CONGRESSIONAL BUDGET OFFICE
U.S. Congress
Washington, DC 20515

Douglas Holtz-Eakin, Director

December 19, 2005

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As you requested, the Congressional Budget Office (CBO) has studied the report prepared by Bates White, LLC, concerning S. 852, the Fairness in Asbestos Injury Resolution Act of 2005. In particular, you asked CBO to evaluate the Bates White projection of the claims against the proposed asbestos trust fund from individuals with lung and other cancers (identified in the legislation as disease levels VII and VI). In light of that evaluation, you also asked whether CBO would modify the conclusions reached in its August 25, 2005, cost estimate for S. 852.

CBO has discussed the Bates White report with its authors and officials of that firm. It has also met or spoken with a number of other experts with varying views on the asbestos legislation, including Judge Edward Becker, trial lawyers with extensive experience in asbestos litigation, and representatives of NERA Economic Consulting, the Asbestos Study Group, the AFL-CIO, and Legal Analysis Systems. As a result of that review and assessment process, CBO has reached the following conclusions:

- The Bates White report contains no new information that would cause CBO to revise its cost estimate.

- The Bates White report is not a cost estimate; its results are therefore not directly comparable with those of the CBO cost estimate. Bates White estimated the value of claims that could be eligible for compensation; CBO estimated the value of claims that would receive compensation. This distinction is important because many potential claimants would probably not file claims and not all of the claims filed would be approved.

- Two elements of the Bates White analysis are particularly important, and contribute significantly to its estimate of potential costs. Bates White assumes that one eligibility requirement in the legislation (weighted work-years of occupational exposure) would not constrain potential claims; Bates White also estimates a prevalence of pleural abnormalities (an eligibility requirement for claimants with lung and other cancers) that is higher than other researchers believe is likely.

- The Bates White report highlights some factors that pose potential risks to the financial viability of the asbestos trust fund that S. 852 would establish—including the possibility that the financial incentives created by the bill could lead to a substantial number of claimants with disease levels VII and VI. Those risks are real, but CBO believes that claims of the magnitude suggested by Bates White are unlikely to occur.

After further reviewing S. 852, studying the Bates White report, and consulting with a wide range of experts on asbestos legislation, CBO reaffirms the findings presented in its August cost estimate:

- The proposed trust fund might or might not have adequate resources to pay all valid claims. There is a significant likelihood that the fund's revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. There is also some likelihood that the fund's revenues would be sufficient to meet those needs. The final outcome cannot be predicted with great certainty.

- CBO projects that the proposed fund would be presented with valid claims worth between $120 billion and $150 billion, excluding certain potential costs or savings that CBO could not estimate; total costs would be higher because the fund must also cover administrative expenses and any financing costs. The revenues collected under the bill would be, at most, about $140 billion, but could be significantly less. If the value of valid claims was significantly more than $130 billion, the fund's revenues would probably be inadequate to pay all claims.

- CBO could not estimate any costs or savings that might result from several features or consequences of the legislation. A number of those features could add to the cost of the legislation. In particular, CBO's estimate does not include potential claims by individuals with older, so-called dormant, asbestos claims pending in the court system, who might seek additional compensation from the fund. It also does not encompass: possible claims by family members of workers who were exposed to asbestos; the costs of any exceptional medical claims that could be made under the bill; the potential costs for residents of other areas of the country who might be deemed eligible to receive the same special treatment given to the residents of Libby, Montana, under the legislation; and the impact on costs of allowing CT scans to serve as documentation of pleural abnormalities. On the other hand, CBO's estimate does not reflect the possibility that medical studies required by the legislation might preclude individuals with certain diseases from obtaining compensation from the fund.

A more detailed discussion of CBO's review of the Bates White report is enclosed. I hope this information is helpful to you.

If you wish further details on this analysis, we would be happy to provide them. The CBO staff contact is Mike Waters, who may be reached at 202-226-2860.

Sincerely,

Douglas Holtz-Eakin
Director

Enclosure

Identical letters sent to the Honorable Patrick J. Leahy and the Honorable Dianne Feinstein.

December 19, 2005

Congressional Budget Office

ANALYSIS OF POTENTIAL CLAIMS UNDER S. 852, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005

As requested by Senators Specter, Leahy, and Feinstein, the Congressional Budget Office (CBO) has analyzed the report prepared by Bates White, LLC, concerning S. 852, the Fairness in Asbestos Injury Resolution Act of 2005, regarding the potential cost of claims against the asbestos trust fund that would be established by that act. In its cost estimate for that legislation, dated August 25, 2005, CBO estimated that the value of valid claims against the fund would total between $120 billion and $150 billion. The Bates White report, which was issued on September 19, 2005, suggested that the cost of claims could be much greater.

CBO has discussed the Bates White report with its authors and officials of that firm. It has also met or spoken with a number of other experts with varying views on the asbestos legislation, including Judge Edward Becker, trial lawyers with extensive experience in asbestos litigation, and representatives of NERA Economic Consulting, the Asbestos Study Group, the AFL-CIO, and Legal Analysis Systems. As a result of that review and assessment process, CBO has reached the following conclusions:

- The Bates White report contains no new information that would cause CBO to revise its cost estimate.

- The Bates White report is not a cost estimate; its results are therefore not directly comparable with those of CBO's cost estimate. Bates White estimated the value of claims that could be eligible for compensation; CBO estimated the value of claims that would receive compensation. This distinction is important because many potential claimants would probably not file claims and not all of the claims filed would be approved.

- Two elements of the Bates White analysis are particularly important, and contribute significantly to its estimate of potential costs. Bates White assumes that one eligibility requirement in the legislation (weighted work-years of occupational exposure) would not constrain potential claims; Bates White also estimates a prevalence of pleural abnormalities (an eligibility requirement for claimants with lung and other cancers) that is higher than other researchers believe is likely.

- The Bates White report highlights some factors that pose potential risks to the financial viability of the asbestos trust fund that S. 852 would establish—including the possibility that the financial incentives created by the bill could lead to a substantial number of claimants with disease levels VII and VI. Those risks are real, but CBO believes that claims of the magnitude suggested by Bates White are unlikely to occur.

After a careful review of the Bates White report and further analysis of the legislation, CBO reaffirms the findings presented in its August cost estimate:

- The proposed trust fund might or might not have adequate resources to pay all valid claims. There is a significant likelihood that the fund's revenues would fall short of the amount needed to pay valid claims, debt service, and administrative costs. There is also some likelihood that the fund's revenues would be sufficient to meet those needs. The final outcome cannot be predicted with great certainty.

- CBO projects that the proposed fund would be presented with valid claims worth between $120 billion and $150 billion, excluding certain potential costs or savings that CBO could not estimate; total costs would be higher because the fund must also cover administrative expenses and any financing costs. The revenues collected under the bill would be, at most, about $140 billion, but could be significantly less. If the value of valid claims was significantly more than $130 billion, the fund's revenues would probably be inadequate to pay all claims.

- CBO could not estimate any costs or savings that might result from several features or consequences of the legislation. A number of those features could add to the cost of the legislation. In particular, CBO's estimate does not include potential claims by individuals with older, so-called dormant, asbestos claims pending in the court system, who might seek additional compensation from the fund. It also does not encompass: possible claims by family members of workers who were exposed to asbestos; the costs of any exceptional medical claims that could be made under the bill; the potential costs for residents of other areas of the country who might be deemed eligible to receive the same special treatment given to the residents of Libby, Montana, under the legislation; and the impact on costs of allowing CT scans to serve as documentation of pleural abnormalities. On the other hand, CBO's estimate does not reflect the possibility that medical studies required by the legislation might preclude individuals with certain diseases from obtaining compensation from the fund.

The Methodology of the Bates White Report

The Bates White analysis of S. 852 is based on an epidemiological analysis of the population employed in industries with some potential exposure to asbestos. To estimate how many claims could be presented to the fund under S. 852 by individuals with both malignant conditions and asbestos exposure, Bates White first estimated the size of the population working in industries and positions in which asbestos exposure was probable. Using estimates of the lifetime incidence for individuals of developing lung and other cancers that could be compensated under S. 852, the authors estimated how many people could make such claims under the bill by further estimating how many of those individuals would develop pleural abnormalities. Evidence of such abnormalities is one of the qualifying requirements for compensation for disease levels VII and VI under S. 852.

For one of the cost scenarios in the Bates White analysis, the authors reported that they estimated that the value of claims from all individuals that could seek compensation from the fund would sum to $300 billion over the next several decades. That figure does not include any costs or savings from most of the same features of the bill, mentioned above, that CBO could not quantify. Bates White also presented an alternative estimate that includes some of those costs, bringing the total value of potential claims to nearly $700 billion. Because the Bates White estimate of the value of claims that could be presented to the fund far exceeds the resources likely to be available to the fund, the authors concluded that the fund would have to be terminated without paying all valid claims.

The Bates White estimate includes a large number of potential claims against the asbestos trust fund from individuals suffering from lung and other cancers, many of which would not have been caused by exposure to asbestos. The report's authors believe that such claims are significantly under-represented in the experience to date in the tort system and existing asbestos trusts. Nevertheless, CBO remains convinced that the number of such claims that would be submitted to the trust fund and approved for payment under S. 852 would be far fewer than suggested by Bates White. In CBO's judgment, the historical experience of the Manville Trust and that trust's current projection of future claims against it are a more reliable basis for estimating the number of future valid claims that would be filed with the asbestos fund under S. 852.

Comparing the Bates White Report on S. 852 and CBO's Cost Estimate for the Bill

The Bates White report and the CBO cost estimate cannot be directly compared because the estimates address different questions. CBO estimated the value of valid claims that would be presented to the fund's administrator. Bates White estimated the value of claims that could be presented to the administrator; its figures are not adjusted to indicate how many individuals actually would seek and receive compensation from the fund. If such adjustments were made, the Bates White cost analysis might be much more in line with other estimates of the likely cost for compensating claims for malignant conditions.

In attempting to answer different questions, the two analyses used different methodologies. CBO's estimate relies on the projections of claims from other analyses prepared with regard to S. 852 and similar legislation. Those projections are grounded, in part, on the historical experience of claims paid by the Manville Trust. That approach reflects the observation that the Manville Trust receives claims from nearly all of the individuals that have brought asbestos tort claims, and the expectation that it provides a reasonable model to use for projecting the number and types of future valid claims likely to be filed with the asbestos trust fund that would be established under S. 852—particularly claims for malignant conditions.

The Bates White analysis of S. 852 rejects the notion of using the experience of the Manville Trust to project the number of claims that could be made against the proposed fund, because the authors observe that not all individuals with malignant conditions that could make asbestos tort claims choose to do so. Bates White notes that engaging in tort litigation can be costly and burdensome, and that many individuals with potential asbestos tort claims choose not to make such claims. The authors expect that replacing the asbestos tort system with the administrative settlement process specified in S. 852 would encourage many of those individuals with malignant conditions and asbestos exposure to make claims against the federal asbestos fund. (Bates White also estimates fewer claims for nonmalignant conditions than CBO projects, but the financial impact of that decrease is much smaller than the impact of its much larger estimate of the number of claims for malignant conditions.)

Evaluation of the Bates White Approach

During the Senate Judiciary Committee's November hearing on S. 852, several witnesses voiced concerns about the Bates White estimate of the number of individuals with lung and other cancers that could make claims for compensation under S. 852. CBO has discussed many of these issues with Bates White and others who have studied the legislation, and shares some of those concerns. They include:

- **Bates White may have overestimated the incidence of pleural abnormalities**. Pleural abnormalities are one of the conditions that claimants with lung or other cancers must exhibit under S. 852 to qualify for compensation. Although there is broad agreement about the incidence of lung and other cancers in the asbestos-exposed population, there does not appear to be a consensus about the extent of pleural abnormalities within that population. The Bates White report cites several studies as the basis for its estimate that about 10 percent of its exposed population of 27 million people could be expected to have pleural abnormalities. Among the more heavily exposed population of about 9 million, however, Bates White estimated that the incidence of abnormalities would be higher—around 24 percent.

  NERA presented CBO with an evaluation of the studies cited by Bates White for its estimate of the incidence of pleural abnormalities. NERA concluded that the report overstated the incidence of pleural abnormalities by at least half. The incidence among the asbestos-exposed population appears to be in dispute because the sample population used in some studies that have measured it may not be representative of the population in question. In addition, some of the studies measured the incidence of pleural abnormalities based on their presence in only one lung, whereas eligibility under the bill would require the presence of such abnormalities in both lungs. CBO has not attempted to independently estimate the incidence of pleural abnormalities in the exposed population, but a proportion that differed significantly from that estimated by Bates White would change the results of that study substantially.

- **The Bates White study does not explicitly account for the work-years of occupational exposure specified by the bill.** Under S. 852, claimants with lung or other cancers would be required to demonstrate that they experienced asbestos exposure for a specific number of years, weighted by the intensity of exposure and when it occurred. By not accounting for the bill's weighted work-year exposure criteria, Bates White has overestimated the number of individuals that could file a successful claim under S. 852. CBO believes that a significant percentage of potential claimants might be unable to demonstrate a sufficient number of work-years of exposure to asbestos to qualify for compensation under the bill.

  Meeting the bill's required weighted work-years of occupational exposure to asbestos is one of the key qualifying criteria—along with exhibiting pleural abnormalities—for an award under the legislation. The Bates White study did not directly account for this requirement. The authors told CBO that most individuals in the exposed population typically had long careers in the same occupation or industry and that the presence of pleural abnormalities was likely to indicate sufficient years of asbestos exposure to meet the bill's criteria.

However, pleural abnormalities can occur in individuals with fewer years of exposure than are required to qualify for disease levels VII and VI under the bill. Consequently, applying the work-year criteria could eliminate a significant number of claimants who might otherwise qualify.

- **The Bates White report attempts to estimate the number of individuals that could make successful claims under S. 852, but does not attempt to estimate how many individuals would seek to do so.** There is general agreement that individuals exposed to asbestos that have developed mesothelioma and asbestosis have a high propensity (probably well above 70 percent) to file tort claims and apply to the Manville Trust for compensation. There appears to be much less agreement on the propensity of individuals that have been exposed to asbestos and have developed lung or other cancers to take such actions. That is, in part, because there is no consensus on how many individuals with lung or other cancers could demonstrate that asbestos exposure was a substantial contributing factor to their disease (the basis for estimating a claiming rate). Many researchers agree that claiming rates for such individuals today are much lower—certainly less than half, perhaps much less—than for people with mesothelioma or asbestosis. Applying a claiming rate of much less than 100 percent for the Bates White estimates of Level VII and VI claims would substantially reduce the costs presented in the Bates White analysis.

- **Bates White estimates a much larger population exposed to asbestos than most other analyses.** Bates White reported that its estimate considered a working population of about 27 million that was exposed to asbestos, a much larger number than many other studies have assumed. However, the authors noted that about 9 million of those people, who had medium-to-heavy exposure to asbestos, accounted for about 90 percent ($270 billion) of the potential claims. An asbestos-exposed population of around 9 million is similar to the estimates of other researchers, and CBO does not consider the size of the exposed population to be a significant issue with the report.

How the key participants in the process—the fund's administrator, claimants, and attorneys or others who assist claimants—behave would have a significant impact on the number of successful claims filed with the proposed asbestos trust fund. The authors of the Bates White report have suggested that the behavior of claimants and attorneys under S. 852 would differ greatly from their behavior under the current system. They expect that under the no-fault administrative process outlined in the legislation, many more claimants with asbestos exposure and lung or other cancers would pursue claims than have done so or filed with the Manville Trust. They anticipate this outcome because they expect that the cost of seeking an administrative claim from the fund would be much less

than pursing litigation, and that the rewards for claimants would be much greater than those obtained from the Manville Trust (though perhaps not as large as awards obtained in some tort settlements).

CBO reaches a different conclusion—that the system specified in S. 852 bears sufficient similarity to the operations of the Manville Trust that the latter's experience is a sound basis for projecting the number of most types of claims under the bill. CBO's estimate of the number of future claims for malignant conditions expected under S. 852 is very similar to the most recent claims projection prepared for the Manville Trust.

A number of factors make that analogy appropriate. For example, whether pursuing an asbestos tort claim under current law or an administrative settlement under the legislation, a claimant would need to demonstrate that asbestos exposure was a substantial contributing factor to his or her cancer. Thus, just as under the current system, claimants could not necessarily assume that the fund's administrator under S. 852 would approve all claims. This is particularly true for level VI claims, which would be individually evaluated by a medical panel. The Manville Trust also requires applicants to demonstrate a specific number of work-years of exposure to asbestos to qualify for an award. The number of work-years needed to qualify for an award from the Manville Trust is generally less than would be required under S. 852, so in that respect, the experience of the Manville Trust could imply more claims than the federal fund might actually face. Also, CBO believes that claimants to the proposed federal asbestos fund would face costs and procedural burdens similar to those that applicants to the Manville Trust face.

Although the financial incentives for some claimants might be greater under the bill than under the current tort system, the financial incentives for attorneys to assist claimants would be weaker. Attorneys play a significant role in identifying claimants and pursuing their claims under the current system, and would probably do so under S. 852. Most claimants would probably need help preparing a claim under S. 852, and the bill would cap attorneys' fees at 5 percent of individual awards made by the fund. By contrast, under the current tort system, attorneys typically receive fees of up to 40 percent of the amount awarded. Because attorneys or others who might assist claimants would play such a key role in the claims process, the bill's cap on fees makes it less likely that the legislation would lead to a substantial influx of claims that are not represented in the current system.

Some of the attorneys whom CBO consulted suggested that asbestos tort claims have recently shifted away from relatively straightforward settlements, and that asbestos cases today involve a significant time commitment and large up-front costs to prepare for litigation, factors that may deter some individuals from pursing claims. If so, the number of potential claimants to the fund proposed under S. 852 might be under-represented in

the current tort environment. But because asbestos litigation has been under way for many years, CBO believes that the long historical experience of the Manville Trust is the best available indicator of claimants' behavior under the bill, even if the current tort environment differs somewhat.