April 18, 2005

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

Dear Chairman Specter:

We want to thank you for your ongoing leadership of the effort to achieve meaningful federal asbestos litigation reform, and we commend you and your staff for both the time and effort dedicated to this issue. The insurance industry is committed to working with you to enact a true, urgently needed resolution to our nation's asbestos litigation crisis. And now that we have had a chance to look at your draft legislation, we would like to share with you some specific reactions to that language.

First, we do appreciate that your latest draft includes improvements, such as the removal of the Level VII claims – which comprise individuals who have smoked and have lung cancer, but have never developed any underlying asbestos disease – from the trust fund. However, it is important that we state clearly that the draft does not adequately address all of our key concerns. As we have stated throughout all of our meetings and correspondence over the past two years, it is imperative that any trust fund provide insurers with both certainty and finality for our asbestos exposure.

From the beginning of this process, insurers have held to our firm position that the fund must provide the exclusive remedy for resolution of asbestos claims. Absent inclusion of all asbestos claims in the fund, there is no real finality for funding participants, since they could find themselves paying both substantial sums to the fund and in the tort system for claims permitted to "leak" outside of the fund. This leakage is of particular concern during the fund's start-up, since insurers are called upon to provide the bulk of up-front funding. Another leakage problem is caused by the draft's prohibition on workers' compensation subrogation.

There are additional, very serious issues related to start-up of the fund. For example, the draft keeps the tort litigation system in place by virtue of three factors: 1) it permits cases in trial on the date of enactment to continue moving forward in the tort system; 2) it creates an "Offer of Judgment" for exigent claims; and, 3) it provides for the re-emergence of litigation for all claims if the Labor Department does not grant "operational certification" for the fund. This certification scheme places the entire burden on the funders if the government does not get the program up and running. Also, while the Offer of Judgment provision is new and does provide for offset credits for any payments made through it (such credit should be for all "participants," rather than just for defendants), it is unclear in many respects. Our concern is that it may well keep going long after the trust fund has started handling exigent claims.

A further concern with the latest draft is that, if the trust fund sunsets, an individual may bring a tort action in either federal or state court subject to certain venue limitations. Insurers believe venue for claims reverting to the tort system upon the fund's sunset should reside exclusively in the federal courts. In addition, the draft deletes previous language that made it clear that claims involving default, conspiracy, bad faith and the

like could not be revived if the trust fund were to sunset. This lack of such a provision in the new draft creates ambiguity about potential revival of these stale claims.

With respect to the insurers' share of the trust fund, it is also critical to state once again that the $46.025 billion (nominal) assigned to our industry will present a true hardship for the relatively few individual insurance and reinsurance companies required to participate. This burden is not only exacerbated by the leakage issues noted above, but also by the requirement that there be an orphan share obligation for annual funding shortfalls. This is very problematic because it will likely result in the U.S. insurance and reinsurance industry assuming the funding obligations of its nonpaying foreign competitors.

The insurance industry continues to believe that it is both essential and possible to enact a solution to our national asbestos litigation nightmare – for the sake of individual medical victims of asbestos and for the sake of our economy. To be truly successful, any federal asbestos reform program must correct the worst abuses in the current litigation system and provide financial equity for all stakeholders. At its heart, legislation to reform the asbestos litigation system should provide fair compensation to those who are truly sick from asbestos exposure, clear legal rules for claimants, defendants and their insurers, and financial certainty.

We appreciate the substantial time and effort you have invested in finding a solution to the asbestos litigation crisis. While the latest draft represents improvements over earlier proposals in some areas, we continue to have serious reservations about key provisions, and without substantial modifications insurers will not be able to support the legislation. The attached unified insurance industry position reflects further concerns with the legislation; although it references an earlier iteration of trust fund legislation, many of the problems remain. This is not an exhaustive list of our concerns, but is illustrative of the problems posed by this new draft in our view.

We would welcome the opportunity to discuss your latest draft in more detail at your convenience.

Sincerely,

American Insurance Association
National Association of Mutual Insurance Companies
Reinsurance Association of America