drive, intelligence, determination, and grit. Steroids have no place in the equation.

Over the last several months, there has been no end of discussion of this troubling issue. Much of it has been thoughtful and constructive; some of it frankly, has not. What I would like to do today, with your permission, is correct a number of misimpressions that have been circulating about Baseball's and the MLBPA's response to the steroid issue.

To boil our position down to its essence:

The players want to rid their game of illegal drug use.

We have never suggested that baseball players should be above the law; but neither should they be below it. They should be treated like anyone else. The good news is that the players and owners have put in place a tough, new testing program that we feel will eliminate steroid abuse in baseball with due regard for the rights of the players.

As I indicated in June of 2002, use of unlawful steroids was then a subject of ongoing collective bargaining between the Players Association and the Major League Clubs. That round of bargaining produced a new Basic Agreement between the parties in September of that year. Before turning to that agreement, it may be helpful to briefly describe the history of drug testing in our bargaining relationship.

The matter of drug treatment and prevention is not new to major league baseball.

Nor is the demonstrable willingness of the parties -- the Players and the Clubs-- to address the issue, despite significant differences over the means which may be appropriately employed to confront the shared goal of the elimination of unlawful drug use in the sport. Two decades ago, in response to a growing concern about the alleged use of cocaine by players, the parties undertook extensive, and at times contentious, negotiations, which resulted in the first Joint Drug Agreement in the major professional sports. The emphasis of that agreement was on treatment and prevention, and its provisions were designed to encourage and assist players to address any chemical use or misuse problems they might be experiencing.

During those negotiations, the subject of suspicionless urine testing of players was advocated by the Clubs, and opposed by us. We thought then -- and believe now - that the testing of an individual, not because of something he is suspected to have done, but simply because he is a member of a particular class, is at odds with fundamental principles of which we in this country are justifiably proud. In this country it is not up to the individual to prove he is innocent, especially of a charge of which he, as an individual, is not reasonably suspected. Moreover, one should not, absent compelling safety considerations, invade the privacy of someone without a substantial reason - that is, without cause - related to that individual. While the Fourth Amendment's protection against unreasonable searches and seizures is not directly applicable to the private employment setting, we have always believed that the important principles on which it is based should not be lightly put aside. The Clubs articulated a different view.

This fundamental disagreement did not, however, stop the parties from continuing to work toward the shared goal of the elimination of the illicit drug use by players. Over the years, even in the aftermath of the termination of that first Joint Drug Agreement, the parties forged a working relationship that eliminated contested cases in this once volatile, highly charged, area. We were able to do that with a program that emphasized education, not punishment, that includes progressive, not draconian, discipline, and that included individual cause-based, not suspicionless, testing - - in other words, a program consistent with basic principles of due process.

This history is helpful because it provides a needed context for the latest rounds of bargaining. Coming into the negotiations that produced the September 2002, Basic Agreement, the parties endeavored to respond to growing reports of widespread use of illegal anabolic steroids. How did the parties bridge the

20-year old divide between them on the subject of suspicionless testing? By agreeing to a Players Association formulation in which, in essence, we proposed to break the decades old deadlock on suspicionless testing by, first, implementing a program of unannounced, anonymous testing of all players (with 20% of the players, selected at random, being subject to a second, unannounced test) in order to empirically determine, the incidence of use, and with an agreement calling for an enhanced testing program to be implemented the following year if 5% or more of the tests were positive. In 2003, a total of 1438 tests were conducted in an 1198 player group, a ratio of actual tests to the number of individuals eligible to be tested that we understand far exceeds the norm in most other testing regimes.

How were the 2003 tests conducted? The tests were administered over the course of the season. Contrary to some suggestions, players did not know when the tests were to be administered. Nor, as some have suggested, was the timing of the tests determined by the Commissioner's Office, or by the Players Association.

The parties then received from the testing administrators, through the laboratory, which conducted the tests, a report of the numerical results. Within hours of receipt of the test results, we publicly announced that the 5% threshold had been slightly exceeded and that identified testing, with potential disciplinary consequences, would be in effect in 2004.

Accordingly, in 2004, each Player was tested on an unannounced, identified basis for the unlawful use of steroids, without any requirement that cause related to the individual to be tested be first demonstrated. No player knew when he was going to be tested. However, as Commissioner Selig announced earlier this month, we have the results from 2004. Incidence of use of illegal steroids declined significantly, from over 5% to approximately 1%. The data suggests convincingly that the 2004 program did work.

Under the program in effect last year (2004) a player who tested positive was first to be evaluated by the joint Health Policy Advisory Committee (HPAC), after which a Treatment Program was prescribed, which can subject him to further testing, effectively for cause, in addition to the testing required of all Players. He was then subject to the progressive discipline set forth in the Basic Agreement, which called for increased levels of suspensions without pay, or substantial fines, for any subsequent positive test result (including any test which is part of the Treatment Program), or other violation of his Treatment Program. For example, for a second positive a player faced a suspension of 15 days, which in an average case would have resulted in the loss of nearly $200,000. Moreover,

Players were then and always have been subject to for-cause testing. If any Club or central office official has information that gives him reason to believe a player is unlawfully using steroids, it can refer the matter to HPAC, which may order diagnostic testing if it believes it appropriate to do so. If HPAC determines the claim has merit, it can prescribe a Treatment Program, and, as noted, that Program may include further testing. When I appeared last March before the Senate Commerce Committee chaired by Senator McCain, I explained the agreements reflected in the 2003 and 2004 testing programs, and also expressed my belief that the 2004 program, if given a chance to do so, would work well, as we now know that it did. But, a year ago, I think it is fair to state that I did not have a receptive audience. I was chastised, both at that hearing and elsewhere, for the perceived deficiencies in our program. These were the principal complaints.

The first major criticism was that the 2004 testing regimen was lacking because all players would only be tested once. Therefore, the criticism was, once a player had been tested he was free to resort to using illegal steroids without fear of detection. A second major criticism was that we had not negotiated a program that called for off-season testing. Even if players knew they had to remain clean during the season, the complaint went, once the season was done he could begin using illegal steroids during the off-season.

The third major criticism was that there was no penalty for a first positive test. Under the Joint Drug Agreement, once program testing began in 2004 a first time offender was to be placed on the "clinical track", that is, required to meet with our doctors and to abide by their treatment program, including further testing for that individual, but was not suspended nor his name made public unless he committed another infraction. There was good reason for this; our focus was on treatment and prevention, not discipline, as is common in drug treatment programs, particularly for first time offenders. But this was unacceptable, we were told, because it meant players could continue to use illegal steroids without fear of serious penalties until after the first positive test.

And so, even though we were very confident that the 2004 program would be successful, and despite the fact that we had a contract which ran for three more seasons, the players nevertheless decided to negotiate a new, stricter, drug testing regime, in light of these perceived criticisms. Our new Agreement with MLB was announced in January. It is fair to state that such a midterm, major, amendment to the CBA is unprecedented, and, it can be argued, the new amendments consist entirely of concessions made by the players, who were under

no legal obligation to bargain over these matters at this time.

Under the new agreement, which is effective this season, every player will be tested once for illegal steroids, and, in addition, players at random will be chosen for additional testing. No players will know in advance when any test will be administered. Every player is potentially subject to being tested whenever random tests are conducted, no matter how many times he has already been tested.

Moreover, we now will have off-season random testing.

Third, for a first positive, a player will now face a 10-day suspension without pay. And the loss of ten or so games that the player will never get back is quite meaningful to a Major League player. But, perhaps more significantly, a player who is suspended for testing positive will be publicly identified, even for a first offense. The penalties for a subsequent positive test or violation of a Treatment Program are enhanced as well.

As we were negotiating the amendments to the Joint Drug Agreement, we learned the results of the 2004 program testing. As mentioned, those results showed that the number of positives dropped dramatically in just one year. Given the new enhancements to the program, and the continued education of the players, we are even more confident that we are moving in the right direction.

Let me make a few more points before I close. First, some may contend that the penalties under our new Agreement are still not strict enough. I respectfully, but strongly disagree. Whether you are a young player trying to make it in the big leagues, an established star, or a veteran utility player fighting for a job, the impact of being identified as a steroid user, especially in the current environment, could be devastating, and certainly will be a significant deterrent.

Second, and with all due respect, if Congress wants employers and unions to negotiate drug testing programs in order to clean up the problems in their own industries, Congress is going to have to be sensitive to the need for confidentiality,

which is surely the cornerstone of any successful drug testing policy. Indeed, Congress has recognized the need for confidentiality in a similar context, by explicitly regulating the disclosure of records from drug treatment programs regulated, conducted or assisted by the government. See, 42 U.S.C. Sec. 290dd-2.

Let me also acknowledge that it has not been easy to get to where we are today. I have worked for the players for 28 years; this is as difficult and divisive an issue as we have confronted in all of that time, including the issues, which led to the two long strikes in 1981 and 1994-5. We have always believed that Constitutional principles such as those contained in the 4th Amendment, while not perfectly applicable in a private employment setting, remain important principles that we should not casually abandon. There is both the view that we should never have agreed to the testing of individuals without cause; and there are those who believe we should have random, mandatory steroid testing, and should have had such testing earlier. For making this new agreement we have been criticized by my mentor and predecessor, Marvin Miller, the first MLBPA Executive Director, and a man to whom all players owe a great debt. He has said publicly that it was a mistake to reopen the contract, that testing should only be for individual cause, and that we will rue the day we took this step. His opinion is not one to be dismissed lightly.

But the important thing is that the players have decided that it is necessary to do this now. We think the agreement we have negotiated will be a successful one.

Under the National Labor Relations Act the negotiation of terms and conditions of employment is committed to good faith collective bargaining between employers and the organizations selected by and representing employees. The agreement reached in September 2002, and now amended, is a product of that process. We continue to believe that collective bargaining is the appropriate forum for consideration and resolution of these issues. One of the premises of our labor laws is that solutions devised by the parties in the workplace are more likely to be workable and enduring, precisely because they are forged by those parties, rather than by others outside that relationship, no matter how well intentioned they may be.

Finally, the Committee has asked what the players can do to educate young people on the dangers of abusing drugs in the name of athletic excellence. As I

have testified before, we stand ready to work with Congress and others on finding the most effective way to convince America's youth that there are no short-cuts to athletic excellence, and that the use of steroids is not only wrong, but dangerous. We must make sure that we do not explicitly or implicitly give credence or notoriety to those who claim that steroids are the future of sports.

But we should recognize other problems while we do so. For example, we also have to address the reality that for many young people steroids may only be a mouse click away on the Internet, or the fact 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, which were pointed out in the hearing held last week. Congress should consider not limiting its attention exclusively to a top-down review of testing programs, but also how to furnish parents, coaches, athletic directors, team physicians, teachers, principals and others who work with our young people with the information they need to counter any suggestion that athletic success should be achieved by the use of unlawful substances.

Let me close with the observation that players share, with the owners and the fans, and with the members of this Committee and this Congress, the goal of a game free of the unlawful use of drugs. We believe that the actions we have taken will achieve that result. We want the fans, and especially the children, the Major Leaguers of the future, to know that we are determined to achieve that goal.