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April – May, 2010: MSCI Advocacy Newsletter

Welcome to the MSCI Advocacy Newsletter, a monthly medium through which MSCI aims to keep its members updated on federal legislative and regulatory issues of importance to the metals industry. The following issue covers a number of broad topics that will affect the metals industry and builds a framework upon which details may be added in the coming months. For additional information on these and other law-related topics, go to www.winston.com and click on "Publications" or "Newsletters" under the "Resources" tab. Or, visit MSCI's [policy agenda](#) for other updated materials.

Chinese Currency and Trade

The debate around Chinese currency manipulation continues to pick up momentum. Domestic manufacturers and producers have repeatedly argued that China's policy to peg the yuan to the dollar artificially raises the price of imports into China and artificially suppresses the price of exports from China to the United States, resulting in a significant loss of jobs. Some recent estimates have been as many as 2.4 million jobs due to the policy.

In February, a group of senators wrote to Commerce Secretary Locke, requesting action against Chinese imports. In March, 130 House members wrote to Commerce Secretary Locke and Treasury Secretary Geithner to request that Commerce apply countervailing duties on Chinese imports. On March 12th, Senators Schumer (D-NY) and Graham (R-SC) introduced a bill entitled "the Currency Exchange Rate Oversight Reform Act of 2010". The bill would allow for substantial sanctions to be



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imposed on China in retaliation for continued currency manipulation, it would lower the standard of proof necessary to take bi-lateral action, and it would remove a great deal of discretion from the Secretary in determining whether to take action against a country such as China. You can see a summary of the bill [here](#). Finally, in May, the House Ways & Means Committee held a hearing on the topic.

While the Schumer-Graham solution is bi-lateral by definition, many support a more multi-lateral plan. Those who believe that diplomacy is the best avenue to success have applied a significant amount of pressure on President Obama to declare China a currency manipulator in his annual currency exchange report. That would trigger WTO action. However, rather than releasing that report on schedule on April 15th, the Administration chose to delay the release of exchange rate report indefinitely in order to buy more time to engage in multi-lateral diplomacy with the "Group of 20" in Toronto in June and through the U.S.-China "Strategic Dialogue" in Beijing this month.

Washington has received a series of positive signals in the past month from Beijing. First, on a visit to China in early April, Secretary Geithner met with Chinese Vice Premier Wang Qishan on the subject. Diplomatic statements emerged from China soon thereafter, and there purportedly was an agreement by China to begin to let the yuan appreciate against the dollar. The next week, President Obama and President Hu Jintao met in Washington during the Nuclear Security Summit and again China gave indications that it would allow its currency to float.

The positive news has not stopped Senator Schumer (D-NY) and Senator Graham (D-SC) from pushing forward. In fact, they have made public their intention to try to attach their anti-currency manipulation legislation to the "must pass" tax extenders package coming up soon for consideration. Chairman Baucus opposes such a move, but the political wind is at Schumer's back on this issue. For, despite China's stated intentions to change course, estimates suggest that the currency will only be able to float about 2 to 6 percent a year. Some economist's calculations indicate that the yuan is currently undervalued between 25 to 40 percent against the U.S. dollar.



Wall Street and Derivatives Reform Legislation

Almost two years after a major financial crisis erupted on Wall Street, legislation aimed at overhauling regulation of the financial and derivatives industry is ever closer to becoming the law of the land. On April 21, 2010 the Senate Agriculture, Nutrition and Forestry Committee, under the chairmanship of Sen. Blanche Lincoln (D-AR), approved the Wall Street Transparency and Accountability Act of 2010 (Lincoln Bill). Only one Republican, Sen. Chuck Grassley (R-IA), voted in favor of the measure. Leading up to the committee vote, Chairman Lincoln and Ranking Republican Chambliss (R-GA) had been negotiating a bipartisan bill. Those negotiations broke down only days before the vote and Chairman Lincoln chose ultimately to bring up her own bill in lieu of a bi-partisan product. That bill has widely been characterized as the “toughest” bill introduced to date on the topic. Its approach to regulating derivatives has been sharply criticized by many in the industry, and some have gone as far as saying that entire sections are unworkable and were drafted solely for political gain.

The Lincoln Bill was always intended to be inserted into a larger legislative package introduced by Chairman Dodd and reported out of the Banking, Housing and Urban Affairs Committee in March of 2010. After a bit of negotiations, the Chairmen did in fact merge the two bills, giving Chairman Lincoln's derivatives title preference over Dodd's. The bill is currently on the Senate floor and amendments are being debated and voted on as of this writing. To date, 129 amendments have been filed, including entire Republican substitutes. While it is a partisan bill for the moment, many expect that a number of Republicans will ultimately vote for final passage and the mood is not nearly as hostile as it was during the Health Care Reform votes.

Of particular interest to the manufacturing sector is the derivatives title. The legislation aims at overhauling the regulation of over-the-counter (OTC) derivatives by regulating the previously unregulated: (i) products; (ii) traders transacting in these products; and (iii) the markets where these products trade. To accomplish this, it will: (a) clarify what securities and non-securities products will be included in the new regulated category of a derivative contract (a “swap”) and expand the authority of both the Commodity Futures Trading Commission (CFTC) and/or the Securities and Exchange Commission (SEC) in regulating these products; (b) mandate that dealers and major traders in swaps become registered with either the CFTC or the SEC and abide by a new set of business conduct standards, trading rules, transparency, and public reporting requirements; and (c) establish new categories of regulated entities through which these products must be traded, cleared, and reported.

Lack of transparency in derivatives markets was largely blamed for the 2008 financial and economic melt-down. However, in addition to being a highly profitable financial product for Wall Street traders,



derivatives serve an essential function for non-financial service businesses ("corporate end users") that use the financial product to manage risk. The House recognized this reality in their earlier passed legislation and chose to exempt certain end-users, including manufacturers, from the legislation's requirements. The intent in doing so was to allow certain truly non-financial companies, who use derivatives to hedge against risks such as fuel price and interest rate spikes, to continue engaging in risk mitigation exercises without having to be concerned about increased cash collateral (i.e. increased cost of purchasing insurance). Having to comply with the requirements aimed at banks, according to these end-users, would make the derivative products prohibitively expensive and would discourage risk mitigation during a very difficult and unstable economic time. The Senate has so far been highly protective of the end-user exemption, crafting it as narrow as possible against the protest of many corporate end user groups. That said, Senator Stabenow (D-MI) was successful at including language that would exempt certain manufacturers (particularly auto manufacturers) from the requirements of the legislation.

The [Chamber of Commerce](#) has spearheaded the fight for corporate end users through the "End User's Coalition". Any company particularly interested in shielding themselves from this regulation should lend a voice to the Coalition's efforts in the coming days.

"Jobs" and Tax Legislation

On April 15, 2010, President Obama signed into law H.R. 4851, the Continuing Extension Act of 2010, which temporarily extends certain unemployment and health care benefits. The Act extends unemployment benefits to individuals who have exhausted state unemployment benefits. The Act also amends the American Recovery and Reinvestment Act of 2009 to extend 65% federal subsidies for COBRA health insurance continuation coverage. H.R. 4851, however, was passed only as a very short term fix designed to buy time for a longer term, albeit still temporary, extension of various tax incentives and social safety net programs.

In addition to the big ticket Wall Street, Immigration and Climate measures, the Congress has its hands full with many tax and jobs related measures in the cue. To make sense of it, you may want to think about the various bills in terms of the following five buckets: (1) tax extenders and social safety net extenders; (2) small business tax incentives; (3) personal income tax rates that are set to rise in January 2011 without Congressional action; (4) estate tax fixes; and (5) energy-related / green jobs tax incentives.



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The first bucket, a tax "extenders" package (H.R. 4213), is most likely to be enacted into law in the near term. Both the House and the Senate have already passed competing versions of this legislation and the relevant leaders in each chamber (Chairman Sandy Levin (D-MI) and Chairman Max Baucus (D-MT)) are working together to resolve differences. Among other things, that bill will extend expired unemployment insurance and COBRA provisions first included in last year's economic stimulus package, and it will do so for a term longer than H.R. 4851 (mentioned above). Finding offsets for the cost of the bill has been the greatest challenge to date. While Democrats would like to treat the social spending side of the bill as emergency spending, Senate Republicans will not allow it. As a result, the Senate will likely need to offset the entire cost of the bill.

The second bucket, the "small business" tax credits bill, has already passed the House in the form of H.R. 4849. The Senate has yet to consider its own version but Chairman Baucus has scheduled a Senate Finance Committee mark-up for next Wednesday. The small business package includes about \$17 billion in incentives for state and local governments and small businesses. More specifically, the House version provides: (1) \$13.2 billion for infrastructure, primarily through bond programs and an extension through 2013 of the federally tax exempt Build America Bonds program; (2) \$3.6 billion in tax benefits to small businesses, including an exemption from capital gains taxes for small businesses who sell stocks; and (3) \$7.7 billion in claw-backs from subsidiaries of foreign-owned companies that have avoided paying taxes by sending funds to other countries.

The challenge facing the small business tax bill in the Senate is that many members are hesitant to move forward without getting some assurances on the fate of buckets three and four, the income tax and estate tax "fixes". As discussed in past newsletters, the estate tax has already expired and by next year the rate will return to 55% on any estate over \$3.5 million. There are efforts under way to bring this instead to 35% of anything over \$5 million, but such a fix will require legislation.

Additionally, in January, the income tax rate for middle class and high earners will return to pre-Bush tax cut rates (i.e. the rates will rise significantly). In an election year, this is particularly problematic for many vulnerable members who need assurances that this issue will be resolved and that middle income earners will not experience a tax hike that could otherwise have been prevented.

With so many legislative matters up in the air, there seems scarce little time to cobble together, and pay for, a "green jobs" bill, but some members such as Ways & Means Democrat Bill Pascrell (D-NJ) are on the record as saying that decisions on these (extenders and small business) tax bills should "not be



taken as a sign that Ways & Means Committee members are giving up ona tax measure focused on "green jobs".

Labor

As discussed in the last issue, the National Labor Relations Board (NLRB) became a topic for political fodder when Republicans chose to block senate consideration of President Obama's nominees to fill the three vacancies at the Board. One specific nominee, Craig Becker, drew a considerable amount of heat over the last few months from republicans who believe him to be too biased to serve on the Board.

Despite the President's insistence that nominees be confirmed, Democrats were unable to secure the 60 necessary votes. However, when the Congress is in recess, the President is able to "temporarily" confirm nominees under his executive authority. In this instance, the President used recess to confirm two members to the NLRB despite [41 Republicans sending him a letter](#) urging that he do not use his executive authority to skirt the Senate process.

Former union attorneys Craig Becker (D) and Mark G. Pearce (D) were both sworn in as members of the National Labor Relations Board through this process, ending 27 months of a defunct Board that had only two of five positions filled. Because President Obama appointed Becker and Pearce during a Congressional recess, their terms will expire at the end of the Senate's 2011 session unless they are confirmed by the Senate. Obama declined to recess-appoint his third nominee, Brian E. Hayes (R).

Much of the criticism around Becker comes from his past work and scholarly articles. Becker was associate general counsel for the Service Employees International Union from 1990-2004 and has been an AFL-CIO staff counsel since 2004. In an effort to address the issue many detractors were concerned about in Becker's nomination, Board Member Wilma Liebman (D) recently stated that the Board is unlikely to make "radical" policy changes with the two recess appointments, but that it does have an opportunity to apply the law "in a way that reinvigorates collective bargaining," particularly in light of the economic downturn.

While the Employee Free Choice Act (EFCA) has been unable to gain traction in the Congress, the AFL-CIO said it is not "backing away" from efforts to secure Congressional passage of the Act. Additionally, senior staff at the AFL-CIO has been reported to be exploring other options for getting the provisions enacted, including possibly using administrative measures to enact portions of the bill. President Obama, a self-described "pro-union guy," has said the Administration is taking



administrative steps to ensure people “get the fair chance to organize.” Finally, the President of the AFL-CIO’s Building and Construction Trades Department said at the federation’s annual legislative conference that it would continue pushing a labor-oriented agenda even after the passage of health care reform, pointing out the need for the Obama administration to act on project labor agreements, job creation programs, benefit protections, worker misclassification, and Davis-Bacon Act prevailing wage standards.

On other fronts, OSHA regulations have received attention in recent weeks. Last week, the Senate Health, Education, Labor and Pensions Committee held a hearing at which senators explored current workplace regulations and OSHA’s enforcement of those regulations. The Committee heard [testimony from officials at OSHA](#) and Secretary of Labor Solis released a [statement](#) of her own the day before the hearing. Labor interests are pushing for legislation, [the Protecting America’s Workers Act](#), to give OSHA more enforcement power. Consistent with the focus on workplace safety regulations, OSHA also announced a new enforcement program that will triple the average penalties on certain employers for work place safety violations. The program is called the “[Severe Violator Enforcement Program](#)” and it will focus on employers who willfully and repeatedly violate federal law.

Finally, some are concerned that a new proposed rule by OSHA to make employers single out musculoskeletal disorders may be an effort to justify a new “ergonomics standard”, a [standard that was set aside by the Bush administration](#).

Climate

Senators Kerry (D-MA), Lieberman (I-CT) and Graham (R-SC) are STILL working to get consensus on climate change legislation that can be enacted before year end. Most observers had for months considered the legislation too heavy of a lift for the Senate to tackle this year. However, the passage of Health Care reform re-invigorated the Democratic Party and led environmentalists and moderates alike to reconsider just how much they may be able to achieve before the clock expires on 2010. Since then, of course, a number of significant external developments have slowed the legislation in its tracks, causing skeptics to feel affirmed in their skepticism and optimists (those optimistic about passage) to re-consider the practical realities.



First, just when the trio of Senators was scheduled to release their bi-partisan bill last week, "Immigration Reform" hi-jacked the headlines, sending climate change to footnote status in the major news outlets. Most significantly, Senator Graham (R-SC), the only Republican actively engaged in climate legislation negotiations, has also been a long supporter of immigration reform and had worked closely with Senator Schumer (D-NY) and others over the years in thoughtful discussions on the topic. That said Graham does not support pushing immigration reform this year. Instead, he [came out loudly against the Schumer bill](#), arguing that the proposal needs a lot of time and effort to "get it right". Seizing political leverage, Graham not only indicated that he couldn't support the immigration reform bill, but also threatened to pull out of climate legislation negotiations until immigration is "off the table" for the year.

Second, prior to the massive BP oil spill in the Gulf of Mexico, President Obama had indicated that he would be willing to open up certain off-shore oil drilling as a concession to Republicans who may be supportive of climate legislation as long as energy supply issues were dealt with. Environmentalists were notably quiet on the development, most likely due to their collective understanding that they would need to give up something to get the prized cap on carbon that they had for years been pursuing.

The reaction to the oil crises in the gulf has been varied, but in all likelihood it has killed the prospects of new drilling provisions being enacted into law this year. Nonetheless, the soon to be introduced legislation is said to still contain off-shore drilling provisions despite specific resistance from otherwise "yes vote" Democrats such as Senators Robert Menendez (D-NJ), Frank Lautenberg (D-NJ) and Bill Nelson (D-FL). Without those votes, the bill will never go anywhere.

Despite the threats, and despite the speculation that new off-shore oil drilling will no longer be palatable, Graham as recently as Tuesday of last week spoke in front of an "Environmental Defense Fund" group and stated with regard to climate legislation that he is "not in this to make a statement" but instead that he is "in this to win." Senator Kerry has also gone on the record to say of Graham that "he is standing by the work product, and he's standing by the bill, no matter what." Clearly, the contradictions have most analysts confused.

Reports from the Hill last Friday indicate that the two senators, Kerry and Lieberman, have decided to move ahead with introduction of legislation on May 12th, with or without Graham's initial support. It will be titled "The American Power Act", abandoning any mention of "cap" or "trade" in the hope of



avoiding labels such as "cap and tax". The authors would like instead to shift the public perception of the bill in the direction of energy independence. Kerry and Lieberman issued a [joint statement](#) Friday and Graham issued [his statement](#) separately. In it, Graham says, "I believe there could be more than 60 votes for this bipartisan concept in the future. But there are not nearly 60 votes today and I do not see them materializing until we deal with the uncertainty of the immigration debate and the consequences of the oil spill."

In a bit of good news for the manufacturing industry, the bill is also said to have pushed out compliance requirements for manufacturers to six years after enactment. Previous versions of the legislation only gave manufacturers four years from enactment. Additionally, the bill is expected to have a strong "offsets" and "early action" component for those sectors (Utilities then Manufacturers) subject to a market based regulatory structure. As discussed in past issues, these provisions will help bring down the cost of compliance by creating a market place in which pollution allowances can be traded and offset credits can be purchased from those who fund projects that result in emission reductions.

In addition to the above, while we do not have the legislation in hand, it will likely include the following:

- (1) An economy wide cap on carbon emissions that would begin in 2012, with a target of reducing carbon pollution 17 percent by 2020 and 80 percent by 2050;
- (2) Separate caps on carbon emissions by the electric utilities sector (immediate phase-in) and the manufacturing sector (phase in six years from enactment), which would have to buy pollution permits from the federal government;
- (3) A straight fee or tax, paid by consumers at the pump, on transportation fuels in place of emissions trading for this sector;
- (4) A combination for the regulated sectors of a cap-and-trade model, under which polluters could trade pollution permits and offsets on an open market, and a "cap and dividend" model, which would return revenue from the sale of permits directly to consumers;
- (5) Application of a "carbon tariff" to imports of goods from countries that do not regulate their carbon emissions;
- (6) A "hard collar" on the price of emission permits of no less than \$10 per ton of carbon emitted and no more than \$30 per ton, which the federal government would manage through a strategic reserve of credits with which they could flood the market if the price exceeds the price collar;
- (7) A single federal system to cap emissions, pre-empting separate state limits; and



(8) Sections or titles devoted to oil refining, farming, coal, clean energy innovation, and increasing production of nuclear energy and oil and natural gas drilling.

Materials may be found at the following links:

[Winston & Strawn Briefing on Greenhouse Gas Emissions](#)

[House Climate Bill \(Passed\)](#)

[House Climate Bill Summary](#)

[Senator Kerry's Climate Bill \(Concepts and Principles for Copenhagen – Not the Draft expected for release Next Week\)](#)

[Senator Stabenow and Moderate Democrats' Climate Bill \(significant industry support\)](#)

Federal Register Notices

Below are a series of Federal Register Notices of interest to the metals industry. Additional information or full notices may be found at the Government Printing Office [web site](#).

❖ FEDERAL REGISTER 75 FR 22555 NOTICE (April 29, 2010)

- ❖ **ISSUE:** Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Rescission of Antidumping Duty Administrative Review
- ❖ **AGENCY:** Import Administration, International Trade Administration, Department of Commerce.
- ❖ **SUMMARY:** On March 30, 2010, in response to requests from interested parties, the Department of Commerce (the Department) published a notice of initiation of the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate (CTL plate) from the Republic of Korea. The period of review is February 1, 2009, through January 31, 2010. The Department is rescinding this review.



❖ **FEDERAL REGISTER 75 FR 22372 NOTICE (April 28, 2010)**

- ❖ **ISSUE:** Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination
- ❖ **AGENCY:** Import Administration, International Trade Administration, Department of Commerce
- ❖ **DATES:** Effective Date: April 28, 2010.
- ❖ **SUMMARY:** The Department of Commerce (the "Department") preliminarily determines that certain seamless carbon and alloy steel standard, line, and pressure pipe from the People's Republic of China ("PRC") is being, or is likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 733 of the Tariff Act of 1930, as amended (the "Act"). The estimated dumping margins are shown in the "Preliminary Determination" section of this notice.
- ❖ **FOR FURTHER INFORMATION CONTACT:** Magd Zalok or Zev Primor, AD/ CVD

❖ **FEDERAL REGISTER 75 FR 22114 NOTICE (April 27, 2010)**

- ❖ **ISSUE:** Aluminum Extrusions from the People's Republic of China: Initiation of Countervailing Duty Investigation
- ❖ **AGENCY:** Import Administration, International Trade Administration, Department of Commerce.
- ❖ **EFFECTIVE DATE:** April 28, 2010.
- ❖ **FOR FURTHER INFORMATION CONTACT:** Patricia Tran and Brandon Farlander, AD/ CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-1503 and (202) 482-0182, respectively.
- ❖ **SUPPLEMENTARY INFORMATION:** On March 31, 2010, the Department of Commerce ("Department") received a countervailing duty ("CVD") petition concerning imports of certain aluminum extrusions from the People's Republic of China ("PRC") filed in proper form by the Aluminum Extrusions Fair Trade Committee and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "Petitioners"). See The Petitions for the Imposition of Antidumping and Countervailing Duties against Aluminum Extrusions from the People's



Republic of China, dated March 31, 2010 (the Petition). On April 6, 2010, the Department issued requests to Petitioners for additional information and for clarification of certain areas of the Petition. Based on the Department's requests, Petitioners filed a supplement to the Petition, regarding general issues, on April 9, 2010 ("Supplement to the AD/CVD Petitions").

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