Statement of Donald M. Fehr,

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before the Committee on Energy and Commerce,

United States House of Representatives

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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 invitation of the Chairman to testify with respect to HR 1862, the Drug Free Sports Act of 2005.

I appreciate the Committee's interest in and concern about the unlawful use of steroids, which led to this hearing. Let me begin by stating the position of the Major League Baseball Players Association ("MLBPA"), which I have previously articulated before several committees of the Congress. Simply put, the Players Association neither condones nor supports the use by players, or by anyone else, of any unlawful substance, nor do we support or condone the unlawful use by players, or by anyone else, of any legal substance. I cannot put it more plainly: the use of any illegal substance or the illegal use of any legal substance is wrong.

Lest there be any question, 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. Playing Major League Baseball requires talent, drive, intelligence, determination, and grit. The unlawful use of steroids has no place in the game. One need not be a physician to appreciate that steroids are powerful drugs with which no one should fool around. 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.

The players want to rid their game of the use of illegal performance-enhancing substances, and the agreements we have reached with the owners have served and will continue to serve that goal. In the 2002 negotiations, the MLBPA reached a steroid testing agreement with the Major League Clubs, and then, over the last winter, the MLBPA and the owners agreed to modify and enhance that agreement effective for this season. The evidence we have of the operation of the program in 2004, and of the enhanced program so far this year, suggests that we were correct; it is working well. The number of confirmed positives fell to about 1% in 2004, and the results we have so far this year also suggest that the enhanced program is effectively deterring steroid use.

Briefly, our current testing program operates in the following manner. Under the agreement effective this season, every player will be tested once for illegal steroids on a random and unannounced basis and, in addition, players at random will be chosen for additional unannounced testing. Every player is potentially subject to being tested whenever random tests are conducted, including during the off-season, no matter how many times he has previously been tested. No player will know in advance when any test will be administered.

For a first positive, a player faces a 10-day suspension without pay, and is publicly identified as having violated the testing regimen. The penalties for subsequent positive tests are significantly stronger. 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 significant are the consequences resulting from public identification. No player wants to be identified as having violated the rules. (Note also that a player who tests positive is, in addition, subject to a treatment program designed by our Health Policy Advisory Committee. This treatment program can include individualized random testing for any such player, in addition to the testing to which all players are subject.)

Both the collection of test samples (done by Comprehensive Drug Testing, Inc.) and the analysis of those samples (done by the WADA certified laboratory in Montreal) are conducted by independent contractors, whose business and reputation depend entirely on conducting themselves in a completely above-board and appropriate manner. The impression that somehow our testing program is not or was not handled by outside entities, which possess both the requisite independence and expertise, is simply incorrect.

In short, we have negotiated a program that we firmly believe will work. Moreover, the evidence

so far is that it is working. In addition, with our recent midterm amendments we have significantly strengthened the policy, demonstrating a clear capability and willingness to modify our program as needed. Indeed, on March 17th of this year, Commissioner Selig hailed our new agreement, saying that the program was as good as any in professional sports. And, what we have done was a product of good faith collective bargaining, just as Congress has always intended.

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. Needless to say, 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.

Accordingly, it should come as no surprise that the Players Association does not believe the proposed legislation should be enacted. As Congress has repeatedly noted, collective bargaining is the appropriate forum in which to deal with matters affecting terms and conditions of employment, even matters as controversial and politically volatile as random suspicionless employee drug testing in the absence of significant concerns about public safety. We believe the program we have implemented in Major League Baseball will work, and will be seen to have worked, if given the opportunity. Our program provides players with the assurance that the testing will be thorough, fair, and accurate, while also making it clear that the unlawful use of steroids is neither tolerated nor excused in the Major Leagues.

Further, we do not agree with the underlying presumption of the legislation - that a single federally mandated and operated drug testing program, in which the covered substances would be chosen by an international body free of any input from or responsibility to the individuals and the entities it will regulate, is the most effective or appropriate means to eliminate illegal performance enhancing drugs in professional sports in the United States. In fact, such an approach may create even more problems than it solves.

For example, there appears to be some confusion over how the legislation should be read. Some claim it would require testing for all substances banned by the World Anti-Doping Agency (WADA), as well as any additional substance which the Secretary of Commerce determines is performance-enhancing and for which testing is reasonable and practicable. Others have

asserted the opposite - the covered list would be limited to those substances banned by WADA that the Secretary of Commerce also determines are performance enhancing.

Obviously, how this provision is interpreted will have a significant impact on the scope of the legislation. If the former description is accurate, the legislation would delegate significant authority over American professional sports to an international body, WADA, which is under no obligation even to consider the views or concerns of the leagues or players in the United States, the impact of its decisions on these persons or entities, or the differences between competition in professional and Olympic sports.

Moreover, the legislation contains no provision which makes it clear that players may use substances which the United States Congress has determined are safe and effective for sale and use by all adult Americans and are readily available for purchase without a doctor's prescription. Professional athletes should not be punished for the appropriate use of legal substances. The Association has never contended that players should be above the law; conversely, they should not be placed below it. In addition to being patently unfair, no public policy basis has been advanced for penalizing professional athletes for the use of legal substances.

Turning to the penalties set forth in the bill, we respectfully submit that those proposed punishments are far too severe. The goal of our program is - and should be - to deter use of illegal substances, and we have agreed that mandatory suspensions for first offenders are necessary for that purpose. However, a two-year suspension for a first offense would, as a practical matter, end the player's career in the vast majority of circumstances. Penalties of that magnitude are simply not necessary to deter use and appear to punish only for the sake of punishing. Moreover, as the Olympics have demonstrated, the severity of the penalty, by itself, does not guarantee the result; if it did, we would see no positive tests in the Olympics.

Our players are extremely diverse. Some are far more educated when they arrive in the league than others, and there is no uniformity as to their legal sophistication or the operative medical rules among their respective countries of origin. In addition, some substances which are illegal in the United States or by WADA rule are legal in other countries. Given these circumstances, there is always the possibility of error or mistake. Ending an individual's career as a result of a single mistake or a poor decision is neither fair to the players involved nor necessary to persuade the public that Major League Baseball and its players are committed to ridding the sport of illegal performance enhancing substances.

The portion of the legislation creating an appeals process is also problematic and confusing. For example, it is unclear whether an athlete will have the right to have his or her fate determined by a neutral judge, jury or arbitrator, whether traditional due process standards will apply, or whether there is even a right to counsel. The legislation also mandates that the entire appeals process - from notification of an appeal to final adjudication - be completed within 30 days, far too little time in cases where there may be factual or scientific issues in controversy. Again, we respectfully submit that additional thought needs to be given as to how this process would work, before Congress passes a law that could deprive an athlete of the right to engage in his chosen profession.

Elsewhere, the legislation is specific in some circumstances but vague in others. For example, it contains a mandate regarding both timing and the frequency of random testing. We believe that such matters are not susceptible to a "one size fits all" approach and are best left to those with knowledge of the workings of a particular sport. In fact, the testing regime we have established for Major League Baseball is more effective, frequent, and random than the proposed regime in the bill. Similarly, the bill also calls for "tests to be administered by an independent party not affiliated with" the professional league. No credible evidence has been brought forward to question the integrity of the administration of any drug testing program currently in force in any professional sport. The NFL and its union apparently have chosen to administer its program in-house, in the main. In baseball, as noted, the parties have retained reputable independent contractors for collection and analysis. Absent any actual evidence of abuse, each sport should be permitted to determine how best to effectuate its program.

Finally, the legislation raises troubling constitutional questions. Suspicionless drug testing, mandated by the federal government, can run afoul of the general Fourth Amendment requirement that searches must be based on individualized suspicion of wrongdoing. The reasons asserted to justify deviation from this principle in the context of professional sports may fall short under the Supreme Court's reasoning in Chandler v. Miller, 520 U.S. 305 (1997). There, the court held that a Georgia statute requiring candidates for state office to submit to drug testing was unconstitutional. Among other things, the Court determined that the stated intention of having candidates set a good example was not sufficient to justify the inherent invasion of privacy. The bill also raises additional constitutional concerns that will have to be addressed.

In conclusion, today, in baseball, our players are tested throughout the year on an unannounced, random basis, at a level in excess of the standard called for in the bill. 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 penalties are sufficient to deter initial use and repeat offenses without destroying careers. This result was achieved without the creation of a new federal agency or

authority, or the resulting problems that will arise from the imposition of the one-size-fits-all approach called for in the legislation. Instead, it was achieved, as it should be, through collective bargaining, utilizing the medical and scientific expertise of the federal government to determine what substances should be covered.

The Players Association shares the Committee's goal in making sure that baseball, like other sports, whether it is played at the professional or amateur level, is free of all illegal performance enhancing drugs. We want the fans, and especially the children, the Major Leaguers of the future, to know that we are determined to achieve that goal.