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May – 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. 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.

"Jobs" and Tax Legislation

As Congress returns this week, the number one priority on the agenda is passage of "tax extenders – jobs legislation". The bill, H.R. 4213, was originally passed by the House on December 9, 2009. Subsequently, the Senate expanded the package and passed it on March 10, 2010. Because the two versions of the bill were significantly different, Senate and House leaders worked behind closed doors to reconcile the two bills. At the end of May, they released a "compromise" and on May 28th the House sent that bill to the floor. As released, the compromise bill had a price tag of \$200 billion. By Friday morning, May 28th, the final version voted out of the House had been pared down to \$114.5 billion.

Included in the final package are the following provisions of interest:

- (1) Extension of ARRA-enacted small business lending program;



- (2) An extension and phase down of "Build America Bonds";
- (3) An extension and additional allocation of "Recovery Zone Bonds";
- (4) Expansion of water and sewer exempt facility bonds;
- (5) Extension of cash in lieu of tax credit allocation for low-income housing tax credit;
- (6) Extension of the Research and Development tax credit;
- (7) Extension and expansion of the New Markets Tax Credit;
- (8) Extension of "Empowerment Zones" and "Renewal Communities";
- (9) Various temporary pension plan provisions, including provisions that would allow struggling employer-sponsored plans to have additional time to make up for not meeting funding targets currently required by federal law;
- (10) Various individual tax benefits;
- (11) Various disaster relief provisions, including loosening of mortgage revenue bond limitations for disaster areas, expanded carry-back and bonus depreciation provisions;
- (12) Extension of energy-related tax incentives, including for bio-diesel, open-loop biomass, and certain natural gas; and
- (13) Provisions to close "loop-holes" re the foreign tax credit so that U.S.-based multi-nationals can no longer avoid payment of taxes on certain foreign income.

[An official summary can be found here.](#)

The Senate is expected to take up the House bill this week. Any changes by the Senate will force yet another House vote, which is increasingly likely since Majority Leader Reid just released a new version of the bill today that would increase Medicaid support for states and modify some of the tax increases used to pay for the bill. Considering that the bill passed the House with very narrow margins in May, this legislation may still have a ways to go before arriving at the White House.

In recent weeks, various interest groups have begun to add a great deal of pressure. The liberal groups want more generous Medicaid and COBRA coverage provisions added back in. Conservatives and a few moderate Democrats are worried about the cost of the bill, which would increase the deficit by \$54.2 billion (whittled down from close to \$100 billion in prior versions). These fiscal conservatives would like to see the bill's cost offset with spending reductions elsewhere.

A moderate group of Democrats and Republicans are concerned about the impact of provisions intended to raise revenue to pay for the bill by increasing taxes elsewhere. 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. The most recent version of the bill released Tuesday makes some improvements to that provision, but opponents still argue that it will decrease the appetite for investment. A second concern is the limitation that the bill imposes 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 Caterpillar and the National Association of Manufacturers. Finally, the bill places 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. Monday, the U.S. Chamber of Commerce [wrote to the Senate](#) opposing these tax increases and in turn H.R. 4213, stating that while "the economy needs an extension of expiring [tax incentive] provisions, the Chamber cannot support legislation which imposes onerous, permanent tax increases to pay for the temporary extension of these provisions. These tax increases will stifle job creation and stunt economic growth."

In addition to the extenders package, the Congress has a number of additional tax-related matters to address before 2011. They include:

- ❖ **Small Business Tax Package:** The Congress is also likely to consider a "small business" tax package (H.R. 4849). That bill, which passed the House on March 24th, originally included a number of municipal financing provisions that were subsequently moved to the "extenders" package, making the bill far less expensive than it once was. The Senate has not formally considered a small business package of its own and it is now unclear whether and when the remaining small business provisions will receive consideration at all with the municipal bond sections removed.
- ❖ **Energy-Related Tax Package:** Congressional leadership earlier in the year indicated that the third leg of their tax / jobs agenda was an energy-related tax package that would promote "green-jobs" through incentives. Majority Leader Reid and the President expected to have the extenders and small business packages on the President's desk by Memorial Day recess. Since that did not happen, an energy package has yet to materialize. That said, staff on the Senate Finance Committee and the House Ways & Means Committee continue to evaluate provisions behind closed doors and the recent oil spill events in the Gulf of Mexico have driven many to believe that the President will be all the more assertive in pushing for legislation to further incentivize alternative energy sources and energy production technologies in the United States.



- ❖ **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 has taken any steps forward. Most expect the upper marginal bracket to see a tax hike regardless of congressional action.
- ❖ **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.

Wall Street and Derivatives Reform Legislation

With the Senate and the House returning this week from Memorial Day recess, imminent action is expected on financial regulatory reform (the "Restoring American Financial Stability Act of 2010" - "RAFSA"). The Senate announced conferees before adjourning at the end of May (7 Democrats and 5 Republicans) and Chairman Frank sent a memo to Speaker Pelosi recommending conferees (8 Democrats and 5 Republicans) soon thereafter. Both chambers have expressed optimism about delivering a final bill to the President by the Fourth of July.

In fact, the President [called for a consensus report](#) by June 24th when he leaves for the "Group of 20 meeting in Toronto" despite a Senate Republican letter to Democrats suggesting that the conference process was too important to be held to "artificial deadlines". President Obama is expected to use the bill as leverage for international cooperation on some less than popular measures to regulate and tax financial entities. Most in Washington agree that this timeline is likely to hold since the House and Senate bills are largely in alignment with one another, leaving only a few issues to be worked out in conference before the RAFSA likely becomes law.

Although the RAFSA has not become law yet, both the CFTC and the SEC are actively staffing up their legal offices to ensure that they will be able to comply with the statutory requirement to propose and implement agency rules within 180 days of enactment. It is expected that the CFTC will implement close to 70 rules and the SEC will implement close to 60 rules on Title VII alone - the title which deals



with the commodity and security derivatives products often used by manufacturers and other large corporations to hedge risk.

As discussed in the last issue, Title VII of the RAFSA will overhaul how over-the-counter (OTC) derivatives are regulated by imposing additional requirements on the markets, products and those who transact in the products. Recognizing that derivatives serve an essential function for non-financial service businesses ("corporate end users") that use the financial product to manage risk, the House 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 significantly increasing the cost of transacting in the instruments and without imposing burdensome reporting requirements on corporate users that are otherwise unfamiliar with reporting requirements traditionally reserved for financial institutions. 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.

Unfortunately, the Senate did not provide for a broad end-user exemption, instead opting for a narrow exemption that will benefit only a few corporate users, including certain manufacturers (particularly auto manufacturers). 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.

Campaign Finance

In January of this year, the Supreme Court held in a controversial 5-4 decision (*Citizens United v. Federal Election Commission*) that corporations, non-profits and labor unions can use money from their own treasuries to fund political advertisements close to elections. Early polls showed more than seventy percent public opposition to the opinion. Under prior law, such entities could only provide support to campaigns through Political Action Committees, which themselves are subject to federal regulations requiring reporting and restricting certain fundraising and contribution activities.

Democrats in Congress wasted no time in attacking the ruling and claiming that it would allow corporations to buy elections by vastly outspending any potential opponent interests. By May 20th the House Administration Committee had reported a bill [H.R. 5175](#) authored by Representative Chris Van



Hollen (D-MD) to limit political spending by corporations, non-profits and labor unions. That bill could make it to the House floor for a vote this week. Senator Schumer (D-NY) introduced a Senate version of the legislation (S. 3295). President Obama supports both the House and Senate bills collectively known as the Schumer-Van Hollen DISCLOSE Act.

Schumer-Van Hollen would restrict government contractors, corporations with foreign ownership and TARP (Troubled Asset Relief Program) recipients from contributing to campaigns. The bills would also impose strict disclosure requirements to ensure that funding streams for corporate and association political expenditures are transparent to the public and that those supporting political advertisements are forced to take claim for the message. It would not affect labor unions in the same way.

However, with entities such as the U.S. Chamber of Commerce and the National Rifle Association opposing the legislation, many question the viability of the bill. MSCI has joined in the opposition effort and is currently coordinating a letter writing campaign on the topic. You can join that campaign [here](#). Recently, Senate Majority Leader Reid has already suggested that the Senate would not have the 60 votes necessary to move Senator Schumer's bill without a number of revisions, if even then.

Despite all of the attention on the Supreme Court decision and possible congressional action to mitigate its significance, recent estimates project total spending in 2010 by the top twenty major political advocacy groups at \$400 million. Labor unions have recently gone on record as saying that they will spend more than \$100 million protecting Democratic incumbents in the November elections. The three primary spenders will be the AFL-CIO, AFSCME and SEIU with AFSCME and SEIU budgeting almost \$100 million just between the two of them. [According to the Washington Post](#), however, Republican-leaning special interest groups, including the U.S. Chamber of Commerce, American Crossroads, American Action Network, the Club for Growth, Freedom Works, Americans for Prosperity and the National Rifle Association also plan significant expenditures this campaign season.

Climate and Energy Policy

On Thursday the Senate will vote on S.J. RES 26 a resolution of disapproval sponsored by Senator Murkowski (R-AK). S.J. RES 26 would veto the authority of the EPA and seek to prevent it from regulating greenhouse gases under the Clean Air Act. Murkowski has argued repeatedly that regulation of greenhouse gases should be done by the Congress, not unelected executive branch staff. As you will recall, the Supreme Court last year affirmed the authority of the EPA to take such action and instructed the EPA that should it find these pollutants to be an endangerment to public health,



they not only had the authority to regulate them, but in fact would be required to do so. In December, the EPA released its finding of endangerment thus triggering their regulatory duties. Just a few weeks ago, the agency [issued a rule](#) to clarify how it intends to apply the regulation, commonly referred to as the "tailoring rule". The Murkowski resolution has 41 co-sponsors, including 3 Democrats. And although it only needs 51 votes to pass, it is expected to fail in the Senate. MSCI supports the passage of S.J Res 26 and if you'd like to contact your Senators and ask them to support it, [click here](#).

Additionally, on May 12th, Senators Kerry (D-MA) and Lieberman (I-CT) released their climate and energy proposal that, according to the authors "will create American jobs and achieve energy security, while reducing carbon pollution by 17 percent in 2020 and by over 80 percent in 2050." Unlike past bills, this one has a significant amount of [industry support](#) already lined up, including from utilities, big oil companies, General Electric, Dow Chemical and others. Some groups such as MSCI and the U.S. Chamber of Commerce are remaining neutral until all of the facts are out. An economic analysis by the EPA and the Energy Information Administration are expected this week. Also unlike past bills, this one is referred to as the "American Power Act" in an effort to emphasize energy independence instead of "cap and trade" or other market-based titles that the bill previously sported.

In a bit of good news for the manufacturing industry, the bill 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. For reference, Senator Kerry's team produced a [short document](#) to highlight the specific benefits to American Manufacturers.

In addition, the legislation includes:

- (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.

Prior to May, most had declared the Kerry-Lieberman bill dead along with any other legislation dealing with greenhouse gas emissions. Mostly as a function of cost and limited congressional calendar days, proponents and opponents alike believed that it would not be possible in 2010. While the American Power Act's fate is still uncertain, a few notable things have changed in the past month.

First, the BP oil spill in the Gulf has brought an enormous amount of scrutiny to offshore drilling and a renewed commitment to environmental stewardship by many citizens who had otherwise shelved such concerns in the interest of economic well-being. In fact, proponents of the legislation are using the Gulf incident in support of their arguments for putting a price on carbon which, according to them, will create a revenue stream for investment in greener technologies and new renewable energy sources all while weaning the United States off of its foreign oil dependency.

Second, the Administration and Congressional Leadership, about to pass a second major regulatory overhaul bill in the form of Wall Street re-regulation, are emboldened. With projections of severe incumbent losses in the upcoming elections, Majority Leader Reid, Speaker Pelosi and the President all sense that now is the time to capitalize on their strength in numbers. On June 3rd, Majority Leader Reid [sent a letter](#) to a few key Chairmen in the Senate, requesting that they "provide any recommendations or report legislation, if desired, in [their] Committee's jurisdiction, before the Fourth of July recess to address the challenges that I have laid out....so it can be incorporated into a comprehensive clean



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energy bill for consideration during the July work period." The letter followed a [speech by President Obama](#) the day before at Carnegie Mellon University in which he called for climate legislation this year.

All of this said, as of today, there is no clear path to 60 votes on the American Power Act. Instead, most expect that the Energy bill passed by the Senate Energy and Natural Resources Committee earlier this year will make it to the floor and receive a favorable vote in July. Whether the climate-oriented provisions encapsulated by the Kerry-Lieberman proposal can be added as an amendment to that bill, or better, serve as the underlying vehicle, is yet to be known. The coming month should be a definitive one – one way or the other – with respect to climate legislation in 2010.

Materials may be found at the following links:

[House Climate Bill Summary](#)

[Copenhagen Accord](#)

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

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

Labor

Just over one month ago, the AFL-CIO and at least three other labor unions removed banners from the side of their Washington, DC offices that promoted passage of 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. Many, including the U.S. Chamber of Commerce and the National Association of Manufacturers have celebrated this victory. However, that is not an end to the fight in Washington.

Recently, Richard Trumka, head of the AFL-CIO, has 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 every effort to attach EFCA to any other legislation that will pass. In addition, his organization is working against not only Republicans but even Democrats in elections this year. The litmus tests are the health care reform vote and a willingness to support the EFCA. As a result, MSCI, the "Workforce Freedom Initiative" at the



U.S. Chamber of Commerce, the "Workforce Fairness Institute" and the "Coalition for a Democratic Workplace" are all continuing to expend resources to solidify no votes in Congress and to fight the more nuanced regulatory battles.

As you will recall, President Obama recently appointed Craig Baker, a long time union attorney for the Service Employees International Union (SEIU) and more recently for the AFL-CIO, to the National Labor Relations Board (NLRB) despite the Senate having blocked his nomination for consideration. The President waited until the Congress was in recess to make a temporary eighteen month recess appointment, a privilege he enjoys as part of his executive authority. He made the move in spite of 41 Republican Senators sending him a letter urging that he do not use his executive authority to skirt the Senate process.

Becker has been quoted in the past as believing that an EFCA-type of change may be made without legislation and through the authority vested in the NLRB. Although fellow board member Wilma Lieberman (D) stated that the Board is unlikely to make "radical" policy changes with Becker's appointment, she also stated that it does give them an opportunity to apply the law "in a way that reinvigorates collective bargaining." Such aggressive regulatory action is not without precedent in the Obama Administration. The "National Mediation Board" in the middle of May changed a 75 year old labor rule to make it easier for railroad and airline workers to organize. The changed rule allows workers to form a union with a simple majority of those voting whereas prior law required a majority of workers to vote in the affirmative -- not just those voting. As a result, those opposed to EFCA are closely scrutinizing the NLRB.

In related news, Speaker Pelosi recently vowed to [remain committed](#) to passing legislation that would ban workplace discrimination on the basis of sexual orientation, otherwise known as the Employment Non-Discrimination Act.

Another labor related piece of legislation to watch is [The Paycheck Fairness Act](#) which passed in the House last year and could come to a vote in the Senate. The Paycheck Fairness Act would significantly expand the reach of the pay equity laws and make it much more difficult for employers to justify legitimate pay differences. For example, it would no longer be permissible to pay employees differently based on market forces, negotiating ability, or even the amount of revenue they generate for the employer's bottom line unless the employer could prove it was a "business necessity." The legislation significantly expands the ability of trial lawyers to sue for legitimate pay practices and greatly increases



potential punitive and compensatory damage awards while doing little to address actual illegal acts of pay discrimination.

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 1, 2010

- ❖ Investigation Nos. 701-TA-382 and 731-TA-798-803 (Second Review)] -- Stainless Steel Sheet and Strip From Germany, Italy, Japan, Korea, Mexico, and Taiwan
- ❖ **AGENCY:** United States International Trade Commission.
- ❖ **ACTION:** Institution of five-year reviews concerning the countervailing duty order on stainless steel sheet and strip from Korea and the antidumping duty orders on stainless steel sheet and strip from Germany, Italy, Japan, Korea, Mexico, and Taiwan.

❖ FEDERAL REGISTER - June 1, 2010

- ❖ Investigation Nos. 701-TA-376 and 379 and 731-TA-788, 790-793 (Second Review)] Stainless Steel Plate From Belgium, Italy, Korea, South Africa, and Taiwan
- ❖ **AGENCY:** United States International Trade Commission.
- ❖ **ACTION:** Institution of five-year reviews concerning the countervailing duty orders on stainless steel plate from Belgium and South Africa and the antidumping duty orders on stainless steel plate from Belgium, Italy, Korea, South Africa, and Taiwan.

❖ FEDERAL REGISTER – May 28, 2010

- ❖ Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Extension of the Final Results of Antidumping Duty Administrative Review
- ❖ **AGENCY:** Import Administration, International Trade Administration, Department of Commerce.
- ❖ **EFFECTIVE DATE:** May 28, 2010.

❖ FEDERAL REGISTER – May 26, 2010

- ❖ Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China: Rescission of Antidumping Duty Administrative Review
- ❖ **AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

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❖ **EFFECTIVE DATE:** May 26, 2010.

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