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March - April, 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.

Health Care Reform

On March 24, 2010, President Obama signed health care reform into law. After a long trudge through Congress and decades of failed attempts, the Democrats finally succeeded in getting enough votes to pass the law, although with no Republican support.

The Patient Protection and Affordable Care Act of 2010 will take years to implement and will be a focal point for debate leading up to November's mid-term elections. The Democrats will emphasize the expansion of insurance coverage to more than 30 million additional Americans in the next decade and new regulations preventing insurance companies from over-profiting at the expense of patients. The Republicans will characterize it, as they have already been doing all along, as a massive government take over of health care at a cost that is unsustainable and insurmountable for the United States economy. Some Republicans have even introduced legislation to repeal parts of the Act and a group of Republican governors from various states have [filed lawsuits challenging the constitutionality](#)



of the legislation. The Democrats were widely expected to lose a significant number of House and Senate seats in November before passage of the Act. It is yet to be known whether this particular issue will further harm or improve the chances of Democrats in November.

The Act makes significant changes to just about every aspect of our nation's health care insurance framework, and it imposes new requirements on individuals, corporations and governments alike. There are various provisions with respect to health care industry payment methodologies, health care professional education and promotion, disease prevention, wellness promotion, and research into better quality care that, while important, are not particularly relevant for the purposes of this briefing. On the other hand, although not exhaustive, the following is a list of key provisions of the Act that may be more immediately relevant to employers and individual health care consumers alike. The list includes a brief description and, where applicable, an accompanying timeline for implementation:

❖ **Extending Insurance Coverage:**

- a. The Act makes important changes to group health plans, and while most of these changes do not take effect until 2014, a number of high-impact items will become effective within the next nine months. The new law impacts all employer sponsored plans – both self-insured and fully-insured group health plans. For a fuller briefing on the impact and timeline for implementation of the various group health plan provisions, see Winston & Strawn's client briefing available at the following [link](#).
- b. The Act establishes a national high-risk pool to provide coverage to adults with pre-existing conditions. (June 2010)
- c. The Act will establish a temporary reinsurance program to assist employers in providing coverage to young retirees (over 55 and not yet eligible for Medicare). (June, 2010)
- d. The Act will require insurance companies to permit dependants to stay on their family's insurance policy until the age of 26. (September, 2010)
- e. The Act will extend Medicare coverage to certain individuals who have developed specific health conditions after exposure to environmental hazards. (Effective Immediately)
- f. The Act calls for state-managed health insurance exchanges where individuals and small businesses who do not have employer-sponsored coverage can buy health insurance. The transition and development of this exchange is expected to take some time. (regulations are due July of 2012) All states must have established an exchange to aid in the purchase of health insurance by 2014. Also by 2014, individuals with incomes



between 133 percent and 400 percent of the federal poverty level will receive federal credits and subsidies to help in the purchase of insurance.

❖ **New Regulations for the Insurance Industry:**

- a. The Act will prevent health insurance plans from imposing lifetime limits on the total coverage an individual can receive and it will not allow insurance plans to end coverage unless there is fraud by the beneficiary. (September, 2010)
- b. The Act will require health insurance plans to cover children with pre-existing conditions. (September, 2010)
- c. The Act provides for \$6 billion in loans and grants to help establish nonprofit, member-run health insurance companies. (July, 2013)
- d. The Act requires the Department of Health and Human Services to work in consultation with the National Association of Insurance Commissioners ("NAIC") to draft regulations on compacts between states allowing insurance plans to cross state lines. (July, 2013) Sale of insurance across state lines will be effective in 2014.
- e. The Act prohibits insurance companies from setting premiums that discriminate based on factors other than age, geography, family composition and tobacco use. (2014)
- f. The Act calls for small-group health plan deductibles to be capped at \$2,000 for individuals and \$4,000 for families. (2014)

❖ **Changes in Prescription Drug Access:**

- a. The Act will this year provide rebates of \$250 to Medicare Part D beneficiaries who reach the "donut hole" gap in coverage. In the future this hole will be closed and there will no longer be such a gap in coverage. Pharmaceutical manufacturers must also now give a 50% discount on their brand name drugs to Medicare Part D and subsidies will be provided to beneficiaries for the purchase of generic drugs through Part D.
- b. The Food and Drug Administration ("FDA") can now review applications for and approve generic versions of biologic drugs, a class of drugs which typically cost substantial sums of money due to the complex process involved in developing and bringing them to market. This approval pathway did not previously exist.

❖ **Taxes and Fees (Mostly in 2013):**

- a. The Act imposes a 2.3% excise tax on manufacturers and importers of certain medical devices.
- b. The Act imposes higher Medicare hospital insurance taxes on the income of those earning in excess of \$200,000 for individuals and \$250,000 for couples.
- c. The Act caps Flexible Spending Accounts ("FSAs") at \$2,500 with annual adjustments.



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- d. The Act increases the threshold for eligible medical expenses from 7.5% of income under current law to 10% before such an expense can be used as an itemized deduction.
- e. The Act requires that individuals have health insurance or face a tax penalty by 2014.
- f. The Act requires that employers of 50 or more employees offer health coverage or else pay a fee to support the coverage provided to their employees through a health insurance exchange.
- g. The Act requires an annual fee on health insurance providers ranging from \$8 billion in 2014 to \$14.3 billion in 2018.
- h. The Act imposes an excise tax of 40% of excess benefits on "Cadillac" or high-cost insurance plans that have been blamed for driving up health care consumption and thus health care costs nationwide. (January, 2018)

Materials may be found at the following links:

- ❖ Overview Patient Protection and Affordable Care Act as [Enacted](#)
- ❖ Patient Protection and Affordable Care [Act](#)

Chinese Currency and Trade

China's currency practices have again taken center stage in Washington. Over the past month, trade associations, members of Congress and federal officials have joined a growing dialogue on how to address China's long time and harmful manipulation of the yuan.

The House Ways and Means Committee held a hearing on this topic on March 24th. The public hearing notice stated the following: "Economists generally agree that the Chinese currency (the renminbi – "RMB" – or "yuan") is substantially undervalued as a result of market intervention by the Government of the People's Republic of China. This policy artificially raises the price of imports into China and suppresses the price of exports from China. The purpose of this hearing is to consider: (1) the immediate and long-term impact of China's exchange rate policy on the U.S. and global economic recoveries and, more specifically, on U.S. job creation; and (2) steps that could be taken to address the issue." See Ways & Means Hearing Notice and Accompanying Materials [here](#).

In response to the first stated purpose of the hearing, the Economic Policy Institute ("EPI") released a well received and [highly publicized report](#) on March 23rd. The report estimated that 24 million jobs



have been permanently lost in the United States since China joined the World Trade Organization in 2001. While there are a number of trade-related reasons for these losses, the report emphasized that currency manipulation is the primary cause. The EPI report broke down job losses across all 50 states and along congressional district lines, prompting fervent political response.

Earlier in the month on March 15th, [130 House members wrote](#) to Commerce Secretary Locke and Treasury Secretary Geithner, requesting that they apply countervailing duties on Chinese imports under the rationale that China's currency manipulation amounts to an export subsidy that gives Chinese exports a distinct advantage over American products. This letter follows on the heels of a February letter from a large group of senators to Locke also arguing that China's currency practices are [effectively a subsidy](#) and urging the Administration to take action against Chinese imports. These members are finding support for their positions in the AFL-CIO, United Steelworkers, the American Iron and Steele Institute, National Council of Textile Organizations and American Manufacturing Trade Action Coalition, among others.

In response to the second stated purpose of the March 24th hearing, almost every expert and elected official agree that China is, in fact, manipulating its currency. However, the same experts and elected officials do not agree on a specific and immediate solution to the problem. Opponents of China's currency policy, such as the group of 130 House members mentioned above, say that the effect of currency manipulation on the price of Chinese imports amounts to a trade subsidy by the Chinese government that costs millions of American jobs and should be met with countervailing duties or retaliatory tariffs. To that end, Senators Schumer (D-NY) and Graham (R-SC) introduced a bill on March 12th entitled "the Currency Exchange Rate Oversight Reform Act of 2010". The bill would allow for substantial sanctions to be imposed on China in retaliation for continued currency manipulation. You can see a summary of the bill [here](#).

Others, while acknowledging the problem and supporting action, remain concerned that sanctions are not the way to go. House Ways and Means Committee Chairman Levin (D-MI), for example, believes that we should avoid unilateral sanctions of any kind and should instead seek to involve other nations who have also been harmed by China's practice. Supported by a number of experts, including those who testified at his own March hearing, Levin appears to believe that China would ignore unilateral action, which could result in more short term pain for Americans. On the other hand, he believes that China cannot ignore multi-lateral action and that countries harmed even more than the United States will need to join in applying pressure on China. Levin did acknowledge that if these efforts fail to bear fruit then congressional action may be required.



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To strengthen this approach, supporters of a multi-lateral plan have been applying a significant amount of pressure on President Obama to declare China a currency manipulator when the Administration releases its upcoming report on international exchange rate policies. The report was originally due on April 15th but has since been delayed. Secretary Geithner on Monday defended a decision by the Administration to [delay the release of their April 15th exchange rate report](#), stating that he would instead use meetings of the Group of 20 and a U.S.-China "strategic dialogue" in Beijing in May to urge China to budge on the yuan. Labeling China a manipulator would trigger a round of negotiations that could result in filing a case against China at the World Trade Organization.

On the other side of the issue are multi-national companies and the [U.S. China Business Council](#). These multi-nationals are concerned that any retaliatory actions could detrimentally impact their access to the China as the United States' third largest export market. They also point out that China remains the world's largest financier of U.S. debt, holding close to \$900 billion in total. They argue that China's stable currency is important to striking the very delicate balance that is the Chinese economy and that de-stabilizing that could also bring unintended and economically harmful consequences to the United States economy. Interestingly, the U.S. Chamber of Commerce, long an opponent of retaliatory action, went on the record this month as saying "The Chamber does not support an eye-for-an-eye and pledges to resist protectionism in Washington. But China must understand that pressures are mounting, particularly in this election year."

As you may recall from our past newsletter, Secretary Geithner stated that he was optimistic in his [testimony](#) before the Senate Budget Committee earlier this year that China would begin letting its currency appreciate, despite the fact that Chinese officials have long denied any wrongdoing in their policies with regard to currency and despite recent assertions by China's Vice Commerce Minister Zhong Shan that China "will not succumb to foreign pressure to adjust our exchange rate". Most recently, Secretary Geithner's optimism seems to be proving to have some merit. On April 8th, [Secretary Geithner met with vice prime minister](#), Wang Qishan, in Beijing on his way back to the United States from India. This previously unplanned meeting is seen as a positive step in the right direction, but is not expected to produce any immediate resolution. However, many believe that Geithner and the President are engaging in a delicate dance designed to give China breathing room and political cover to shift policy without it appearing as though they have directly succumbed to pressure by the United States. And according to the [New York Times sources](#), the Chinese government is preparing to announce in the coming days that it will allow its currency to strengthen slightly.



In other trade news, as you will recall, President Obama made a bold new commitment to double America's exports over the next five years and to create millions of jobs in the process. According to the [International Trade Administration \(ITA\)](#) at the Department of Commerce, exports accounted for almost 13 percent of GDP in 2008. This is up from less than five percent fifty or so years ago. The ITA estimates that six million jobs are dependant on manufacturers being able to export their products abroad where more than ninety percent of the world's consumers reside.

The following is a list of key documents related to the export promotion plan:

- ❖ [President's 2010 Trade Policy Annual Report to Congress.](#)
- ❖ The "Export Control Practitioner's Group" blue print for doubling exports in the form of a [letter and proposal](#) to the White House. The group is made up of trade associations, businesses and legal practitioners.
- ❖ Commerce Secretary Gary Locke's [Back to Basics: A Blueprint for Exports-Driven Job Growth](#)"
- ❖ Commerce Secretary Gary Locke's [keynote](#) address at the U.S.-China Business Council's "Forecast 2010" conference where he announce the Obama Administration's first cabinet-level trade mission to China and Indonesia in May.

"Jobs" Legislation

Tracking the many "jobs" packages floating through Congress these days requires a great deal of organizational skill and diligence. That said, when Congress returns from recess they are expected to take up a short term "extenders" package (H.R. 4851) that will address, among other things, expired unemployment insurance and COBRA provisions first included in last year's economic stimulus package. For a number of political and procedural reasons, they were not able to put the final touches on that bill before adjourning for spring recess nearly two weeks ago.

On the progress side of the ledger, President Obama signed into law on March 18th a \$17.6 billion job-creation bill that contains tax breaks for employers who hire new workers, among other things. The Hiring Incentives to Restore Employment (HIRE) Act ("Act"), H.R. 2847, includes the following major provisions:



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- ❖ It grants employers an exemption from the 6.2 percent Social Security payroll contribution for each new qualified employee hired in 2010. A “qualified employee” is defined as a person who has not been employed for more than 40 hours during the previous 60 days. In addition, the new employee must not be hired to replace a currently employed person, unless that person quit voluntarily or was terminated for cause;
- ❖ It gives employers an additional \$1,000 income tax credit for each qualified employee who remains on the payroll for 52 weeks. This tax credit will be taken on the employer’s 2011 tax return;
- ❖ It permits small businesses to write-off up to \$250,000 of the cost of capital investments, such as purchases of new equipment, made in 2010; and
- ❖ It includes funding for highway and mass transit programs and expands the Build America Bonds program, which funds state and municipal capital construction projects.

This is the first jobs bill to be enacted in 2010, but likely not the last. For example, you will recall that the House of Representatives has pending before it now H.R. 4213, a \$140 billion package that was approved by the Senate on March 10th. Pieces of that package were reflected in the above discussed HIRE Act, but others will need to find a vehicle of their own. Additionally, both chambers are now working on an energy-related jobs package and the House on March 24th passed a \$16.8 billion package of tax incentives for state and local governments and small businesses. That package, H.R. 4849, provides:

- ❖ \$13.2 billion for infrastructure, primarily through bond programs and an extension through 2013 of the federally tax exempt Build America Bonds program;
- ❖ \$3.6 billion in tax benefits to small businesses, including an exemption from capital gains taxes for small businesses who sell stocks;
- ❖ \$7.7 billion in claw-backs from subsidiaries of foreign-owned companies that have avoided paying taxes by sending funds to other countries.



Finally, we will continue to monitor any developments with regard to Representative Lipinski's (D-IL) bipartisan [National Manufacturing Strategy Act, H.R. 4692](#), which is aimed at helping American manufacturing by developing a strategy to increase competitiveness globally. Underlying the bill is a strong sense of fear about the erosion of manufacturing as a percentage of the U.S. economy and the rapid growth and competitiveness of Chinese manufacturers in areas where they previously did not compete. Lipinski's bill is in line with a recent effort by a bi-partisan group of senators to get the President's attention on this. The group, which included senators from outside the "Rust Belt", [wrote to President Obama](#), calling for a "rational" and "comprehensive" manufacturing policy in the United States that commits an adequate amount for resources and coordination across the federal agencies that would lead to developing "a highly skilled and productive workforce, investing in new technologies and emerging technologies, ensuring stable capital markets, providing support for communities in transition, strengthening infrastructure, improving market access for U.S. exports and fostering entrepreneurial talent."

Labor

It has been a few months since the Employee Free Choice Act has occupied significant attention in Washington. While labor unions continue to push for passage this year, neither supportive nor non-supportive members had the time to address the issue with the health care reform debate roaring onward. That said, the National Labor Relations Board (NLRB) has recently come into sharp focus as Republicans have for months been blocking the Senate's ability to confirm one of President Obama's nominees to the Board. Since three of the five slots on the Board are currently vacated, hundreds of labor cases have been delayed consideration.

The Senate Health, Education, Labor, and Pensions Committees approved the nominations of Craig Becker (D) to membership on the National Labor Relations Board (NLRB). Becker practiced as a labor law attorney for eight years before becoming associate general counsel for the SEIU in 1990 and then staff counsel for the AFL-CIO in 2004. He also taught labor law at several law schools and has published numerous academic articles on labor law. Many management groups are opposed to Becker's nomination, arguing that Becker has a pro-union agenda and his views are a threat to economic growth, particularly at a time when we can ill afford to add cost burdens to our manufacturers. While Democrats failed to obtain the 60 votes necessary to override a filibuster on Becker's appointment before Congress went into recess two weeks ago, the President used his executive authority to make a "recess appointment" of Mr. Becker to the NLRB.



Prior to the recess, [41 Republicans sent President Obama a letter](#), urging him not to use the recess to appoint Mr. Becker and arguing that: (1) Mr. Becker was not confirmed by the Senate and the precedent of Senate confirmation should remain protected; and (2) Mr. Becker has demonstrated a desire to "institute far-reaching changes in labor law far exceeding the Board's authority." Some believe he may even attempt to implement the Employee Free Choice Act through regulation. The President responded by accusing the Republicans of unfair Senate holds and stating that he "cannot allow partisan politics to stand in the way of basic functioning of government." According to the Washington Post, George W. Bush made at least 171 recess appointments while Bill Clinton made 139.

Climate

For a number of months, Senators Kerry (D-MA), Lieberman (I-CT) and Graham (R-SC) have been working to get consensus on guidelines that can form the basis for bi-partisan climate change legislation. As part of that process, the trio of senators has avoided committing to any particular legislative language, choosing instead to discuss principles and outlines. While some have deemed climate legislation, and in particular cap and trade, dead for this legislative session, the recent passage of health care reform has cleared the table and emboldened the bi-partisan talks. President Obama has even weighed in, indicating that he would be willing to open up certain off-shore oil drilling as a concession to Republicans who may be supportive if their political concerns around energy supply are addressed.

The senators have held meetings over the past few weeks with major industry representatives, including the National Association of Manufacturers, U.S. Chamber of Commerce, American Petroleum Institute and representatives from the Railroads, Electrical, Gas, Coal, Nuclear, Cement, and Farm sectors, among others. They also met with environmental groups, but those meetings were conducted with a bit less fan fare than the "industry" meetings. At the meetings, the senators handed out a brief outline of the proposed legislation which they collected back before meeting participants were able to leave. In recent days, they have sent a draft of actual legislative language to the Congressional Budget Office ("CBO") and the Environmental Protection Agency ("EPA") for revenue and cost estimates. That process could take a few more weeks and the target public release date for legislation is now slated for the week of April 19th, which corresponds with Earth Day.

While we do not have the legislation in hand, the draft that is set for April introduction will likely include the following: (1) An economy wide cap on carbon emissions that would begin in 2012, with a



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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 2016), 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.

Senator Cantwell's (D-WA) “cap and dividend” approach ([“Carbon Limits and Energy for America’s Renewal \(CLEAR\) Act”](#)) to limiting carbon emissions is likely to figure into the above. To what extent it is hard to know, but the bill, as introduced, would focus only on producers and importers of fossil fuel -- not power plants and manufacturers. There is no indication as of yet that Kerry and company would extend its scope, assuming they incorporate the Cantwell provisions at all. As a stand alone measure, the Cantwell bill has received a great deal of criticism for precluding a long favored market-base trading solution for lowering emissions. The covered entities would be required to buy permits for carbon emissions through an auction mechanism. The revenue from the auction would primarily be returned to energy consumers as an offset for the presumably higher energy costs. Twenty five percent of the revenue would go to investment in clean energy technology. Many market participants are concerned that without a market for carbon, there will be no way to keep the cost of compliance down.

Further, as discussed in a prior newsletter, dividing emissions regulation into a sector by sector approach has both advantages and disadvantages. While it allows manufacturing state Democrats to claim victory by protecting home state jobs, it also runs the risk of fragmenting a rather fragile coalition of disparate interests that was instrumental in climate legislation through the House. Some cite recent membership defections from U.S. CAP as signs of the process unraveling while others emphasize that the coalition of companies still has 26 members with near \$2 trillion in market cap and that their



sticking together despite major differences in their specific views on climate legislation is testament to the survival power of this issue.

Additionally, the EPA continues to move ahead with its rule writing process to regulate carbon, but it has recently signaled that implementation with respect to "stationary sources" (factories, power plants, etc.) will take significantly longer than expected by many. As you will recall, on December 15th, the EPA published its so-called "endangerment finding". The document is an official finding by the agency that greenhouse gases threaten public health, triggering a duty upon the agency to begin to regulate such gases from "mobile sources" (automobiles) under its Clean Air Act authority, which then could trigger a requirement on stationary sources to install BACT, or "Best Available Control Technology". The assumption of delay found support when EPA Administrator Jackson wrote a [letter to Senator Rockefeller](#) (D-WV), noting that despite its authority to do so, the EPA will not regulate any power plants or other major stationary sources until at least the second half of next year and in most cases much later. To environmentalists and some attorneys general, it is of paramount importance that the EPA continues down this path while Congress decides what it will do in legislation. While there are many efforts in Congress and via lawsuits to stop the EPA process, this past week a group of attorneys general from seven states [wrote to Senators Kerry](#), Graham and Lieberman, requesting that the three do not include a provision preempting the EPA from taking action and arguing that "abandonment of the existing federal authority, prior to having new federal authority in place and functional, would be imprudent given the magnitude, complexity and time sensitivity of global warming."

MSCI opposes the EPA's monitoring of stationary sources under the Clean Air Act and is working with other associations opposed to this new costly regulation, these associations include the American Iron and Steel Association (ASIS), the Specialty Steel Industry of North America (SSINA), the Aluminum Association and the National Association of Manufacturers (NAM). You can ask your legislators to act to delay this regulatory action by sending a letter to your elected representatives in Washington. To send your letter, [click here](#) and select "Stop EPA Regulation of Stationary Sources of GHG".

Materials may be found at the following links:

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

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

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[House Climate Bill Summary](#)

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

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

[United Nations Framework Convention on Climate Change](#)

[Copenhagen Accord](#)

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