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COMMERCE
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Chairman Rush, Chairman Waxman, Ranking Member Radanovich and members of the Committee, thank you for the opportunity to be here today to address an issue of concern to Major League Baseball.

Baseball Commissioner Allan H. Selig has made the eradication of the use of performance enhancing substances a strategic priority for Major League Baseball. Under Commissioner Selig's leadership, drug programs have been developed, deployed, updated and constantly improved at both the Major League and Minor League level. Baseball's programs call for pre-game and post-game testing for both steroids and stimulants. Out of competition or off-season testing is required. In total, we conducted almost 13,000 tests in 2009. Baseball uses the most up to date testing technology at laboratories certified by the World Anti-Doping Agency. And, our programs are transparent in that all suspensions are announced publicly and testing statistics are reported annually by the Independent Program Administrator. These programs have been effective in reducing the use of performance enhancing substances (we had just 2 steroid positives in 2009) and have been equally effective in detecting players, including high profile players, who have persisted in the inappropriate use of such substances.

Without exception, the progress Baseball has made at the Major League level has been accomplished in the collective bargaining process. The first drug testing program was negotiated as part of our 2002 collective bargaining agreement. When it became apparent that improvements needed to be made, Baseball and the Players Association took the unprecedented step of twice reopening the agreement to strengthen the drug program. The collective bargaining parties made further improvements in the 2006 round of negotiations and then reopened that new agreement to deal with recommendations made by former Senator George Mitchell at the conclusion of his high-profile investigation. In short, the collective bargaining process has proven to be an effective vehicle for dealing with the issue of performance enhancing drugs.

Based on our experience, Major League Baseball believes that the substantive terms of drug testing programs should continue to be established through the bargaining process created and regulated by the National Labor Relations Act. Consistent with the policies of the NLRA, the parties to the collective bargaining process are best situated to craft a program that deals with the unique circumstances presented by Major League Baseball.

The recent decision by the United States Court of Appeals for the Eighth Circuit in Williams v. National Football League,¹ however, has raised the possibility that state laws could interfere with the uniform enforcement of Baseball's collectively bargained drug program. It is well-settled law that section 301 of the National Labor Relations Act preempts state claims that are "inextricably intertwined with consideration of the terms of

¹ 2009 U.S. App. LEXIS 20251 (8th Cir. 2009)

the labor contract.”² Prior to the Eighth Circuit decision, we assumed that claims based on state laws establishing standards for drug testing programs would be preempted in the context of a collectively bargained program because a court could only determine if the state law standards were met by “considering” -- in the words of the Supreme Court -- the terms of a labor contract. In fact, we remain convinced that the Eighth Circuit decision is wrongly decided because it ignores this tenet of the law of preemption established by the Supreme Court.

Uniformity of enforcement is an essential element of any drug testing program in the context of professional sports. The essence of sport is fair competition. The use of performance enhancing drugs undermines fair competition. In a nation-wide sport such as professional baseball, all athletes must be held to a single standard of clean competition. Once Major League Baseball and the Major League Baseball Players Association have agreed on a drug testing program, individual states and local governments cannot be allowed to undermine the program with employee-protective statutes. All players, regardless of the state in which their Club is located, must be held to the same standard. In short, players in Minnesota should not have greater leeway to use performance enhancing drugs than players in other states.

Unfortunately, the problem of inconsistent state and local regulations is not a merely hypothetical problem. There are a number of states and municipalities that have laws related to drug testing that could create claims for players covered by our program. Such claims could lead to uneven enforcement of the drug policy which, in turn, would

² Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985)

undermine the credibility of our program and the integrity of the competition known as Major League Baseball.

Because we have always believed claims based on state drug testing laws to be preempted, we have never bargained with our Players Association in an attempt to deal with the problem of state claims. I am a firm believer in the process of collective bargaining and the utility of that process in dealing with difficult issues. Having said that, I doubt that the collective bargaining parties have the legal power to waive in advance state law claims of individual union members. Moreover, it would be impractical to suggest that these issues can be dealt with by litigating the precise contours of a myriad of state and local statutes.

Major League Baseball, of course, recognizes the legitimate right of states to pass employee protective legislation in the area of drug testing. Even a cursory review of the applicable state laws, however, demonstrates that such statutes were intended to deal with programs that regulate the use of drugs of abuse in traditional workplaces such as factories and hospitals, not the use of performance enhancing substances by professional athletes. For example, some statutes require laboratory certification. But, these required certifications are for those laboratories that test for marijuana and cocaine. There is, to the best of my knowledge, no mention in a state statute of WADA certification, the gold standard in testing for performance enhancing drugs. Given this fact, it would seem that a narrowly drafted statute could solve the problem faced by professional sports while

avoiding undue interference with the prerogatives of the states and preserving the primary role of collective bargaining in setting the substantive terms of drug programs in sports.

I thank you for giving us the opportunity to address this important issue.