Testimony of

Ms. Peg Seminario

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Testimony of Margaret Seminario,
Director, Safety and Health Department,
American Federation Labor and Congress of Industrial Organizations
Before the Senate Judiciary Committee
on the
Fairness in Asbestos Injury Resolution Act of 2005 (S. 852)

April 26, 2005

The AFL-CIO appreciates the opportunity to testify on the Fairness in Asbestos Injury Resolution Act of 2005 (S. 852). Senator Specter and Senator Leahy, I would like to acknowledge and recognize your tireless efforts and the efforts of many others including Senator Feinstein, Senator Hatch and Judge Edward Becker to attempt to develop a fair and effective asbestos compensation bill.

As you are well aware, the AFL-CIO has a long involvement in the asbestos issue and for the past three years we have been deeply engaged in the discussions and process that have led to the current proposal (S. 852). We have done so because we believe that many victims are not being well served by the current system, and that the hundreds of thousands of victims who will develop asbestos diseases in the future could be better served by an alternative system that provides compensation to sick individuals in a more efficient and equitable manner.

The AFL-CIO has consistently supported the establishment of a federal asbestos trust fund to fairly compensate asbestos victims for their injuries through a no fault system. At the same time we have made clear that we cannot accept a substitute to the current civil litigation system unless it would provide a means by which victims could obtain fair compensation on a timely basis.

The Fairness in Asbestos Injury Resolution Act of 2005 (S. 852), introduced last week, includes a number of important improvements over past proposals, and again, we want to acknowledge the work of Senators Specter and Leahy, and your staffs, in securing these changes. Unfortunately, in the AFL-CIO's view, the bill still fails to ensure victims just and timely compensation and would leave tens of thousands of individuals with no remedy at all. That is why we oppose the legislation as introduced.

Over the past three years, as we have worked on this legislation, we have listened to the concerns and proposals put forward by business and insurers, and have attempted to be responsive. In the interest of reaching agreement on legislation we have compromised on our initial position that all claimants deserve a monetary award. We have accepted a much lower level of overall funding for the program than we think will be actually required to meet anticipated claims. And, while we have pushed for full transparency on the funding mechanisms and participant contributions, we have not made such disclosures a condition of our endorsement.

But on the fundamental issue of ensuring that the legislation will create a system that will, in fact, deal with victims fairly and pay timely compensation to those who are sick from asbestos disease, we can accept no compromise that does not achieve this basic objective. It is not in victims' interests to trade one flawed system for another that has serious identifiable problems and deficiencies and threatens to leave many individuals worse off. These serious problems include the exclusion of thousands of asbestos-related lung cancer claims, leaving most victims with no remedy during the start-up period, the inclusion of restrictions preventing individuals with both asbestos and silica disease from obtaining access to the courts or fair compensation from the fund, unworkable statute of limitations provisions that could bar tens of thousands of worthy claims, and program sunset provisions that could leave claimants in limbo should the fund run out of money.

We continue to believe that the major problems with the bill can still be corrected, and we have put forward proposals to do so. Moreover, we believe that a primary reason that they have not been addressed is due to objections by some business and insurer groups who want to limit claims and costs by making it difficult or impossible for individuals who are sick to receive compensation. If the goal is truly to enact a bill that provides prompt and fair compensation to claimants who meet the eligibility requirements, then there is no valid reason not to fix the problems we have identified.

We have prepared detailed comments on the legislation that are included as an attachment to this testimony.

Let me now turn to our major concerns with the legislation.

Compensation for Thousands of Asbestos Lung Cancer Victims is Eliminated
In response to objections from some Senators and others, the bipartisan medical criteria agreed to in the last Congress have been changed and the former Level VII lung cancer category has been eliminated from the bill. This category provided compensation for individuals with lung cancer who had 15 years of substantial occupational exposure to asbestos, but no signs of underlying non-malignant asbestos disease. Let me be clear: with 15 years of demonstrated substantial occupational exposure to asbestos, lung cancer can be attributed to that exposure. Based on CBO claims projections, the elimination of Level VII potentially removes more than 40,000 asbestos-related lung cancer victims from coverage under the bill.

Provisions have been added that allow some of these lung cancer victims to use CT scans to show that they have asbestosis, but the bill does not specify that victims with pleural disease can use this more sensitive and specific diagnostic test to show their disease and exposure. Thus, the net result of the bill as introduced is that 25,000 - 30,000 asbestos lung cancer victims previously covered may not be eligible for compensation.

The AFL-CIO believes that any asbestos-related lung cancer victim who can demonstrate significant asbestos exposure should be compensated for this fatal disease. At a minimum, the bill must permit claimants to use CT scans to document underlying non-malignant asbestos disease ("markers" of asbestos exposure) for all lung cancer categories (i.e. Level VII and VIII in S. 852 as introduced). Otherwise, tens of thousands of asbestos lung cancer victims will be denied coverage under the bill.

Tens of Thousands of Asbestos Disease Victims Left in Limbo
There are currently hundreds of thousands of claims pending in the tort system. Tens of thousands of these claims are for victims who have life threatening or serious asbestos diseases. Earlier asbestos legislation (S. 1125) included an important amendment adopted unanimously by the Judiciary Committee that preserved the right of asbestos victims to litigate their claims in court until the trust fund was up and running. But S. 852 has eliminated this important protection, and leaves most asbestos victims with no remedies for as long as two years while the fund gets up and running.

Provisions are included for terminally ill victims to seek an offer of judgment during the start-up period and to return to court within 9 months if the fund is not up and running.
But all other asbestos claimants are left with no remedy during the start-up period. Any right to go to court is stayed for up to 24 months.

According to CBO estimates, there are at least 60,000 - 80,000 asbestos claimants with serious asbestos diseases who may have no remedy during the first two years after enactment. Many of these individuals have already been waiting for years while companies like Halliburton and Babcock and Wilcox have used the bankruptcy law to stay claims.

Asbestos victims should not be required to bear the burden of the start-up of this program.

The AFL-CIO believes there should be no stay of claims for terminally ill victims, and that the maximum stay for all other claimants should be one year. Moreover, we believe that the bankruptcy trusts should remain in place to pay all qualifying impaired victims until the national trust fund is up and running, with any subsequent trust fund awards offset for these payments.

Legal Rights for Victims with Silica Disease are Restricted

The bill establishes medical criteria for lawsuits by individuals who have both asbestos-related disease and silica-related disease, which will bar many of them from seeking redress in the courts for their silica-related injury. While we understand concerns of defendants and insurers that some plaintiffs seeking to avoid the fund will convert their asbestos claims into silica claims, we believe S. 852 handles the issue by unfairly restricting the rights of victims of silica exposure.

The bill bars individuals with silica disease from seeking compensation for that disease in court if they either have previously filed an asbestos suit or would be eligible for a monetary award from the fund. The only exception is for those individuals who suffer "functional impairment" from their silica disease and can demonstrate that asbestos exposure did not substantially contribute to their impairment. The only recourse for victims of both diseases who cannot make this showing will be to seek compensation for "mixed diseases" (Level II) from the asbestos fund - an award of only $25,000.

We believe this issue can be fairly addressed by allowing all victims with silica related disease, including those who also have asbestos disease, to seek redress in the courts for their silica injury, but to limit any damages to the injury attributable to their silica exposure.

The Statute of Limitations for Filing Claims and Sunset Provisions are Unclear and Problematic

The bill fails to establish clear and workable criteria to trigger the statute of limitations for bringing claims for specific disease levels, particularly for victims of non-malignant diseases that get progressively worse. As drafted, the statute of limitations begins to run not just when the claimant actually receives a diagnosis of an asbestosis-related condition but earlier, when he or she should have received such a diagnosis - a point in time that is surely beyond the competence of either the claimant or the Administrator to identify. Moreover, what sort of diagnosis triggers the statute of limitations: is it a general diagnosis of pleural disease or asbestosis, or is it a diagnosis accompanied by test results and other evidence that meet the criteria for a particular disease level?

As drafted, the statute of limitations provisions may bar claims by deserving victims who did not file a claim with the Fund when they were first diagnosed with asbestos disease but no impairment but whose disease has since progressed to a more serious level, thus forcing unimpaired individuals to file claims immediately to qualify for later compensation if their disease worsens. We believe that the bill should be clarified to tie the statute of limitations to the date on which the individual first received a diagnosis of an eligible disease or condition of a level of severity that would qualify for a monetary award under the Act. Further, the provision that triggers the statute of limitation by the discovery of facts that should lead to obtaining a medical diagnosis, as opposed to the medical diagnosis itself, should be eliminated. It serves no purpose other than to make it more difficult for qualified claimants to receive compensation.

It is also unclear what circumstances will trigger the sunset of the Fund, which claims will be allowed to go forward in court if the Fund sunsets, and what statutes of limitation will apply. As drafted, the AFL-CIO believes the bill does not provide the kind of ongoing oversight, planning and mechanisms necessary to anticipate and hopefully avoid termination of the fund. At the same time, the bill seems to force drastic actions on time frames that are premature, perhaps even years before the fund cannot meet its obligations.

The legislation should provide a rational, workable process for sunset and reversion. There must be a clear and unambiguous rights for victims to pursue their claims in court in the event the fund cannot pay qualifying claims on the terms set forward in the Act, and statute of limitations should be set that ensure that victims indeed have a remedy in the event of reversion.

The victims of asbestos disease deserve to have all of these issues clearly and squarely addressed, and not left to be resolved through years of litigation in the courts.

Other Key Problems and Deficiencies

S. 852 has a number of other key problems and deficiencies which will impede the ability of claimants to receive fair compensation.

We remain deeply concerned that there is not adequate upfront funding to cover the large volume of claims that will be filed in the early years of the program. Absent sufficient funding or guarantees that needed funds can be borrowed at a reasonable interest rate, the fund may face a very real threat of collapse within several years.

The definition of asbestos claim contained in S. 852 is overly broad, and may well preempt many types of claims that the legislation is not intended to bar. The bill attempts to deal with this problem by listing specific actions that are exempted from the definition and therefore not preempted. We believe that it is better public policy, and makes far more sense, to have a clear and specific definition of what claims are covered by the bill, than to define the bill's scope through a series of exemptions.

Compensation awards for Level II non-malignant disease have been reduced from $35,000 - an amount agreed to last year in bipartisan discussions -- to $25,000. This low level of compensation is unfair. Many of these individuals will be very sick or disabled from their asbestos disease. This is also the disease level and award that will apply to individuals who have both silicosis and asbestosis and who S. 852 precludes from seeking a tort remedy for their silica-related injury.

S. 852 fails to provide supplemental awards for individuals with exceptional circumstances, such as those who are young or have dependent children. The simple fact is that both the economic and the non-economic impacts of a life threatening or disabling asbestos-related disease are much greater for a 45year-old with young children than they are for an 85 year-old with the same disease. While there are discretionary provisions that allow for adjustments in awards for mesothelioma victims, no adjustments are permitted for any other disease category.

S. 852 caps attorneys' fees at 5% for all claims, which applies to the initial filing and any administrative review. The AFL-CIO believes that fees in the current tort system are too high and that there should, in fact, be a cap on attorneys' fees. But we are concerned that the current level is so low that it will hinder the ability of claimants with more complicated claims from obtaining adequate legal assistance.

Improvements in S. 852 Over Earlier Proposals

As noted above, the current bill does include a number of important provisions that are significant improvements over past proposals. The AFL-CIO recognizes that there has been strong opposition to some of these measures, and we thank the sponsors for their diligent efforts to include them in the legislation.

S. 852 has increased the award values for certain disease categories. Specifically, the award values for mesothelioma victims and non-smoking lung cancer victims with asbestosis have been increased to $1.1 million. In addition, the awards for some other categories and subcategories of diseases have been increased.

The bill prohibits the subrogation of trust fund awards by workers' compensation insurers, health insurers or other parties that provide such benefits. This prohibition, which the AFL-CIO strongly supports, will prevent the awards from the trust fund from being diminished or eliminated as a result of payments that are not related to the fund.

S. 852 includes significant improvements that clarify how a claimant may prove or document exposure. It makes clear that an affidavit, which has been permitted in earlier proposals, will be accepted as validation of exposure, if credible. The bill also instructs the Administrator to adopt exposure presumptions developed by the Manville Trust, which will greatly facilitate the evaluation and processing of claims.

The bill includes a medical screening program that the AFL-CIO has advocated and strongly supports. Such a program is important to provide high-risk workers the opportunity for high quality medical assessments, so that disease can be detected early and appropriate interventions made. We are concerned, however, that the bill sets no minimum level of funding for the program. In addition, the bill links reimbursement for services to Medicare levels, which may be too low to ensure participation by qualified providers.

S. 852 includes a compromise provision for handling of asbestos claims for rail workers. FELA rights for asbestos claims are preempted, but claimants who would qualify under FELA will receive an additional award as a substitute for the "workers compensation" payment they would have received under FELA.

Provisions are included to enhance the penalties for violations of workplace asbestos standards, to permit the criminal prosecution of willful violations of OSHA asbestos rules where it is warranted. In addition, the bill requires that employers or other parties that violate OSHA or EPA asbestos rules make contributions to the asbestos fund. These provisions will help maintain an incentive, which will no longer be present from the threat of a tort suit, for employers and others to limit future asbestos exposures for workers and the public.

The bill clarifies that claimants whose tort claims are stayed at the effective date of the Act, but who return to the tort system due to delays in getting the fund up and running, will have the option of seeing their court cases through to completion, rather than being pulled out of court once again when the fund is operational.

Conclusion

The AFL-CIO has spent years working on this legislation and believes that we have played a constructive and responsible role in this process. We intend to keep working to address the major problems with the bill with the hope that changes will be made that will enable the Federation to support the bill. However, in its present form the AFL-CIO must oppose S. 852, since it fails to ensure asbestos disease victims the just and timely compensation they deserve.

Attachment
AFL-CIO Critical Issues (April 26, 2005)
S. 852 - "Fairness in Asbestos Injury Resolution Act of 2005"
Key Concerns and Improvements

Key Concerns

Eliminates Compensation for Thousands of Asbestos Lung Cancer Victims and Reduces Compensation Awards for Individuals with Mixed Disease (Level II)
Earlier versions of this legislation provided three levels of compensation for victims of asbestos-related lung cancer: Level VII, for lung cancer victims with fifteen years of substantial occupational exposure, but whose x-rays showed no "markers" of non-malignant asbestos-related disease; Level VIII, for victims with lung cancer who have pleural disease; and Level IX for lung cancer victims with asbestosis. S. 852 has eliminated Level VII and, according to the CBO projected claims estimates, potentially removed more than 40,000 asbestos-related lung cancer victims from coverage under the bill.

Provisions have been added that allow some of these lung cancer victims to use CT scans to show that they have asbestosis, but the bill does not specify that victims with pleural disease can use this more sensitive and specific diagnostic test to show their disease and exposure. Based upon the opinion of our medical experts, we estimate that CT scans may identify pleural disease or asbestosis in approximately half of individuals without such findings on x-rays, and that about half of these identified by CT scans will have asbestosis and half will have pleural disease. Thus, the net result of the bill as introduced is that 25,000 - 30,000 asbestos lung cancer victims previously covered may not be eligible for compensation.

The AFL-CIO believes that asbestos-related lung cancer victims who can demonstrate substantial asbestos exposure should be compensated for this fatal disease. With 15 years of demonstrated substantial occupational exposure to asbestos, lung cancer can be attributed to that exposure. At a minimum, the bill must provide for the use of CT scans to document underlying non-malignant asbestos disease ("markers" of asbestos exposure) for all lung cancer categories (i.e., Levels VII and VIII in the bill as introduced). Otherwise, tens of thousands of lung cancer victims may be denied compensation for their asbestos-related diseases.

In addition, S. 852 has reduced the compensation for Level II disease -- individuals who have both a restrictive lung disease caused by asbestos and an obstructive lung disease from other causes. The bill reduces the compensation for this level from $35,000 to $25,000, despite earlier bipartisan agreements to the higher award level. This level of compensation is unfair. Many of these individuals will be very sick or disabled from their asbestos disease. This is also the category for individuals whose mixed disease includes silicosis and who - as discussed below -- S. 852 bars from seeking a tort remedy for their silica related injury. At a minimum, compensation awards for Level II should be returned to the $35,000 level previously agreed upon.

Tens of Thousands of Asbestos Disease Victims Left in Limbo

There are currently hundreds of thousands of claims pending in the tort system. Tens of thousands of these claims were filed by victims who have life threatening or serious asbestos diseases. Earlier asbestos legislation (S. 1125) included an important amendment, adopted unanimously by the Judiciary Committee, that preserved the right of asbestos victims to litigate their claims in court until the trust fund was operational. But S. 852 has eliminated this important protection, and would leave most asbestos victims with no remedies for as long as two years while the fund gets up and running.

The bill stays all pending and new asbestos claims, except those that are in trial on its enactment date. During the start-up period, the bill permits exigent claimants (those with a terminal asbestos-related illness) to seek an offer of judgment from defendants for an award in the scheduled amount for that disease level. Where no offer or an inadequate offer is made, these claimants can go to court. After the later of nine months from enactment or from the date the claim was filed, if the fund is still not operational, all terminally ill claimants can go to court.

S. 852 also directs the administrator to contract with a claims facility "to facilitate the prompt payment of exigent claims." (Section 106 (c) (4)). It is unclear how claims will be resolved by such a facility, under what terms and for what period of time (i.e. start-up only or during the entire life of the fund). It is also unclear whether the claims facility will process claims before interim regulations are issued by the Administrator, or what is envisioned by the provisions to allow the claims facility to "enter settlement with claimants. " The AFL-CIO believes that the provisions for contracting out the processing of claims in earlier proposals were much clearer and provide sufficient authority to the Administrator to contract out claims processing under the terms of the Act and implementing regulations.

But the bill leaves all other asbestos claimants with no remedy during the start-up period. Any right to go to court is stayed for up to 24 months. Moreover, as drafted it is not clear that claims that arise after enactment have any right to go to court, even after 24 months, if the fund is not up and running.

According to CBO estimates, there are at least 60,000 - 80,000 asbestos claimants with serious asbestos diseases who may have no remedy during the first two years after enactment. Many of these individuals have already been waiting for years while companies like Halliburton and Babcock and Wilcox have used the bankruptcy law to stay claims. Just as many of these claimants are finally about to receive compensation from newly formed private asbestos bankruptcy trusts, the legislation proposes to eliminate these trusts and again stay these claims.

The AFL-CIO believes there should be no stay of claims for terminally ill victims, and that the maximum stay for all other claimants should be one year. Moreover, we believe that the bankruptcy trusts should remain in place to pay all qualifying impaired victims until the national trust fund is up and running, with any subsequent asbestos fund awards offset by these payments.

Limits Legal Rights for Victims with Silica Disease

Defendants and insurers have raised concerns that plaintiffs seeking to avoid the fund will convert their asbestos claims into silica claims. While we understand the concern and believe it can be fairly addressed, S. 852 handles the issue by unfairly restricting the rights of victims of silica exposure.

The bill essentially rewrites tort law for individuals with both silica and asbestos-related diseases. As a general matter, the bill bars individuals with silica disease from seeking compensation for that disease in court if they either have previously filed an asbestos suit or would be eligible for a monetary award from the fund. The only exception is for those individuals who suffer "functional impairment" from their silica disease and can demonstrate that asbestos exposure did not substantially contribute to their impairment. The only recourse for victims of both diseases who

cannot make this showing will be to seek compensation for "mixed diseases" (Level II) from the asbestos fund - an award of only $25,000.
While the overall number of individuals who have disease from both silica and asbestos may not be large, it is not a rare occurrence in certain groups of workers who have been exposed to both substances. (e.g foundry workers and refractory bricklayers). Indeed, a study of cases of occupational lung disease reported to the Michigan State Surveillance System from 1985 - 1996 found that among 697 workers confirmed to have silicosis, 166 (24%) also had asbestos disease or pleural changes. One hundred twenty one (121) of the individuals with both silicosis and asbestos- related disease were foundry workers who had significant occupational exposures to both silica and asbestos. (Rosenman KD, Reilly MJ (1998): Asbestos-Related X-Ray Changes in Foundry Workers. Am J Ind Med 34: 197-201).
Individuals with silica related disease should not be barred from seeking redress for their silica injury in court. The AFL-CIO does not object to requiring individuals who file silica claims to provide sufficient documentation to make a prima facie showing that they, in fact, have a silica- related injury. Where an individual has injuries attributable to both silica and asbestos, we propose that any recovery in the tort system be limited to damages resulting from the silica exposure. This approach would allow non-meritorious claims to be evaluated and dismissed at an early stage and, in cases involving mixed disease impairment or mixed causation, damages to be limited to the silica-related injury.

The Definition of Asbestos Claim is Overly Broad
The definition of asbestos claim in the bill is too broad. It encompasses "any claim, premised on any theory, allegation, or cause of action...directly, indirectly, or derivatively arising out of, based on, or related to, in whole or part the health effects of exposure to asbestos...." Since the bill would preempt any action defined as an "asbestos claim," the AFL-CIO has long been concerned about the extremely broad range of legal actions falling within that definition. We note that this definition is much broader than that included in S. 1125, the asbestos compensation bill reported out of the Senate Judiciary Committee in 2003, which expressly limited an "asbestos claim" to "any personal injury claim" arising out of, based on, or related to, the health effects of exposure to asbestos.

S. 852, as introduced, has attempted to rein in the scope of preempted claims by expanding the list of actions excluded from the definition of asbestos claim. But, we remain very concerned that the overly broad definition of "asbestos claim" may still capture and preempt other types of claims that have nothing to do with the issues in this bill. We believe it would be better to provide a narrower, clearer definition, limiting "asbestos claims" to claims for personal injury.

The Statute of Limitations for Filing Claims is Unclear and Problematic
The statute of limitations in S. 852 is set at 5 years (versus 4 years in S. 2290). This period begins to run when an individuals receives a diagnosis, or discovers facts that should have led the individual to obtain a diagnosis of an eligible disease or condition. This statute of limitations has several problems. First, it is not clear exactly what condition or disease triggers the statute of limitations. Is it a general diagnosis of a disease such as asbestosis or pleural disease, or is it the diagnosis, accompanied by documentation establishing that the individual has a condition that qualifies at a disease level specified in the bill?

This is an important issue since many cases of asbestos disease are progressive and, as the disease's characteristics change, the individual may qualify for a different disease level. Take, for example, an asbestos insulation worker who was diagnosed with asbestosis, but no lung impairment (equivalent to Level I under the bill) in 1999. In 2005, his condition would still be diagnosed as asbestosis, but he now has suffered a loss of pulmonary function that meets the bill's criteria for Level III. Does the 5-year statute of limitations permit or bar this individual's claim for level III compensation? The AFL-CIO believes the bill should indeed permit this claim, but as drafted, it is not clear.

Similarly, as drafted the bill may require individuals diagnosed with pleural plaques or asbestosis but no impairment to file with the fund to hold their place in line so that they qualify for compensation if they later develop more serious non-malignant disease. In our view this makes no sense. It will force all claimants to immediately file a claim, even those with no impairment, putting unnecessary stress on the system, particularly during the early, start-up years.

An additional problem is the bill's provision that the statute of limitations is triggered not only a diagnosis, but also by the claimant's discovering facts that would have led a "reasonable person" to obtain a medical diagnosis. It is the AFL-CIO view that this provision - which inappropriately presumes that all claimants will have had the kind of ready

access to medical care that would have encouraged them to seek a care whenever they felt ill - will prove almost impossible to interpret and implement, and could only be intended to eliminate what would otherwise be valid claims.

We propose that, to ensure that the statute of limitations is workable and fair and that deserving claimants are in fact eligible for compensation, the statute of limitations be tied to the date on which the individual first received a diagnosis of an eligible disease or condition of a level of severity that would qualify for a monetary award under the Act. Further, the provision that triggers the statute of limitation by the discovery of facts that should lead to obtaining a medical diagnosis, as opposed to the medical diagnosis itself, should be eliminated. These modifications would relieve claimants from having to file level I claims upon diagnosis and also clarify that individuals who are diagnosed with a serious asbestos-related disease within the 5 year statute of limitation, are not barred from filing compensation simply because they did not file a claim for an earlier asbestos disease that did not involve impairment. They would also eliminate the unnecessary traps that may be imposed by the unclear language that links the statute of limitations to some unspecified knowledge requirement.

The Sunset and Reversion Provisions are Unclear

The AFL-CIO hopes that if the fund is established, it will be successful, and our efforts throughout this process have been aimed at achieving that goal. However, in the absence of an "evergreen" provision to guarantee on-going funding, it is absolutely necessary to preserve the rights of asbestos victims to return to the tort system if the fund proves unable to pay all meritorious claims.

As drafted the sunset provisions of S. 852 are confusing and counter productive. The bill calls for a shortfall analysis if the Administrator determines based on the annual report that the fund may not be able to pay claims as they become due at any time during the next 5 years. This analysis is to include recommendations for alternative action to address this situation, which may include termination or reform of the program. If recommendations are made, they are automatically referred to a special commission, which has 180 days to review the Administrator's recommendations, and taking into account public comment, make its own recommendations to Congress. The referral to this commission for immediate action is required even if the possibility of a shutdown is remote and 5 years away.

In addition, the bill includes a further provision that requires that if as part of the review conducted to prepare an annual report, the Administrator determines that if additional claims are resolved, the Fund will not have sufficient resources to pay 100 percent of all resolved claims and to meet other obligations, the fund will terminate 180 days after this determination.

The AFL-CIO believes the bill does not provide the kind of ongoing oversight, planning and mechanisms necessary to anticipate and hopefully avoid termination of the fund. At the same time, as drafted, it seems to force drastic actions on time frames that are premature, perhaps even years before the fund can not meet its obligations.

The AFL-CIO has proposed that there be an ongoing review of the fund's operation, and that at any point that the administrator determines that it is more likely than not that the fund will be unable to meet its obligations at anytime within the next five years, the Administrator conduct a full sunset analysis. The analysis should include the Administrator's recommendations as to what steps should be taken to address the problem, which may include termination or reforms, and should should specify the date on which the fund will no longer have adequate funds to pay qualifying claims that are received and resolved. That date, which may be several years in the future, should be the date after which no further claims will be accepted, and the date that after which, in the absence of reforms or modifications in the Act or a change in predicted circumstances, all new claims will be filed in the tort system. In addition, there should be a provision that if, in the event of unanticipated extreme circumstances, there are insufficient funds to pay all qualifying claims under the terms of the legislation, any individuals with unresolved claims pending in the fund or future claims will have a right to proceed in the tort system.

The post-sunset statute of limitations provisions are also problematic. Under the bill, individuals with unresolved claims pending in the fund at the time of termination have two years to go to court. The bill has no provisions, however, for individuals whose claims arose before sunset, but who did not file before reversion. Since many state statutes of limitations may be shorter than the five-year limitations period applicable during the life of the fund, there

may well be victims who will find themselves without a right to go to court if the fund sunsets. The AFL-CIO proposes that the bill create a special statute of limitations in the event of reversion, which will give individuals diagnosed with an asbestos-related disease before reversion five years from diagnosis to file a tort suit. All subsequent claims would be governed by the applicable state statutes of limitations.

Adequate Upfront Funding is Uncertain

The trust fund must have sufficient funding to pay the large numbers of claims that will be filed during the earlier years, when the stresses on the system will be the greatest. Based on the numbers of pending claims and projected cases of future disease, the AFL-CIO believes that $60 billion will be needed in the first 5 years of the program. The draft bill provides $42.625 billion in the first 5 years (including $7 billion from the existing bankruptcy trusts, which will be liquidated). We believe this level of funding is insufficient. Adequate upfront funding should be provided, and at a minimum, there must be a guarantee that needed funds can be borrowed at a reasonable interest rate so that the fund will not collapse immediately. The certainty that funds can be borrowed at a reasonable interest rate is particularly important since there is certain to be litigation by the bankruptcy trusts, insurers and some defendant participants over their required contributions, with no guarantee that the expected contributions will in fact be made.

Funding and Reimbursement Limitations for Medical Screening May Hinder Effective Implementation

S. 852 includes a medical screening program that we strongly support. However, problems in the bill could undermine the program. First, the bill sets no minimum level of funding for the program, but instead specifies a maximum of up to $30 million per year in funding, meaning that much less than this modest level of funding may be provided. Second, the bill ties reimbursement for providers of screening to levels of reimbursement provided under Medicare, which are very low. At these specified levels, it is questionable whether quality providers will participate in the screening program.

The AFL-CIO believes that the funding for the medical screening program should be set at a minimum of $30 million a year, and up to a maximum of $50 million. Moreover, we propose that the Medicare reimbursement rates for services be applied only to the extent that, at these levels of reimbursement, qualified providers will participate in the program. Given the great concerns about the quality of asbestos screening programs conducted in the past, it is in everyone's interest to guarantee that highly qualified providers conduct the medical screening program.

No Supplemental Awards for Asbestos Victims with Exceptional Circumstances

As the AFL-CIO has consistently made clear, we believe that the legislation must provide for upward adjustments in compensation for those victims and the families of victims on whom the burdens of asbestos disease fall most harshly. The simple fact is that both the economic and the non-economic impacts of a life-threatening or disabling asbestos-related disease are much greater on a 45- year-old with young children than they are on an 85- year-old with the same disease.

S. 852 includes a provision that allows the Administrator to enhance awards for mesothelioma victims who are less younger than 51 and have dependent children, but in our view, this provision is too limited. It leaves all adjustments totally to the discretion of the Administrator, requires that the claimant both be younger and have dependents, and is available only to mesothelioma victims.

The AFL-CIO has proposed that supplemental awards be provided for all victims who are unusually young or have dependent children. We have developed proposals that base such supplemental awards on objective measures, and implement them in a manner that is cost neutral to the fund. We see no reason why these proposals for equitable treatment of victims with exceptional circumstances should not be included in the legislation.

Limits on Attorneys Fees Deny Some Claimants Assistance of Counsel

S. 852 caps attorneys' fees at 5%. We understand that this cap is intended to apply to claims within the fund, and not to appellate court review. We believe that fees in the current tort system are too high and that there should, in fact, be a cap on attorneys' fees in the bill. But we are concerned that the 5% cap may hinder claimants with more complicated claims from obtaining adequate legal assistance, and believe that provisions for higher attorneys fees or upward adjustments should be made for complex cases and/or claims that undergo administrative appeal.

Improvements in S. 852 Over Earlier Proposals/Drafts

Increase Award Values for Certain Disease Categories
S. 852 has increased the award values for certain disease categories. Specifically, the award values for mesothelioma victims and non-smoking lung cancer victims with asbestosis have been increased to $1.1 million. In addition the awards for other categories and subcategories of lung cancer have been increased by approximately $25,000 over levels proposed last year by Majority Leader Bill Frist.

Prohibits Liens Against Trust Fund Awards by Workers' Compensation and Health Insurers
S. 852 includes a key provision that prohibits the subrogation of trust fund awards by workers' compensation insurers, health insurers or other parties that provide such benefits. This prohibition, which the AFL-CIO strongly supports, will prevent the awards from the trust fund from being diminished or eliminated as a result of payments that are not related to the fund.

Clarifies Proof of Exposure and the Includes Initial Presumptions for Occupations/Industries with Substantial Occupation Exposure
S. 852 includes significant improvements that clarify how a claimant may prove or document exposure. It makes clear that a credible affidavit will be accepted as validation of exposure. Affidavits are subject to the penalty of perjury and may be rebutted by the Administrator based upon other evidence. The bill also instructs the Administrator to adopt exposure presumptions the Manville Trust developed based on years of litigation and evidence, which identify occupations and industries where there was significant occupational exposure to asbestos. These presumptions, which may be modified by the Administrator based on new evidence, will greatly ease administration of the program and ensure more timely compensation of qualifying claimants.

Includes a Medical Screening Program for High-Risk Workers
As noted above, S. 852 includes a medical screening program for high-risk workers that the AFL-CIO strongly supports. While we have concerns about funding and reimbursement provisions of the screening program, with the changes that we have suggested, we believe the program will be sound and beneficial. The medical screening program will help detect disease early, so that interventions can be made to lessen the impacts and/or prevent the disease from progressing. The program is consistent with the recently issued American Thoracic Society Guidelines on the Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos, which recommend both medical screening and medical monitoring as part of the medical management of asbestos-related diseases (Am J Respir Crit Care Med, Vol. 170. pp 691-715, 2004). In addition to providing early detection, treatment and management of asbestos-related diseases, a high quality medical screening program can provide individuals at high-risk with access to medical evaluations that meet accepted medical standards, conducted by qualified medical professionals. Patients can have confidence in the results and medical advice provided through such evaluations.

Includes an Acceptable Compromise Provision for FELA Claims
S. 852 includes a compromise provision for handling of asbestos claims for rail workers. FELA rights for asbestos claims are preempted, but claimants who would qualify under FELA will receive an additional award as a substitute for the "workers compensation" payment they would have received under FELA.

Provides for Enhanced Penalties for Workplace Asbestos Violations and Contributions to the Fund by OSHA and EPA Violators.
The bill includes provisions to enhance the penalties for violations of workplace asbestos standards to permit the criminal prosecution of willful violations of OSHA asbestos rules where it is warranted. In addition, it requires employers or other parties that violate OSHA or EPA asbestos rules to make contributions to the asbestos Fund in amounts linked to the level of penalties assessed for such violations. With the bill's elimination of the threat of a tort suit, these provisions will help maintain an incentive for employers and others to limit future asbestos exposures for workers and the public.