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March 16, 2005

Mr. Allan H. Selig
Commissioner of Baseball
The Office of the Commissioner of Baseball
245 Park Avenue, 31st Floor
New York, NY 10167

Donald M. Fehr, Esq.
Executive Director and General Counsel
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Dear Commissioner Selig and Mr. Fehr:

On January 13, 2005, Major League Baseball and the Players' Association announced a new policy on performance-enhancing drugs. In meetings with us, senior baseball officials represented this policy as the "gold standard" for drug testing. In public statements, Commissioner Selig stated, "My job is to protect the integrity of the sport and solve a problem. And I think we've done that."[1] He has also said, "Do I believe the new program … will work? I really do… We will eradicate steroid use."[2] Relying on Major League Baseball's assurances, observers have called the new policy "very strict,"[3] "finally … the right thing,"[4] and "one strike-you're out."[5]

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[1] *Selig Takes on Critics, Lauds New Drug Policy*, Sacramento Bee (Mar. 7, 2005).

[2] *Selig Vows to Purge Steroids from Baseball*, Chicago Tribune (Mar. 6, 2005).

[3] *Tougher Calls for Players,* Hartford Courant (Jan. 14, 2005).

[4] *Handwriting Was on Dugout Wall*, Atlanta Journal Constitution (Jan. 13, 2005).

[5] *One Strike—You're Out*, Tampa Tribune (Jan. 14, 2005).

On Monday, Major League Baseball provided the Committee with a copy of its new policy, which was noted to be "still in draft form."[6] Our preliminary review raises questions about whether the new policy is as comprehensive and effective as you have claimed. For example, we have questions about:

- **The Penalties for Violations.** In public statements, Major League Baseball representatives have emphasized that players who violate the new policy will be publicly identified and suspended from baseball for ten days. In fact, the details of the new policy reveal that the penalty for a first offense can be either a suspension or a fine of $10,000 or less; that there is no public identification of players who are fined instead of suspended; and that even if players are suspended, the public disclosure is limited to the fact of their suspension with no official confirmation that the player tested positive for steroids. In contrast, the Olympic policy calls for a two-year suspension for a first offense.

- **The Scope of the Ban.** The new Major League Baseball policy appears to differ markedly from the Olympic policy in the scope of the drugs covered. At least four anabolic steroids banned by the Olympics are excluded from Major League Baseball's ban, as are novel "designer" steroids that the Olympics prohibit because they have "a similar chemical structure or similar biological effect." Unlike the Olympic policy, the Major League Baseball policy does not include tests for human growth hormone or amphetamines.

- **The Makeup of the Supervisory Committee.** Under the new Major League Baseball policy, many key implementation decisions, such as how to conduct off-season testing and whether to prohibit additional substances, are to be made by a four-person committee that includes Robert D. Manfred, Jr., Major League Baseball's Executive Vice President, Labor and Human Resources, and Gene Orza, the Chief Operating Officer and Associate General Counsel of the Major League Players Association. According to the policy, some of these decisions must be made unanimously, giving both Major League Baseball management and the players union a veto. The Olympic drug testing policy takes a different approach, giving an independent expert agency, the World Anti-Doping Agency, the authority to make important scientific judgments.

- **The Anti-Oversight Clause.** An unusual provision in the new Major League Baseball policy provides that the new policy "will be suspended immediately" if there is an independent government investigation into drug use in baseball.

There are other significant differences between Major League Baseball's new policy and the more stringent Olympic policy. For example, while the Olympics require

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[6] Letter from Robert D. Manfred, Jr. to the Honorable Tom Davis and the Honorable Henry A. Waxman (Mar. 14, 2005).

continuous monitoring of the athlete from the notification of the test until its completion, Major League Baseball appears to permit players to leave in the middle of a drug test.

In these areas and others, we have a number of questions about the discrepancies between Major League Baseball's public presentation of its new drug testing effort and the language of the new policy. We hope you will come prepared to address these questions at tomorrow's hearing.

The Penalties for Violations

In announcing its new policy in January, Major League Baseball described a set of specific penalties to the public. Robert D. Manfred, Jr., Executive Vice President, Labor and Human Resources, stated:

> For the first time, we will have discipline for first-time offenders under the drug program. Such offenders will be suspended for 10 days. All of the suspensions under this program are without pay. For the second offense, a 30-day suspension will be imposed. Third offense, a 60-day suspension. And fourth offense, the suspension will be for one year.[7]

Referring to the penalty for a first offense, Commissioner Selig has stated: "People have said that policy is weak … I strongly disagree. A player making the average salary would lose $140,000 for a first offense."[8]

Major League Baseball officials have also indicated that the names of players who test positive for steroids will be disclosed to the public. Commissioner Selig has stated, "The fact that it is announced and everybody in America will know who it is, that's a huge deterrent … No player wants that."[9]

These descriptions of the policy, however, appear to contradict its text. The policy states that after testing positive for steroids, a player faces *either* "a 10-day suspension *or* up to a $10,000 fine." The second violation may be settled by *either* "a 30-day suspension *or* up to a $25,000 fine." The third violation may be settled by *either* "a 60-day suspension *or* up to a $50,000 fine." The fourth violation may be punished by *either* "a one-year suspension *or* up to a $100,000 fine." One hundred thousand dollars is less money than some players earn in one game. The penalty for a fifth violation is at the discretion of the Commissioner.[10]

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[7] Fox on the Record with Grega Van Susteren (Jan. 13, 2005).

[8] *Selig Asserts Steroid Policy Works,* Milwaukee Journal-Sentinel *(Mar. 6, 2005).*

[9] *Id.*

[10] Major League Baseball, *Joint Drug Prevention and Treatment Program*, 11-12 (2005)(Emphasis added).

In addition, contrary to public statements by Major League Baseball, the policy does not require public disclosure of positive steroid tests. In fact, the policy appears to prohibit such disclosure. The policy states that "the results of any Prohibited Substance testing ... shall remain strictly confidential."[11] In the case of a fine, the policy also states that "any disciplinary fines imposed upon the Player by the Commissioner shall remain strictly confidential."[12] Under the policy, there appears to be public disclosure only in the case of a suspension, and even then the disclosure appears to be limited. The policy states that "the only public comment from the Club or the Office of the Commissioner shall be that the Player was suspended for a specified number of days for a violation of this Program."[13]

The testing program covers ephedra, ecstasy, and a variety of other drugs.[14] Consequently, a public announcement that a player has been suspended for a violation of the program would not reveal whether the drug involved is a performance-enhancing steroid.

By comparison, the first violation in Olympic sports carries a two-year suspension, and the second requires a lifetime ban.[15] All disciplinary actions are made public.

The Scope of the Ban

A central element of Major League Baseball's new drug policy is the list of substances that are (1) prohibited and (2) subject to testing so that the ban can be enforced. In key areas, however, the baseball list appears limited, especially when compared to the more comprehensive Olympic standards.

First, the new policy does not ban all anabolic steroids. It appears that at least four anabolic steroids recognized by the World Anti-Doping Agency and prohibited for Olympic athletes are still permitted for major league ballplayers. These include boldione, danazol, quinbolone, and dihydroepiandrostone.

The policy does not explain the rationale for exempting these substances, all of which can enhance performance. One of the substances, boldione, is marketed on the web as "Boldione for Muscle Mass!" and "the most potent anabolic prohormone ever

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[11] *Id.* at 10.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 3.

[15] World Anti-Doping Agency, *World Anti-Doping Code* (2003).

developed."[16] After boldione was detected in the urine sample of a swimmer, she was barred from Olympic competition for two years.[17] Yet boldione and the other anabolic steroids listed above are not included on either of the two lists that, according to Major League Baseball officials, are the basis of Major League Baseball's steroid testing regimen.[18]

Major League Baseball's new policy also fails to ban novel or "designer" steroids. These are drugs created in the lab to evade laboratory detection and marketed directly to sport's top stars. In contrast, the Olympic ban broadly includes all substances that have "a similar chemical structure or similar biological effect(s)" to existing anabolic steroids."[19] The Olympics enforces this ban by conducting tests on stored samples from athletes as novel drugs are identified.

The failure of Major League Baseball to cover designer steroids would appear to be a significant omission. According to experts, hundreds of potential "designer" steroids already exist.[20] Major League Baseball is still confronting a major scandal caused by the designer steroid tetrahydragestrinone (THG). According to leaked grand jury testimony, several baseball stars may have used THG for years before its detection by authorities and its addition to the list of federal controlled substances.[21] Yet under the new Major League Baseball policy, the use of the next THG would appear to be permissible in baseball.[22]

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[16] Vitafly, *Bondione for Muscle Mass!* (Undated) (online at http://www.vitafly.com/article112.html).

[17] *Area Swimmer Has Few Options After Positive Test*, Washington Post (Nov. 6, 2004).

[18] The four anabolic steroids are not found either on (1) a list of 43 anabolic steroids on pages 3 and 4 of the draft baseball policy or (2) on schedule III of the Drug Enforcement Administration. While the Health Policy Advisory Committee has the capacity to add additional steroids beyond these two lists to baseball's testing regimen, we understand that the league has only added one, desoxymethyltestosterone. Robert D. Manfred, Jr., Major League Baseball's Executive Vice President, Labor and Human Resources, telephone briefing with staff of the Government Reform Committee (Mar. 15, 2005).

[19] World Anti-Doping Agency, *The 2005 Prohibited List*, 5-6 (2005).

[20] *Doping Experts Say Baseball Faces Tough Job*, New York Time (Dec. 9, 2004).

[21] *Giambi Admitted Taking Steroids*, San Francisco Chronicle (Dec. 2, 2004); *What Bonds Told the BALCO Grand Jury*, San Francisco Chronicle (Dec. 3, 2004); *Sheffield's Side*, San Francisco Chronicle (Dec. 3, 2004).

[22] The new baseball policy includes a provision prohibiting "anabolic androgenic steroids that are not covered by Schedule III but that may not be lawfully obtained." However, there is no federal law that explicitly prohibits the obtaining of designer

Another apparent gap is the policy's failure to test for human growth hormone, a substance with similar effects to anabolic steroids. Major League Baseball officials have assured the public that "human growth hormone will be banned under the program."[23] Yet the new policy fails to enforce this ban. Testing of major league ballplayers is limited to urine samples,[24] and all available tests for human growth hormone require analysis of blood.[25]

When asked about the omission of testing for human growth hormone, Major League Baseball officials have responded that there is no reliable blood test for the substance.[26] Publicly, Major League Baseball's officials have expressed optimism about the availability of a urine test "in the relatively short term," perhaps as early as next season.[27] Yet independent experts have raised doubts about Major League Baseball's approach. In April 2004, the U.S. Anti-Doping Agency convened a meeting of the world's leading researchers and concluded that all promising approaches for measuring human growth hormone "use blood for measurement, as opposed to the traditional use of urine in doping control."[28] According to Dr. Gary Wadler, who serves on the Prohibited Lists and Methods Committee of the World Anti-Doping Agency, a validated blood test for human growth hormone was employed at the Olympic games in Athens.[29] Blood testing for human growth hormone is now standard for Olympic athletes.[30]

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steroids. There also appears to be no provision in the draft policy for retaining samples to test in the future when designer steroids are recognized. MLB, *Prevention*, *supra* note 10 at 3-4.

[23] *Major League Baseball Revises Drug Policies*, Cable News Network (Jan. 13, 2005).

[24] MLB, *Prevention*, *supra* note 10 at 6.

[25] *Baseball's New Drug Policy Way Off Base*, Miami Herald (Jan. 17, 2005).

[26] Robert D. Manfred, Jr., Major League Baseball's Executive Vice President, Labor and Human Resources, telephone briefing with staff of the Government Reform Committee (Mar. 15, 2005).

[27] *Selig Says Steroids Testing Is Working*, St. Louis Post-Dispatch (Mar. 6, 2005).

[28] U.S. Anti-Doping Agency, *Statement from Larry Bowers, USADA Senior Managing Director. Following USADA Research Symposium on Growth Hormone* (Apr. 5, 2004).

[29] Dr. Gary Wadler, Telephone briefing with minority staff of the Government Reform Committee (Mar. 16, 2005); *Hormone Tests in Athens*, New York Times (Sept. 18, 2004).

[30] WADA, *supra* note 19.

Major League Baseball's policy also fails to ban other substances that have similar effects to anabolic steroids, including insulin, human chorionic gonadotropin, and IGF-1.[31] These substances are all banned for Olympic athletes.[32]

In addition, Major League Baseball's new policy apparently fails to ban amphetamines and most other stimulants. Experts believe this omission makes no sense. Dr. Wadler has stated, "The most classic of all studies ever done in doping was on amphetamines. ... It clearly is performance-enhancing."[33] At the Olympic level, athletes are prohibited from using a wide range of amphetamines and other stimulants.[34]

The Makeup of the Health Policy Advisory Committee

According to the new policy, Major League Baseball's drug program will be run by a four-member Health Policy Advisory Committee. This committee determines many key elements of the program's implementation including (1) how to conduct off-season testing; (2) whether to prohibit the use of additional substances; (3) whether a player's challenge to a testing result has a "reasonable basis"; and (4) whether a player has good cause to refuse to submit a sample.[35]

According to Major League Baseball, one member of the Health Policy Advisory Committee is Robert D. Manfred, Jr., Major League Baseball's Executive Vice President, Labor and Human Resources. Another member is Gene Orza, the Chief Operating Officer and Associate General Counsel of the Major League Baseball Players Association. For many years, these two men have led collective bargaining efforts for management and the players' union, respectively. The two other members are physicians, one appointed by Major League Baseball and the other by the Players' Association.[36]

The staffing of the Health Policy Advisory Committee raises serious questions about the credibility of the drug testing policy. For example, the Players Association has long resisted a random testing program for anabolic steroids. Under the new policy, either Mr. Orza or the physician appointed by the Players Association has a veto over

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[31] MLB, *Prevention*, *supra* note 10.

[32] WADA, *supra* note 19.

[33] *Baseball Bulks Up Steroid Testing; New Policy Omits Amphetamines*, Chicago Tribune (Jan. 14, 1005).

[34] WADA, *supra* note 19.

[35] MLB, *Prevention*, *supra* note 10.

[36] Robert D. Manfred, Jr., Major League Baseball's Executive Vice President, Labor and Human Resources, telephone briefing with staff of the Government Reform Committee (Mar. 15, 2005).

adding any new steroid to the existing program.[37] The policy also permits any single member of the committee to deem that a player's objection to a positive result has a "reasonable basis," triggering automatic arbitration.[38]

The Olympics takes a markedly different approach to oversight of its testing program. To assure integrity, the Olympics has handed control over drug testing to an independent expert agency, the World Anti-Doping Agency.

The Anti-Oversight Clause

The new policy contains an extraordinary provision that in the event of a "governmental investigation" relating to drug testing of players, "all testing ... shall be suspended immediately."[39] The suspension will remain in effect until the government investigation is withdrawn, the league and players' union "have successfully resisted an investigation at the trial court level," or both sides agree to resume testing.[40] If testing is suspended for a year, then the entire drug program is subject to renegotiation.[41]

We have serious questions about this provision. By requiring the indefinite suspension of the testing program when government officials, including elected representatives, ask basic questions about drug use in baseball, this provision appears designed to discourage responsible independent oversight.

Other Questions

We have questions about other significant differences between testing for Olympic athletes and the new Major League Baseball policy.

One question relates to the integrity of the testing process. For Olympic athletes, the World Anti-Doping Agency requires uninterrupted monitoring from the "first moment of in-person notification until the completion of the sample collection procedure."[42] We understand that the goal of such monitoring is to keep athletes from having opportunities to cheat. In addition, the Olympic rules do not permit an athlete to evade testing by only providing a partial specimen. If an Olympic athlete provides less

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[37] MLB, *Prevention, supra* note 10, at 4.

[38] *Id.* at 13.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] World Anti-Doping Agency, *International Standard for Testing*, 18 (June 2003).

than the required amount of urine, the sample is not discarded. Instead, he or she must drink liquids under supervision until the remainder of the sample is provided.[43]

By contrast, under the new policy, when a major league player fails to provide the required amount of urine, his sample must be discarded. He may then leave the testing site unmonitored and return in an hour.[44] This extended break could provide an opportunity to cheat or develop an excuse to postpone the testing altogether.

This provision for interrupting drug testing is a departure from the previous Major League Baseball policy on testing, which did not permit players to leave in the middle of a drug test. The 2002 collective bargaining agreement stipulated that "players may not leave the place of testing without giving a specimen unless authorized to do so."[45] We intend to ask why Major League Baseball's approach was weakened and why it falls so far short of the Olympic standard.

We also plan to ask you about several important issues that are not specified in the new policy. For example, Major League Baseball officials have stated: "We're using only Olympic-certified labs ... these are the best labs in the world, the gold standard of laboratories."[46] However, the new policy apparently does not require Major League Baseball to continue using a certified lab. The policy only states that analyses be done "pursuant to a scientifically-validated urine test."[47]

Conclusion

Despite the public assurances of Major League Baseball officials, we have questions about the effectiveness of its new drug policy. There appear to be major differences between Major League Baseball's new policy and the independent, widely respected testing program of the Olympics. The Olympic policy appears comprehensive, strict, independent, and transparent. Major League Baseball's program appears to raise questions on all four counts.

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[43] *Id.* at 36.

[44] Major League Baseball, *Addendum A: Major League Baseball Collection Procedures* (2005).

[45] Major League Baseball, *Major League Baseball's Joint Drug Prevention and Treatment Program*, 173 (2002).

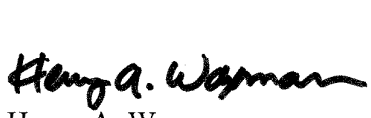
[46] *Selig: I'll Rid Game of Steroids,* Chicago Tribune (Mar. 6, 2005).

[47] MLB, *Prevention, supra* note 10, at 5 (2005).

We hope to explore these and other questions with you at the Committee's hearing tomorrow.

Sincerely,

Tom Davis
Chairman



Henry A. Waxman
Ranking Minority Member