

**TESTIMONY OF PAUL TAGLIABUE
COMMISSIONER, NATIONAL FOOTBALL LEAGUE
AND
EUGENE UPSHAW, EXECUTIVE DIRECTOR, NFL PLAYERS ASSOCIATION
BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE
& TRANSPORTATION
UNITED STATES SENATE
SEPTEMBER 28, 2005**

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 US 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 t:e 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.