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Drug Testing In Sports: Proposed Legislation

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Summary

Following a wave of allegations that the use of performance enhancing drugs by American athletes is growing, various congressional committees have held hearings on the effectiveness of the drug testing policies and procedures of professional sports leagues. Currently, there are six bills before Congress that would create mandatory minimum drug testing procedures for pro sports leagues: S. 1114; S. 1334; H.R. 2565; H.R. 1862; H.R. 2516; and H.R. 3084. This report provides a summary of these six bills.

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Drug Testing In Sports: Proposed Legislation

Introduction. Following a wave of allegations that the use of performance enhancing drugs by American athletes is growing, various congressional committees have held hearings on the effectiveness of the drug testing policies and procedures of professional sports leagues.¹ Currently, there are six bills before Congress: S. 1114 (Senator McCain); S. 1334 (Bunning); H.R. 2565 (Representative Davis); H.R. 1862 (Representative Stearns); H.R. 2516 (Representative Sweeney); and H.R. 3084 (Stearns). The McCain and Davis bills are virtually identical, and all six bills would establish minimum drug testing standards for some professional sports leagues. This report provides a summary of the six bills currently before Congress and a side-by-side comparison of their major provisions. It is noted at the outset that government-mandated random drug testing of pro athletes may raise some constitutional concerns.²

H.R. 2565. By statute, the authorization for the Office of National Drug Control Policy (ONDCP) expired in 2003,³ although ONDCP has continued to operate through appropriation acts. The Davis bill would repeal the statutory sunset provision, so that ONDCP's authorization would be permanent.⁴

H.R. 2565 would require the “major professional sports leagues” – defined to include Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League, and any “successor leagues” – to implement independently administered drug testing programs mirroring the standard of the United States Anti-Doping Agency (USADA).⁵ Under the bill, the USADA standard would (at a minimum) have to provide for the testing of each professional athlete at least five times each calendar year. At least three of these tests would have to be administered in-season without advance notice, and at least two off-

¹ For a comparison of some of the testing regimes used in professional and Olympic sports, see CRS Report RL32894, *Anti-Doping Policies: The Olympics and Selected Professional Sports*, by (name redacted).

² See CRS Report RL32911, *Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues*, by (name redacted).

³ 21 U.S.C. § 1712. See CRS Report RL32352, *War on Drugs: Reauthorization of the Office of National Drug Control Policy*, by (name redacted).

⁴ H.R. 2565, § 102.

⁵ USADA is non-governmental and independent of Olympic athletes and the United States Olympic Committee.

season without advance notice.⁶ Each test would have to cover all substances prohibited in USADA's anti-doping code,⁷ and each sample would have to be analyzed at a USADA-approved lab.⁸

A positive test would be any test in which a prohibited substance (or a metabolite or marker of a prohibited substance) is detected. In addition, if an athlete refuses to take a test or uses a method to obscure the testing results, then that would be considered a "positive test."⁹ An athlete's first positive test would carry a two-year suspension with loss of pay, while a second positive test would result in a lifetime ban from all of the covered leagues.¹⁰ The leagues would be required to disclose positive tests and resulting penalties to the public.¹¹

Each covered league would be required to annually certify to the ONDCP Director that the league has consulted USADA in developing its adjudication process, which would have to provide the athlete who tests positive a hearing (after notice), representation of counsel, and the right to appeal. While such proceedings are pending, the athlete in question would be suspended.¹²

Each covered league would be required to annually certify to the ONDCP Director that the league has consulted with USADA in developing its testing distribution plan and drug testing protocols.¹³

The ONDCP Director would have the authority to modify the aforementioned standards, so long as the modifications would not reduce the effectiveness of the standards in curbing the abuse of performance-enhancing substances, or "diminish the leadership role of the United States" in eliminating such substances from sports.¹⁴ Further, the Director could expand the number of leagues covered under the bill to include other pro sports leagues and NCAA Division I and II colleges and athletes.¹⁵

⁶ H.R. 2565, § 201(a) (creating new § 724(b)(1) of P.L. 105-277). From the wording of the bill, it appears that tests beyond the minimum number could be administered with advance notice.

⁷ Leagues would be allowed to make exceptions for properly prescribed substances. *Id.*

⁸ H.R. 2565, § 201(a) (creating new § 724(b)(5) of P.L. 105-277).

⁹ H.R. 2565, § 201(a) (creating new § 724(b)(6)(B) of P.L. 105-277).

¹⁰ *Id.* The bill would allow for lesser penalties where an athlete unwittingly takes a prohibited substance, or where an athlete who tests positive helps the league track down those who are violating the drug policy or helping others to do so. *Id.*

¹¹ H.R. 2565, § 201(a) (creating new § 724(b)(9) of P.L. 105-277).

¹² H.R. 2565, § 201(a) (creating new § 724(b)(8) of P.L. 105-277).

¹³ H.R. 2565, § 201(a) (creating new § 724(b)(2), (3) of P.L. 105-277).

¹⁴ H.R. 2565, § 201(a) (creating new § 725 of P.L. 105-277).

¹⁵ *Id.* The Director could delegate the Director's duties under § 725 to another federal agency.

Under the Federal Trade Commission (FTC) Act,¹⁶ the FTC has the authority to issue regulations proscribing certain activities as “unfair or deceptive acts or practices” affecting commerce.¹⁷ The Davis bill would make a violation of the aforementioned testing standards an unfair or deceptive act under the FTC Act, and require the FTC to promulgate regulations to enforce the Clean Sports Act as if the FTC Act were incorporated into the Clean Sports Act.¹⁸ The FTC would be empowered to levy fines of up to \$1 million for failure to implement the required testing procedures.¹⁹

The Davis bill would require each covered league to report to Congress every two years on how the league’s drug policy compares with that of USADA, number of players tested, etc. The ONDCP Director would be required to report to Congress from time to time on potential improvements to federal drug laws with respect to curbing the use of performance enhancing substances by athletes.²⁰ Further, both the Government Accountability Office (GAO) and the Commission on High School and College Athletics (which would be established by the ONDCP Director) would have to report to Congress on issues related to the use of performance enhancing substances by amateur athletes.²¹

S. 1114. S. 1114 is virtually identical to the Davis bill, except that it would not take the form of an amendment to the Office of National Drug Control Policy Act, nor would S. 1114 reauthorize the ONDCP.

H.R. 1862. H.R. 1862 would include not only the four leagues covered in the McCain and Davis bills, but also Major League Soccer (MLS), the Arena Football League, “and any other league or association that organizes professional athletic competitions as the Secretary [of Commerce] may determine.”²²

H.R. 1862 would require the Secretary of Commerce to promulgate regulations governing testing for prohibited substances by covered leagues.²³ Under the bill, the regulations would have to require that every athlete be independently tested at least once a year – without notice – for substances prohibited by the World Anti-Doping

¹⁶ 15 U.S.C. § 41 et seq.

¹⁷ *Id.* at § 57a.

¹⁸ H.R. 2656, § 201(a) (creating new § 726 of P.L. 105-277). The bill would also require the FTC to promulgate parallel regulations regarding professional boxing.

¹⁹ *Id.*

²⁰ H.R. 2565, § 201(a) (creating new § 727 of P.L. 105-277).

²¹ H.R. 2565, § 201(a) (creating new §§ 729, 730 of P.L. 105-277).

²² H.R. 1862, § 2(2).

²³ The Secretary would be empowered to exempt leagues that had previously implemented testing procedures that meet or exceed those listed in the Secretary’s regulations. *Id.* at § 4.

Agency (WADA) and other substances determined by the Commerce Secretary to be performance-enhancing “for which testing is reasonable and practicable.”²⁴

H.R. 1862 would require a two-year suspension without pay for the first positive test, and a lifetime ban from the individual league for the second positive test.²⁵ An athlete testing positive would have the right to appeal the result so long as he or she files such an appeal within five days of learning of the result. The league would then have 30 days in which to issue a decision. The aforementioned penalties would be stayed pending the appeals process.²⁶

Covered leagues would have one year to adopt and enforce testing procedures that comply with the regulations issued by the Commerce Secretary. After this grace period ends, the Secretary could levy fines of up to \$5 million for noncompliance, and add another \$1 million for each additional day of noncompliance.²⁷

The Commerce Secretary would be required to submit to Congress every two years a report on the effectiveness of the drug testing regulations. In addition, the Comptroller General would be required to conduct a study of the use of performance-enhancing substances by amateur athletes and submit to Congress a report on the study’s findings and with recommendations as to extending the coverage of the Commerce Secretary’s testing regulations to include amateur athletes.²⁸

H.R. 3084. On June 28, Representative Stearns introduced another bill, modeled after H.R. 1862, but also containing significant differences. Like H.R. 1862, H.R. 3084 would include not only the NFL, NBA, MLB, and NHL, but also MLS, the Arena Football League, “and any other league or association that organizes professional athletic competitions as the Secretary [of Commerce] may determine.”²⁹

H.R. 1862 would require the Secretary of Commerce to promulgate regulations governing testing for prohibited substances by covered leagues.³⁰ Under the bill, the regulations would have to require that every athlete be independently tested at least five times a year – without notice – for substances prohibited by the World Anti-Doping Agency (WADA) and other substances determined by the Commerce Secretary to be performance-enhancing or intended to hide performance-enhancing

²⁴ *Id.* at §§ 3(1), (2).

²⁵ *Id.* at § 3(4).

²⁶ *Id.* at § 3(5).

²⁷ *Id.* at § 5.

²⁸ *Id.* at § 6.

²⁹ H.R. 3084, § 2(2).

³⁰ *Id.* at § 3(a).

substances and “for which testing is reasonable and practicable.”³¹ The Secretary could grant exemptions for legitimate therapeutic and medical uses.³²

The bill would require a half-season suspension without pay for the first positive test, a full season ban from the individual league for the second positive test, and a lifetime ban for the third positive test.³³ Significantly, under H.R. 3084, the Secretary would be required to establish criteria - in consultation with WADA – for reducing penalties in “exceptional circumstances” in which athletes can demonstrate that they bore no significant fault or negligence.³⁴

An athlete testing positive would have the right to appeal the result so long as he or she files such an appeal within five business days of learning the result. The league would then have 45 days in which to issue a decision. The arbiter of the appeals process would be a person mutually agreed upon by the league, the athlete, and the Secretary. The aforementioned penalties would be stayed pending the appeals process.³⁵

Covered leagues would have one year to adopt and enforce testing procedures that comply with the regulations issued by the Commerce Secretary. After this grace period ends, the Secretary could levy fines of up to \$5 million for noncompliance, and add another \$1 million for each additional day of noncompliance.³⁶

The Commerce Secretary would be required to submit to Congress every two years a report on the effectiveness of the drug testing regulations. In addition, the Comptroller General would be required to conduct a study of the use of performance-enhancing substances by amateur athletes and submit to Congress a report on the study’s findings and with recommendations as to extending the coverage of the Commerce Secretary’s testing regulations to include amateur athletes.³⁷

H.R. 2516. H.R. 2516 would make it illegal to organize *or participate in* a NBA, NFL, NHL, or MLB game without meeting the bill’s testing requirements.³⁸ A violation would be treated as a violation of “a rule defining an unfair or deceptive trade act or practice” under the FTC Act, and the FTC would, accordingly, have the authority to enforce the bill’s requirements. In addition, the FTC would have the

³¹ *Id.* at §§ 3(a)(1), (2). The Secretary would also have the discretion to add more substances to the list. *Id.*

³² *Id.* at § 3(a)(3).

³³ *Id.* at § 3(a)(5)(A).

³⁴ *Id.* at § 3(a)(5)(C).

³⁵ *Id.* at § 3(a)(6).

³⁶ *Id.* at § 4.

³⁷ *Id.* at § 5.

³⁸ H.R. 2516, § 4(a).

authority to extend the bill's coverage to other pro sports leagues and the NCAA.³⁹

The bill would require random testing of WADA-prohibited substances (including related metabolites and markers) and methods at least four times a year (twice in-season and twice out of season) and when the covered league has reason to suspect that an athlete or team is in violation of that league's drug policies. A refusal to submit to a drug test would be considered a positive test.⁴⁰

Under the Sweeney bill, drug tests would have to include testing of blood or urine samples (the provision of which would have to be observed by the party administering the tests) and analysis of such samples by WADA-accredited labs. In developing its testing methodology, each covered league would be required to consult with USADA.⁴¹

H.R. 2516 would require a two-year suspension without pay for the first positive test and a lifetime ban from the relevant covered league for any future positive tests. Any positive test would have to be disclosed to the public, and each covered league would be required to develop an appeals process in consultation with USADA.⁴² Every two years, each covered league would be required to submit to the FTC and to Congress a report on that league's testing policies and procedures.⁴³

S. 1334. The Bunning bill would cover the NFL, NBA, NHL, MLS, MLB, Arena Football League, Women's National Basketball Association (WNBA), and Minor League Baseball. Each of these leagues would be required to adopt drug testing procedures. At a minimum, the substances banned in-season and out-of-season would have to correspond to those banned by USADA in-competition and out-of-competition, respectively. In addition, the FTC could add other performance-enhancing substances "for which testing is reasonable and practicable."⁴⁴

Athletes would have to be independently tested at random at least three times per year, and specimens would be analyzed by a U.S. lab "that meets the requirements for approval" by USADA.⁴⁵ The presence of any banned substance (or its metabolite or marker), evidence of a prohibited method, or assistance in administering a banned substance or covering it up, would constitute a violation of the testing policy.⁴⁶

³⁹ *Id.* at § 5.

⁴⁰ *Id.* at § 4(b).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at § 6.

⁴⁴ S. 1334, § 5.

⁴⁵ *Id.* at § 5(d)(2).

⁴⁶ *Id.* at § 5(c).

S. 1334 would require a two-year suspension without pay for the first violation of the bill's provisions and a lifetime ban from any covered league for any future violations. Any positive test would have to be disclosed to the public, and each covered league would be required to develop an appeals process. A suspension would not be stayed pending appeal.⁴⁷

The Bunning bill would empower the FTC to enforce the bill as if a violation of its provisions were a "violation of section 18 of the Federal Trade Commission Act regarding unfair or deceptive acts or practices." In addition, the FTC could impose penalties on covered leagues of up to \$1 million for each day of non-compliance.⁴⁸

⁴⁷ *Id.* at § 5(e).

⁴⁸ *Id.* at § 6.

**A Side-by-Side Comparison of the Major Provisions of H.R. 2565, S. 1114, H.R. 1862,
H.R. 3084, H.R. 2516, and S. 1334**

	H.R. 2565	S. 1114	H.R. 1862	H.R. 3084	H.R. 2516	S. 1334
ONDCP Reauthorization?	Yes	No	No	No	No	No
Leagues Covered	MLB, NFL, NBA, NHL, and professional boxing	MLB, NFL, NBA, NHL, and professional boxing	MLB, NFL, NBA, NHL, MLS, Arena Football, and other leagues as determined by Secretary of Commerce	MLB, NFL, NBA, NHL, MLS, Arena Football, and other leagues as determined by Secretary of Commerce	MLB, NFL, NBA, NHL	NFL, NBA, NHL, MLS, MLB, Arena Football League, WNBA, and Minor League Baseball
Benchmark Standard	USADA	USADA	WADA	WADA	WADA for banned substances; USADA for testing and appeals procedures	USADA
Minimum Number of Tests Per Year	5	5	1	5	4	3

	H.R. 2565	S. 1114	H.R. 1862	H.R. 3084	H.R. 2516	S. 1334
Maximum Fines for Failing to Implement Required Testing	\$1 million	\$1 million	\$5 million, and another \$1 million for each additional day not in compliance	\$5 million, and another \$1 million for each additional day not in compliance	No provision	\$1 million for each day not in compliance
Regulatory Oversight	ONDCP would be empowered to modify the bill's requirements, while FTC would have enforcement authority	ONDCP would be empowered to modify the bill's requirements, while FTC would have enforcement authority	Secretary of Commerce	Secretary of Commerce	FTC	FTC
Lab Analysis of Tests	USADA-approved lab	USADA-approved lab	No provision	No provision	WADA-approved lab	USADA-approved lab
Penalties for Those Who Administer Banned Substances	No provision	No provision	No provision	No provision	No provision	<i>1st offense</i> - two years suspension w/o pay; <i>2nd offense</i> - lifetime ban from all covered leagues

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	H.R. 2565	S. 1114	H.R. 1862	H.R. 3084	H.R. 2516	S. 1334
Penalties for Positive Tests	<i>1st positive test</i> - two years suspension w/o pay; <i>2nd positive test</i> - lifetime ban from all covered leagues	<i>1st positive test</i> - two years suspension w/o pay; <i>2nd positive test</i> - lifetime ban from all covered leagues	<i>1st positive test</i> - two years suspension w/o pay; <i>2nd positive test</i> - lifetime ban from league in question	<i>1st positive test</i> - half-season suspension w/o pay; <i>2nd positive test</i> - full season suspension; <i>3rd positive test</i> - lifetime ban from the league in question	<i>1st positive test</i> - two years suspension w/o pay; <i>2nd positive test</i> - lifetime ban from league in question	<i>1st positive test</i> - two years suspension w/o pay; <i>2nd positive test</i> - lifetime ban from all covered leagues
Suspensions Stayed Pending Appeals?	No	No	Yes	Yes	No provision	No
Public Disclosure of Positive Tests?	Yes	Yes	No provision	No provision	Yes	Yes

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