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June, 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. This issue covers a number of topics 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.

"Jobs" and Tax Legislation

The Congress, while quite successful in passing numerous and large pieces of legislation in the first part of 2010, ran into a road block in June. With various versions of "jobs" and "tax extenders" bills on the docket for months, the reality of a nearing November election became a more prominent consideration for lawmakers. While there are many popular and bi-partisan provisions included in these tax and job-focused bills, federal budget deficits continue to rise and there are less and less savings opportunities available to use as offsets for these popular items. Without offsets, Republicans and moderate Democrats alike are simply unwilling to move forward.



That said, even where offsets are available, they have been contentious. The most contentious is the "carried interest" provision, which will raise revenue by increasing the tax rate that private equity fund managers, venture capitalists and real estate investors pay on certain income. Efforts were made before the Fourth of July recess to moderate that provision in scope, but most expect that it will pass. A second concern is the limitation that the bill places on a corporation's ability to use foreign tax credits. The chief complaint is that this provision is highly complex and has not been vetted through any public hearing in Congress. This provision is heavily opposed by the National Association of Manufacturers. Finally, a version of the bill placed limitations on small professional service companies structured as S-corporations so that they cannot avoid paying taxes by characterizing earnings as profits rather than wages. Certain senators, including Senator Snowe (R-ME), raised concerns about the treatment of S-Corps. The final results of these efforts are yet to be seen.

Consequently, the Senate was unable to get a final vote before the Fourth of July recess, resulting in a temporary expiration of federal unemployment benefits for laid-off workers whose state benefits have run out. The Democrats had split this particular provision off from the larger above-discussed package of jobs and tax extenders in the hopes of moving it on its own, but they encountered resistance from Republicans who wanted to see its cost offset.

In addition to the extenders provisions, Congress has a number of additional tax-related matters pending. The most promising among those is a "small business" tax package. The House passed its bill on March 24th (H.R. 4849) and the Senate has produced its own version through the combined work of the Senate Committee on Small Business and Entrepreneurship and the Senate Finance Committee. The bi-partisan Senate bill includes a \$30 billion lending fund designed to help small banks extend credit, small business hiring tax credits and extension of "bonus depreciation", which the House bill did not include.

Progress has also been made on the energy-related tax package that is currently under development in the Senate Finance Committee. This measure would seek to promote "green-jobs" through various incentives. Recent reports indicate that the package will be intruded soon and that it will include tax-favored bonds for energy conservation and renewable energy projects, including financing of facilities engaged in manufacturing. There are also rumored to be investment tax credits included in the package.



Other tax considerations before year end include:

- ❖ **Extension of Individual Tax Cuts:** In addition to all of the above, the Bush-Administration tax cuts for individuals are set to expire at the end of the year. President Obama has vowed not to let that happen for the middle-class, but neither he nor the Congress have taken any real steps to ensure the tax cuts don't expire for all Americans. Most expect the upper marginal bracket to see a tax hike regardless of congressional action. Any extension of the tax cuts will require offsets in spending, a steep hill to climb.
- ❖ **The Estate Tax:** The Estate Tax is also an issue on the table. While there is general agreement on extending an exemption, the asset limit for the exemption and the highest tax rate are subjects of dispute. Prior estate tax limitations have 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 and so far no commitment has been made on when such a measure might get considered. Most recently, a small group of Senators wanted to add an estate tax friendly amendment to the small business bill on the floor, but Senate Majority Leader Reid used procedural techniques to prevent this from happening. The amendment would have weighed down an otherwise non-controversial bill with a huge cost burden.

Trade and Chinese Currency

You will recall from past issues that China's currency practices have come back into focus in Washington. Although domestic manufacturers and producers have repeatedly argued that China's policy to peg the Yuan to the dollar distorts markets and results in a loss of jobs in the United States, Washington's response has been spotty at best.

During the early part of this year, much of the press coverage centered on letters exchanged between Congress, the Secretary of Commerce and the Secretary of the Treasury. In March and April, Senators Schumer (D-NY) and Graham (R-SC) introduced a bill entitled "[the Currency Exchange Rate Oversight Reform Act of 2010](#)". In May, the House Ways & Means Committee held a hearing on the topic, but Chairman Levin (D-MI) was far less convinced that legislation promised the clearest path to success and instead encouraged diplomatic efforts to be exhausted first. On April 15th, many were frustrated that the President failed to label China as a currency manipulator, an action that would have allowed



the issue to go before the World Trade Organization ("WTO"). Instead, he opted to delay the release of an exchange rate report until the "Group of 20" meetings scheduled to be held in Toronto in June.

One week before the Toronto meetings, Chairman Levin (D-MI) of the House Ways and Means Committee changed his tone, arguing that months had passed and nothing had changed. He threatened to support legislation and move away from a multi-lateral approach unless he saw some change. Perhaps coincidentally, the head of China's central bank announced only a day or two later that the government would allow greater flexibility in the exchange rate of its currency.

While the President and key members of Congress looked favorably on the statement from China, the most common response was one of cautious skepticism. The Chairmen and Ranking Members of the Senate Finance Committee and the House Ways and Means Committee recognized China's announcement as a good first step, but called on the country to ensure that their currency appreciation is "meaningful", unlike during the period of 2005 to 2008 when China's actions were insufficient. Today, 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 calculations indicate that the Yuan is currently undervalued by 25 to 40 percent against the U.S. dollar.

Senator Schumer has made clear that, despite China's announcement, he will seek a vote on his legislation this year. His legislation would permit sanctions to be imposed on China in retaliation for continued currency manipulation, lower the standard of proof necessary to take bi-lateral action, and remove a great deal of discretion from the Secretary of Commerce in determining whether to take action against a country such as China. Many U.S. manufacturers support this legislation. Last week Treasury finally released its April 15th semiannual report and again failed to name the Chinese as currency manipulators. This will provide additional pressure for action on the Capital Hill.

In addition to currency matters, the President has finally ended his silence on Free Trade Agreements. Just last week, he promised to address the lingering agreement with Korea before the next Group of 20 meeting in November. However, that would require prompt Senate approval before year end. Many are skeptical whether all congressional concerns can be addressed by then.



Campaign Finance

In response to a recent Supreme Court ruling (*Citizens United v. Federal Election Commission*) that would allow corporations, non-profits and labor unions to use money from their own treasuries to fund political advertisements close in time to elections, the House of Representatives passed a bill ([H.R. 5175](#)) to place limitations on the impact of the Court's ruling. The bill would restrict government contractors, corporations with foreign ownership and TARP (Troubled Asset Relief Program) recipients from contributing to campaigns. The bills would also impose disclosure requirements to ensure that funding streams are transparent to the public and that those supporting political advertisements are forced to take claim for the message. However, the bill does not affect labor unions in the same way and is designed to delay any Supreme Court constitutional challenge for as many as three electoral cycles.

Senator Schumer (D-NY) introduced a Senate version of the legislation (S. 3295), which is also supported by President Obama. However, Senate Republicans have vowed to fight to the end, meaning that at least two Republicans will have to join the Democrats in voting in favor of final passage. Despite the opposition, Democrats perceive this as a strong election issue and Senate Majority Leader Reid has vowed to bring it to the Senate floor for a vote before the November elections. Early polls after the Supreme Court decision was released showed 70% of Americans opposed to such corporate spending. The Republicans will make strong arguments that the bill unfairly favors labor unions over corporations, a fact appealing to many voters and campaign supporters who feel that there is already a preferential imbalance under federal law.

MSCI opposes this legislation and continues to coordinate a letter writing campaign against it. You can join that campaign [here](#).

Climate and Energy Policy

Last month, the Senate blocked Senator Lisa Murkowski's (R-AK) resolution of disapproval to veto the authority of the EPA to regulate greenhouse gas emissions under the Clean Air Act by a vote of 47-53. In December, the EPA released a finding that greenhouse gas emissions endanger public health and welfare. In light of that finding, the EPA intends to regulate greenhouse gas emissions from both mobile and stationary sources. This Spring the EPA issued a rule clarifying how it intends to regulate stationary sources of greenhouse gas emissions. Under this "tailoring rule," EPA intends to begin



regulating the largest stationary sources of greenhouse gas emissions by January 2011. Proponents of climate change legislation hope that EPA's impending regulations—combined with Senator Murkowski's failure to block them—will provide the needed momentum for a climate change bill to be passed in the Senate this year.

Senate Majority Leader Harry Reid (D-NV) has announced that he intends to bring a climate and energy proposal to the Senate floor this month. It is still unclear what form such proposal will take. At a recent meeting at the White House, President Obama announced to a bipartisan group of Senators that he still wants a bill setting a price on carbon by the end of 2010. The President did not announce support for any particular pricing mechanism, leaving the specifics of the bill up to Senator Reid and the Senate.

In May, Senators Kerry (D-MA) and Lieberman (I-CT) released their climate and energy proposal—the American Power Act—intended to “create American jobs and achieve energy security, while reducing carbon pollution by 17 percent in 2020 and by over 80 percent in 2050.” The proposal would set greenhouse gas emission caps on the utility, manufacturing, and transportation sectors. But there is significant doubt that such an extensive proposal could achieve the needed 60 votes to pass in the Senate this year. Senators Kerry and Lieberman have since offered to scale back their proposal if it would open the door to setting a price on carbon.

A more limited alternative has been suggested, but not yet introduced, by Senator Jeff Bingaman (D-NM)—Chairman of the Senate Energy and Natural Resources Committee—to limit the cap on greenhouse gas emissions to the utility sector. Republican Senator Susan Collins (R-ME) has announced that she would consider such an alternative. She believes that an economy wide approach would be too costly, but that EPA regulation of greenhouse gas emissions could threaten American business if Congress fails to act on climate change in some manner. Since Senator Lindsey Graham (R-SC) withdrew his support from the Kerry-Lieberman proposal, the only other Republican that has taken a lead in negotiations has been Senator Susan Collins (R-ME), who continues to support a “cap and dividend” approach with Senator Maria Cantwell (D-WA), under which the proceeds from the sale of carbon allowances would be refunded to the public.

It is not clear whether the utility sector would support a utility-only approach to cap and trade, which would place unique costs on that industry, but would also provide a certain measure of regulatory certainty. Perhaps surprisingly, the manufacturing sector has expressed the most concern over this alternative. While the utility industry would face a more certain regulatory regime, manufacturers



would be left in limbo—unsure of whether and how EPA’s greenhouse gas regulations would apply to them. Moreover, the utility-only approach would likely cause a spike in electricity costs for manufacturers. The American Iron and Steel Institute has announced its disfavor of a utility-only approach for this reason.

At the end of the day, none of these proposals to set a price on carbon have a clear path to achieving the needed 60 votes in the Senate this year. Many believe that cap and trade may have to be left out of any bill entirely. It appears much more likely that the Senate could muster support for an energy-only bill—for example, the energy bill passed by the Senate Energy and Natural Resources Committee last year—which includes a renewable electricity standard, but no cap on greenhouse gas emissions. However, the recent BP oil spill in the Gulf of Mexico has thrown a wrench in this mix as well. Several Republicans agreed to support the energy bill because of its provisions in support of off-shore drilling. But Senator Bingaman has suggested that these provisions may need to be removed in light of recent events. The month of July promises to be an eventful one as climate change negotiations in the Senate come to a head.

Materials may be found at the following links:

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

[House Climate Bill Summary](#)

[Senator Cantwell "Cap & Dividend" Legislation](#)

[Kerry-Lieberman American Power Act and Accompanying Materials](#)

[Kerry-Lieberman one pager specific to benefits for American Manufacturers](#)



Labor

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. According to the Occupational Safety and Health Administration ("OSHA") at the United States Department of Labor, their role is "to assure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance." In recent months, OSHA has begun work on an "Injury and Illness Prevention Program" proposed rule. To open up the rule making process to comments, OSHA held three informal stakeholder meetings in June in New Jersey, Texas and Washington, DC. Two additional meetings are scheduled in Washington, DC and Sacramento, CA in July and August respectively. Anyone interested in participating in the meetings should submit a notice of intent to participate through the following [link](#).

As one might expect, industry stakeholders have raised a number of concerns about the potential impact of such a wide ranging rule. Chief among those concerns is that any new standards addressing workplace safety and health hazards should not be overly broad so that it becomes impracticable for employers of all sizes to meet the audit, documentation and remediation requirements. Additional background on this issue was [posted in the Federal Register](#) last month. MSCI will continue to monitor developments and report on them as appropriate.

The Department of Labor also issued its second wage and hour guidance document in the form of an "Administrator's Interpretation" on June 16, 2010. According to the new Administrator's Interpretation, certain activities may be determined to be compensable that had not previously been considered as such. Specifically, "clothes changing" is an activity that is excluded from compensability by § 203(o) of the Fair Labor Standards Act. However, by the Administrator's Interpretation, such activity can still qualify as a principal activity, which has implications for industries where employees typically change clothes at the beginning or end of a shift. When changing clothing qualifies as a principal activity, all subsequent activities, including walking and waiting time, would be compensable. For more information on this, click the following [link](#).

In other labor news, the National Labor Relations Board (NLRB) continues to make the headlines. Three weeks ago, the Senate confirmed sixty pending appointments to various federal agency positions, but again refused to address the nomination of Craig Becker who as you will recall was appointed by the President on an interim basis in March and can serve out the rest of the year in that



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position without Senate approval, but he must eventually be approved or relinquish his post. Becker remains controversial among Republicans for his employment history as counsel for major labor unions and for his writings on labor issues. The Senate did confirm two other NLRB nominees -- Brian Hayes and Mark Pearce -- filling out the five seats of the NLRB for the first time in two years.

The NLRB confirmations come on the heels of a 5-4 Supreme Court ruling in *New Process Steel v. National Labor Relations Board* that the NLRB cannot issue decisions with only two members. This is problematic because, as a result of the Senate's inability to confirm new members, the Board was operating for more than two years with only two seated members. The Court's decision places into question the outcome of approximately 600 decided cases, many of which will likely now be appealed. For more on this, click on the following [link](#).

Finally, NLRB General Counsel, Ronald Meisburg, stepped down on June 20, 2010. Meisburg has served in that position since January of 2006. President Obama appointed NLRB attorney Lafe Solomon as the new acting General Counsel.

The Employee Free Choice Act (EFCA), otherwise known as "Card Check" -- legislation to eliminate the use of the secret ballot in union elections and, as opponents argue, allow intimidation by union officials in unionizing efforts -- has been on the back burner for awhile now. While all assessments are that the Senate does not have the votes to pass the legislation this year, the fight is not over. In fact, Senator Tom Harkin spoke to 1,400 delegates at the United Auto Workers Quadrennial Constitutional Convention and pledged to push for the passage of the EFCA. This is not a surprise, but it is significant since Senator Harkin is Chairman of the Labor Committee in the Senate. Further, as reported in the last issue, Richard Trumka, the head of the AFL-CIO, has recently been quoted as saying that although most think that the EFCA will not pass on its own in the Senate this year, he is going to make any effort to attach it to other legislation that will.

Wall Street and Derivatives Reform Legislation

In the last issue, we reported that the House and Senate were aiming to complete work by the Fourth of July on the "Restoring American Financial Stability Act of 2010" ("RAFSFA"), including a title that regulates the use of specialized financial instruments often used by large commercial entities, including



manufacturers, to hedge risk. The Conference Committee was able to complete its report and the House of Representatives voted favorably on that report before the Fourth of July recess. However, the Senate was unable to muster the 60 votes needed to pass the report in time. While most believe Senate Majority Leader Reid will have 60 votes, including at least 4 Republicans, a final vote is not expected until this week.

Title VII of the final legislation will overhaul how over-the-counter (OTC) derivatives are regulated, including by imposing additional requirements on those who transact in the products. Derivatives serve an essential function for non-financial businesses ("corporate end users") who use these products merely to manage risk and not to speculate on the value of the instrument itself. Recognizing this, many in the House pushed to fully exempt these end-users, including manufacturers, from the legislation's requirements. Doing so would allow risk mitigation activity to continue without significantly increasing the cost and administrative burden of transacting in the instruments.

The Senate, on the other hand, did not provide for a broad end-user exemption, instead opting for a narrow exemption that will benefit only a few corporate users. Unfortunately, the final product substantially followed the Senate's language and added new language that left many to question whether and to what extent these requirements, including posting of margin in order to enter into a derivatives transaction, will apply to non-financial entities. [The Chamber of Commerce](#) and others continue to review the implications of the legislation on corporate end users and will likely engage in the rule making process to ensure that the rules are crafted as favorably as possible for large manufacturers.

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 – June 28, 2010

- Circular Welded Carbon Steel Pipes and Tubes from Thailand: Rescission of Antidumping Duty Administrative Review



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- **AGENCY:** Import Administration, International Trade Administration, Department of Commerce.
- **EFFECTIVE DATE:** June 28, 2010.

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