



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

February 1, 2006

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

Dear Mr. Chairman:

I am pleased to provide you with the enclosed responses to questions submitted for the record following the Senate Judiciary Committee's hearing on November 17, 2005, regarding S. 852, the Fairness in Asbestos Injury Resolution Act of 2005.

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

Sincerely,

Donald B. Marron  
Acting Director

Enclosure

cc. Honorable Patrick J. Leahy  
Ranking Democratic Member

## **Questions from Senator Cornyn:**

*Can you comment, specifically, on the limitations faced by the Congressional Budget Office in producing the report and making the valuation of the trust fund? What specifically are the limitations on the accuracy of the CBO's valuation of \$120 billion to \$150 billion and what confidence level can the CBO place on that valuation?*

Projecting any activity nearly fifty years into the future poses significant estimating risks. Our estimate of the valid claims that would be submitted to the asbestos fund is subject to numerous limitations, as indicated in our cost estimate of August 25, 2005, and in our subsequent letter to Senator Specter on December 19, 2005. Those limitations include little information about settlements that have already occurred, the lack of comprehensive information on the status of pending claims for injuries caused by asbestos exposure, and the highly uncertain number of future claims for such injuries. In addition, it is difficult to predict how the behavior of claimants and their advocates under a new system to compensate asbestos injuries might compare with that under the current tort system, and exactly how the procedures governing the new fund would be implemented. Finally, unpredictable fluctuations in economic conditions (in particular, inflation and interest rates) add to the uncertainty of the estimate over 50 years.

CBO's estimate for S. 852 is based on past behavior of claimants and the judgments of others who have studied the legislation. Many of the individuals that have studied the legislation have also participated in determining adequate funding for various bankruptcy trust funds that have been established to pay victims of asbestos exposure related to individual firms. In hindsight, some of those trust funds did not contain adequate funds to pay all of the claims presented to them; for others it is too soon to judge their ultimate financial viability.

There is no comparable historical data series for CBO to use to determine a specific confidence level for this cost estimate. We estimate the value of claims that would be presented to the asbestos fund is between \$120 billion and \$150 billion, though the ultimate result could certainly fall outside that range. Furthermore, that range does not encompass the impact of several factors CBO could not quantify, such as the submission and approval of dormant claims, claims for take-home exposure (that is, indirect exposure of family members), exceptional medical claims, the impact of using CT scans for medical documentation, and the potential effects of treating other sites like Libby, Montana. In addition, the bill would require the Institute of Medicine of the National Academy of Sciences to examine the causal link between asbestos exposure and cancers other than lung cancer or mesothelioma. We cannot predict the outcome of that study—but if it were to determine that there is no causal link between asbestos exposure and any of those cancers, the number of claims for such conditions (level VI under the bill) could decline significantly.

*The CBO uses a number of sources for its valuation. Please provide the number of sources used and please list the names of those sources.*

In determining its projection of future claimants to the asbestos fund, CBO considered other projections available to us. These included several forecasts prepared for the Manville Trust, some prepared by Navigant Consulting, and reports published by the Rand Corporation. We also examined estimates from sources that were mentioned by Senator Specter during the hearing on November 17, 2005, including the Asbestos Study Group, Legal Analysis Systems, and NERA Consulting. Finally, CBO discussed the legislation with representatives from trade unions, business groups, and the insurance industry. More recently, CBO examined projections produced by Bates White, LLC, and met with representatives of that firm.

*Does the CBO have an equivalent effective estimate of the total number of possible level 6 and level 7 cancer victims that could show occupational exposure and asbestos-related disease (speaking epidemiologically)?*

No, CBO did not attempt to calculate the total number of individuals who might qualify for compensation under the bill. Our estimate is based on the number of claims that have been compensated and forecasts of future claims, knowing that some who qualify will not apply for compensation.

*...does the CBO have an opinion about a reasonable rate to assume for those that will actually file a claim? Why and on what basis?*

No, CBO did not estimate claiming rates as part of its analysis. CBO projected the number of future claimants but did not estimate the number of individuals who would be eligible to file claims. The number of people who claim benefits in other federal programs often falls well short of the number who are eligible. (For example, the Department of Agriculture estimates that, in 2003, only 56 percent of those eligible for food stamps applied for them.) It is possible that the same will be true of the asbestos trust fund.

*How can the CBO be assured that Level 6 and Level 7 claimants will not be sufficiently higher than the estimates of past funds or claims within the tort system given the substantially higher claim awards within the trust fund? Why and on what basis? Is it not reasonable to assume that the number of claims to the Trust Fund should increase dramatically, as STATS points out and Bates White seems to recognize? Why or why not?*

There is not enough information available for CBO, or any other analysts, to be sure of any particular outcome. In the course of its analysis, however, CBO has concluded that there is no compelling basis for concluding that the claims experience of the proposed asbestos trust fund would differ significantly from that of the current tort system.

It is unclear, for example, whether the proposed federal asbestos fund would provide financial incentives to the various participants that would result in claims that differ significantly from those under the tort system. Some claimants might obtain a greater award from the federal fund than they would be able to win in the tort system; others might receive less. Even though the Manville Trust does not have sufficient funds to pay the full value of its awards, most who receive payment from Manville also receive payments from multiple other defendants, adding up to awards significantly greater than the amount received from the Manville Trust alone. Actual settlement amounts are typically confidential, but the recent Bates White report on S. 852, for example, estimates that average compensation—before attorneys' fees—is \$915,000 for claimants with mesothelioma, \$230,000 for claimants with lung cancer, and \$115,000 for those with other cancers. If those estimates are accurate, the amounts received by claimants are less than the awards authorized under S. 852, but they are not insignificant sums, and it is not clear that the prospect of larger awards under the bill would cause dramatically more claims to be filed.

Furthermore, 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. However, the bill would cap attorneys' fees at 5 percent of awards from 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.

*Given the CBO's expressed limitations with respect to predicting future claims, and given at least some competing views with respect to predicting claims, how can we realistically predict the total cost of the Trust Fund and ensure that the Fund will not either revert to the court system or require additional private or public funding?*

Neither CBO nor other analysts can provide absolute assurance that any particular estimate of the valid claims that would be presented to the asbestos fund is correct. CBO's analysis suggests that, as the bill is currently structured, the fund might or might not have sufficient 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, as well as 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. Without a substantial increase in the resources available to the fund, there is no way to guarantee that the fund will not either revert to the court system or require additional funding. Under S. 852, any additional funding beyond the amounts authorized in the bill would require the Congress to enact additional legislation.

## Questions from Senator Biden:

*1. You have stated that the number of malignants likely to file under the fund ranges from 60,000 to 100,000, and even to as high as 130,000 or 150,000. If claims reach 100,000 or 150,000, how does that affect your projections?*

The center of our range reflects costs for about 100,000 claims for malignant conditions. If the number of such claims were as high as 150,000, we would expect the value of claims filed for malignant conditions to rise by about \$45 billion.

*2. The press has reported that you are “terrified” about the budget deficit in coming decades. If we pass this bill, are you likely to become more terrified or less?*

The aging of the baby-boom generation will put increasing pressure on the federal budget in the coming decades—at the same time that the asbestos fund would be paying claims. But, under S. 852, the fund’s administrator would not be authorized to obligate funds in excess of anticipated revenues. Because the administrator would be allowed to borrow against future revenues to the fund, its operations could contribute to the federal deficit in some years, but over the life of the fund (whether or not it sunsets), we would not expect the legislation to add to the aggregate federal debt.

There is some risk, however, that if valid claims were to exceed the fund’s resources, the Congress and the President might feel impelled, at some time in the future, to allocate general funds of the Treasury to satisfy such claims.

*3. You say you didn’t take into account the cost of exceptional medical claims. Are there limitations for who can submit an “exceptional medical claim?”*

The only limitation is that those already covered under the medical criteria could not submit an exceptional medical claim. Subsection 121(g) of the bill would stipulate that any claimant “who does not meet the medical criteria requirements...may apply for designation of the claim as an exceptional medical claim.” But such a claimant needs to be able, “through comparably reliable evidence,” to show that he or she “has an asbestos-related condition that is substantially comparable to that of a medical condition that would satisfy the requirements of a category” specified in the bill.

*a. Doesn't that mean that anyone who has an asbestos-related disease may submit an exceptional medical claim? Would the cost be minimal or substantial?*

Anyone who does not meet the medical criteria could *submit* such a claim. The ultimate costs of such claims would depend on the criteria that the administrator and the reviewing physicians panels would apply in considering such claims. The bill is not specific in that regard. Because CBO has no basis for predicting those criteria or how stringently they would be implemented, we have not attempted to estimate the costs that might result from exceptional medical claims.

*4. CBO's analysis states that the Asbestos Fund would increase budget deficits over the 2006-2015 period by \$6.5 billion, excluding debt service costs.*

*a. Why did you exclude debt service costs?*

In estimating the budgetary impact of legislation for the purposes of the Congressional budget process, the budget committees and CBO have a long-standing estimating convention of not including financing (debt-service) costs in the cost estimates for individual pieces of legislation. Such costs are ultimately incorporated in CBO's multiyear baseline projections and in our analyses of comprehensive budget plans, such as the President's budget and budget resolution options.

*b. What are CBO's projected debt service costs for this fund?*

Over the 2006-2015 period, the Treasury's debt-service costs would add about \$1 billion in outlays to the federal budget. If the value of valid claims presented to the fund were about \$130 billion (the scenario presented on page 8 of CBO's August 25, 2005, cost estimate for S. 852), we estimate that the fund would incur interest costs totaling about \$10 billion over its life.

*c. If you have not estimated such costs, please execute such an estimate and include it in any revised evaluations of the fund. Also, please provide and explain the interest rate you are utilizing.*

We used CBO's March 2005 projections for the rate on the 10-year Treasury note to project borrowing costs for the fund. That rate starts at 4.6 percent in 2006 and rises to 5.4 percent for 2008 and subsequent years.

5. *What is the impact on the fund's finances and its ability to pay claims if the Supreme Court determines that the National Fund's seizure of existing trust assets violates the Constitution?*

If the administrator of the fund were unable to obtain the assets of existing trusts, the fund would lose a significant portion of its initial resources—about \$8 billion. The consequences of that event would depend on what responsibility the new asbestos fund would have for claimants against those existing trusts. If potential claims against the new fund were not correspondingly reduced, its ability to pay all valid claims would be diminished. CBO's estimate does not seek to anticipate any potential legal challenges concerning this legislation.

6. *The Black Lung Fund was initially designed to be a program requiring federal funding only during the initial transition years. Over 30 years later, the program is still going strong and is almost exclusively financed by the federal government. Without definitive information on the number of persons that form the eligible population, the actual number of pending claims, the number of claims that will be filed, the values of those claims, and the actual revenues that will be collected from defendants and insurance companies, doesn't the federal government run the risk of either a similar bailout concerning the proposed asbestos trust fund, or a collapse or sunset of the program?*

Despite extensive research by many parties over a long period of time, there is no definitive way to predict with precision the number and value of claims against the asbestos fund or the revenues that will be collected. By CBO's estimate, the fund might or might not have sufficient resources to pay all valid claims. It is certainly possible that the proposed asbestos fund would be required to sunset before compensating all valid claims presented to it, or that the Congress and the President would feel the need to enact additional legislation providing resources beyond those authorized in S. 852.

7. *The Black Lung Fund was projected to cost a maximum of \$3 billion during its first 20 years; yet, during the first ten years of its existence, more than \$8 billion was paid to claimants in Part B alone. Is it not the case that if the experience of the proposed fund mirrors the events involving the Black Lung Fund, the excessive cost could put the total cost of the asbestos fund beyond the \$200 billion range?*

If the value of valid claims were to be two or three times what CBO estimates, the potential cost of such claims could far exceed \$200 billion. In that event, the program would sunset and the fund would not be liable for payments in excess of the resources available to it.

8. *How would the need for borrowing in the first 10 years be affected by a start date of January 1, 2007?*

Assuming no significant change in the value of the assets held by the bankruptcy trusts, such a change in the start date would not have a significant impact on the fund's borrowing.

## Questions from Senator Durbin:

*...the CBO projects 78,000 future compensable cancer claims. Do you know how many of these projected claims are mesothelioma cancers? And how many projected lung cancer claims are in each lung cancer category?*

For the midpoint of its range, CBO projects about 34,000 future claims for mesothelioma and about 34,000 future claims for lung cancer (about 17,000 for each of Levels VIII and VII). The remaining 10,000 future claims for malignant conditions in our estimate are for other forms of cancer (Level VI).

*Data from the National Center for Health Statistics show that the number of deaths actually reported to be from mesothelioma in the U.S. are running 25% higher than the number of mesothelioma claims that have been projected by the CBO. Additionally, a recent study by the National Institute for Occupational Safety and Health suggests an even higher number of mesothelioma deaths. What would be the cost of S. 852 if your underlying assumption on the number of mesothelioma claims is wrong?*

If the number of mesothelioma claims were to prove higher than expected while other claims remained the same, the total cost to the fund would rise accordingly. Over the life of the fund, an average mesothelioma claim would have a value of about \$1.4 million, CBO estimates. An increase of 25 percent in the estimated number of future claims for mesothelioma would add about \$12 billion to the value of claims against the fund.

*Section 133 of S. 852, as reported by the committee, presumes a 3 year payout period. Yet, your study seems to assume that all non-exigent claims will be paid out over 4 years. How would a 3 year payout compared to a 4 year period impact the funding needed and debt incurred in the initial 10 years?*

In general, the bill would provide for a three-year payout, but it also would direct the administrator to develop guidelines for a four-year payout (with at least 50 percent of the total award paid in the first two years) if such action is warranted. Because CBO believes that the administrator would need to borrow very early in the life of the fund, and because a longer payout period would reduce the need to borrow in any given year, we believe that a four-year payout is more likely.

If the Administrator chose to adopt a three-year payout, the amount of funding needed in the first 10 years would increase by around \$3 billion. It would also increase the 10-year impact on the budget deficit by about the same amount.

*What is the amount of increased liability that the Trust Fund would face if the 9,400 new mesothelioma claims that were presented to Manville since the beginning of 2003 filed a claim with the Trust Fund for the unpaid value of their claims under the Trust Fund? How would this affect the need for borrowing by the Trust Fund in the first 5 years?*

CBO's estimate already encompasses such claims because it includes the value of pending claims (including claims for mesothelioma) at the time of the bill's enactment. The value of pending claims includes those of claimants that have received payments from one or more defendants that sum to less than the awards authorized by the legislation.

*What is the amount of increased liability for the Trust Fund if the estimate of future mesothelioma claims is increased by 20,000 over the life of the Trust Fund?*

If we were to increase our estimate of the number of valid mesothelioma claims that would be presented to the fund over the next 50 years by 20,000 and make no other changes to the estimate, the value of claims presented to the fund would increase by around \$30 billion. That figure assumes that the distribution of those additional claims over time would be the same as the distribution reflected in our cost estimate for S. 852.

*What is the amount of increased liability for the Trust Fund if you accept the "Tillinghast 2005" projections that weighted average projection for future U.S. mesothelioma claims for the Manville Trust would be 42,500?*

The 2005 projections of mesothelioma claims prepared for the Manville Trust by Tillinghast and CBO's estimates are not directly comparable and may not be significantly different. Manville's projection of 42,510 total future mesothelioma claims is not comparable to CBO's estimate of 34,000 future claims because it includes claims expected in 2005, while the first year of future claims projected by CBO is 2006. (The 2005 cases are treated as pending claims in CBO's estimate.) Adjusting for this difference in the projections would reduce the Manville projection by about 2,300, to a total of about 40,200. In addition, because claims presented to the Manville Trust have generally already been filed elsewhere as well, some of the claims that Manville expects to see in the future are among those claims that CBO estimates will be pending when the fund begins operations. We estimate that there will be nearly 8,000 pending mesothelioma claims when the fund begins operation, and our estimate includes the cost of such claims. An unknown number of those pending claims are included in the Tillinghast estimate.

*What additional liability would the Trust Fund face assuming this weighted average accounts for only 90% of the total mesothelioma claims, as stated in the testimony by Mr. Mark Lederer of the Manville Trust?*

In estimating the likely value of claims against the new asbestos fund, it is appropriate to assume that some potentially eligible claimants would not seek compensation from the fund—just as not all eligible beneficiaries participate in many federal programs. Thus, if the Manville Trust is only facing claims involving 90 percent of mesothelioma cases, that outcome would not necessitate an adjustment to CBO’s estimate.