

**TESTIMONY OF DAVID J. STERN**  
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**BEFORE THE COMMITTEE ON COMMERCE,**  
**SCIENCE, AND TRANSPORTATION**  
**UNITED STATES SENATE**

**SEPTEMBER 28, 2005**

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 10 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.

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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.