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December, 2009 – January, 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

The Senate worked late into the night leading up to Christmas Eve to pass their comprehensive health care reform package. With a great deal of horse trading in the final hours, they were able to secure the 60 votes necessary to pass the bill. It is now subject to negotiation with the House before a final document can be compiled and sent to the President for his signature. While the largest hurdle has been crossed, the fight is not over. Democrats from each chamber must now agree to substantive concessions in order for the President to have a chance at signing it. Just this week, the leaders indicated that they would not move this bill through a formal "conference" where typically key members of each chamber work together on a consensus document and then send to the floor for a vote. Instead, they are going to finish work in a "ping-pong" fashion where the bill is revised by House members and then sent back to the Senate where they accept or revise again and send back to the House, ultimately producing one uniformly acceptable bill. Notwithstanding the process, substance lies in the way of clear resolution.



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Below are the major provisions in the Senate legislation:

- ❖ **Insurance Exchanges:** The bill establishes “exchanges” or marketplaces for uninsured people to buy federally subsidized health insurance. Private health insurers would operate under uniform regulations, including a prohibition on discrimination based on pre-existing conditions and a limitations on age or health based premium increases. In place of the “public option”, the Senate bill provides for a system of national, private insurance plans that are supervised by the Office of Personnel Management, at least one plan of which must be run by a nonprofit.
- ❖ **Mandates:** Beginning in 2014, individuals would be required to have insurance or pay penalties. Similarly, smaller companies (less than 50 employees) will be required to provide insurance or pay a penalty. Larger companies will be required to provide affordable insurance with significant penalties if employees migrate toward the exchange due to lack of affordability of employer-based coverage.
- ❖ **Regulations:** Beginning in 2014, the bill prevents insurers from denying coverage based on pre-existing medical conditions, or from cancelling policies for those who become ill. Between now and 2014, the bill will provide for temporary high-risk insurance pools. Additionally, insurers would have to spend between 80 and 85 percent of their revenue on claims (15 to 20 percent on Administrative costs) depending on the market they are selling into. Customers, including employer sponsors, would receive rebates if the insurer fails to meet that target.
- ❖ **Medicaid Expansion:** The bill expands Medicaid for families earning up to 133 percent of the federal poverty line (about \$29,300 for a family of four in 2009). More than 15 million currently uninsured people will receive coverage this way.
- ❖ **Abortion:** No insurer offering insurance into the exchange will be required to cover abortion and those that do will have to separate premiums so that no federal subsidy money (i.e. taxpayer dollars) are used to subsidize abortion. The effect is that women who want coverage will have to make two separate premium payments.
- ❖ **Tax:** The Senate bill includes a .9% increase in Medicare withholding tax for income earners over \$200,000. The Senate bill is also largely paid for with an excise tax on the most expensive so-called “Cadillac” health insurance plans. The tax is an attempt at discouraging over utilization of care, a policy supported by the analysis of the Congressional Budget Office that acknowledged its potential to save the system substantial sums of money over the course of ten years due to decreased incentives to seek unnecessary care. However, this approach also has its critics, including labor unions and other strongly Democratic organizations who have argued that many low and middle income workers such as fire and safety personnel must purchase expensive plans to insure against the unique hazards of their jobs. Most recently, detractors have argued that this excise tax would encourage firms to cut benefits for their employees due to increased costs, effectively passing the cost on to the worker.



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In comparison, the House legislation includes: an individual mandate, requiring that most people purchase health insurance coverage or pay a fine (2.5% of income); federal government subsidies available on a sliding scale to help offset the cost of premiums; an employer mandate requiring that most employers offer coverage or else contribute to the cost of coverage for their employees in some other way; a prohibition on insurance plan denial of coverage on the basis of pre-existing conditions; a prohibition on lifetime limits on coverage; and a “**public option**” that will allow a federally sponsored insurance program to compete head to head with the private sector in a newly created health care insurance “exchange”. The House also included a provision to restrict health insurers who operate in the exchange from providing abortion coverage, a bit more restrictive than the provision in the Senate package.

And finally, the House would largely pay for its bill with a surtax on the wealthy. Specifically, it would impose a 5.4% surtax on individuals making more than \$500 thousand dollars in adjusted gross income (\$1 million for couples). Since 70% of manufacturers are organized as S-Corporations or other entities that pay taxes at the individual income tax rate, this provision is highly problematic. It does not only penalize wealthy individuals but small businesses as well. Many have also criticized this approach for not being indexed for inflation, meaning that it will capture more and more small businesses and high income earners as the years go on.

Thus, the House and Senate bills differ in at least three significant ways. First, the Senate bill does not have any version of a public option whereas the House has a “robust” option, permitting the federal government to compete directly with private insurers for the business of the millions of currently uninsured Americans. This is a chief priority for the progressive wing of the Democratic Party. Second, the House bill permits a “national” health insurance exchange whereas the Senate plan only permits state and regional exchanges. Some argue this is significant in that the larger national pool ensures a consistent product and better consumer bargaining power. And third, the House bill would pay for its package by placing a surtax on the highest income earners while the Senate would instead place the tax on so-called “Cadillac” health insurance plans. This last difference is perhaps the most complicated to resolve at the moment. In fact, as of this writing, negotiators are considering options, including a hybrid approach that maintains some of each form of tax. Most observers believe that Senate negotiators have the upper hand in this debate though (and the backing of the President).

As you will recall, MSCI has officially joined 460 other organizations and companies opposing the House passed bill on the grounds that it would increase health care costs, jeopardize employer coverage, and include a public option that will distort the market. We believe the Senate bill poses many of the same threats. As of now, there is no deadline for final action. While President Obama wanted a bill to sign before the State of the Union Address, no public commitments have been made to that effect.

Materials may be found at the following links:

[House Health Care Bill](#)



[House Bill Summary](#)

[Various House Background Materials](#)

[Senate Bill](#)

[Senate Bill Summary](#)

Climate

The Senate took a break from consideration and negotiation of climate change legislation in the fall after the Kerry-Boxer bill failed to make progress. That said, climate policy deliberations are alive and well in Washington and around the world.

Most recently, on January 7th, the Environmental Protection Agency (EPA) released a substantial regulatory proposal to tighten smog standards nationwide. The most recent smog standard, adopted in 2008 by the Bush Administration, permits 75 parts per billion of ground-level ozone. The Obama EPA would seek to reduce that over the next 20 years to somewhere between 60 and 70 parts per billion. Industry estimates that the cost on utility companies, refineries and factories will range from \$19 billion to \$90 billion, prompting interest groups such as the American Petroleum Institute to take a position against the new standard. They argue that such costs will result in energy cost increases, job losses and less domestic oil and natural gas development. Proponents of the new standard such as Earthjustice and the American Lung Association say the standard is in line with science, will result in health benefits up to \$100 billion and fewer missed days of work. The EPA will finalize the standard in August after a 60 day notice and comment period.

On December 15th, the EPA also 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. The finding officially takes effect on January 14th and rules on "tail pipe" emissions are expected as soon as March. While the finding does not immediately require the EPA to similarly regulate "stationary sources" (factories, power plants, etc.), once the tailpipe standards are released, stationary sources will automatically be required to install BACT, or "Best Available Control Technology".

Many industry stakeholders are concerned about the later requirement, questioning what steps new and modified facilities will have to take to comply. As such, EPA is expected to release guidance well before the tailpipe standard is finalized. Fortunately for smaller facilities, the EPA intends to also propose a "tailoring rule" which will shield facilities that emit less than 25 million tons per year of GHG emissions from the requirement.



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Nonetheless, lawsuits are already beginning to roll in. The deadline for filing suits is February 16th, almost assuring that Washington law firms will be very busy in the coming weeks.

The hot topic in Washington now is how this development at EPA will influence the Congress. The answer to date is unknown, but there are certainly a plethora of options at hand. The Congress could stay silent and continue to legislate on its own timeline. They could choose to allow the EPA to proceed with tailpipe standards, but restrict them from dealing with stationary sources. They could also craft legislation to fully preempt agency regulations. This later option is unlikely as many believe that the threat of EPA action is a major motivation for the Senate to move on its climate change legislation before year end – a threat that Democratic leadership wants to remain in place. Others remain skeptical of the influential nature of the "endangerment finding" at this juncture. In either case, at least some members of Congress, led by Senator Lisa Murkowski (R-AK), have made clear that they will oppose any action. In fact, Senator Murkowski has filed and been assured that she will have a "resolution of disapproval" considered this month. The resolution, if it passes both the House and the Senate, and is signed by the President, would effectively restrict the EPA from moving forward. Few believe this resolution has any realistic chance of becoming law.

Finally, as part of the [United Nations Framework Convention on Climate Change](#), the world's climate negotiators descended on Copenhagen late in December to negotiate a "binding treaty" on greenhouse gas emissions. Falling far short of that objective, President Obama was nonetheless credited with rescuing the talks in the final day and making a "politically binding" agreement possible. That agreement has been dubbed the "Interim [Copenhagen Accord](#)". Opponents of climate change legislation are quick to point out that the Accord has no teeth and that the UN again "failed" to move forward. Proponents argue that this was a major step forward, forcing China to the table and resulting in an agreement, albeit informal, between the United States, China and a growing list of developing nations for the very first time.

The group of countries, including China, India, Brazil and South Africa committed on a handshake that they will cut emissions AND allow international review of such emission reductions, a key element for many moderate U.S. Senators who believe that passing a domestic cap and trade program must not occur before the United States has assurances that other countries are doing the same. Specifically, these senators want to ensure that U.S. industry is not disadvantaged to those located in countries without such costly regulation.

Equally important for U.S. interests is what is NOT in the Accord. The United States fought back efforts by China and India to limit our authority to use border tariffs on imported energy intensive products. Such tariffs will be a necessity in securing at least 12 senate votes for any final package. Additionally, the United States did not agree to reduce emissions below the targets set earlier in the summer by the House-passed climate legislation (despite enormous pressure to do so).

To put this in context, as outlined in prior newsletters, the House of Representatives successfully passed a comprehensive climate change bill on June 26th that included provisions to set an economy wide cap on



greenhouse gas emissions and to establish a marketplace for the trading of emission allowances and offset credits. That bill sought to reduce emissions by 17% in the out years, a target that President Obama echoed in Copenhagen. Since that time, the Senate has struggled to gain any sort of realistic consensus around language of its own, prompting Senators Kerry (D-MA), Lieberman (I-CT), and Graham (R-SC) to begin negotiating a set of principles that they believe can be the foundation for successful climate bill in 2010.

The tri-partite bill is still in its infancy and will not be reduced to legislative language before the end of January. However, Kerry did release a [broad outline](#) in December before the United Nations meetings, which will serve as its foundation. Based on that outline, the legislation is likely to tempt Republican support with the addition of off-shore oil drilling provisions and stronger incentives for nuclear energy production. Kerry has also stated that he expects to receive recommendations from the Agriculture, Commerce and Finance Committees in the coming weeks. In sum, the process is likely to take at least a month before a credible document is released. Additionally, Senator Brown (D-OH) is working to ensure that domestic manufacturers are not adversely impacted by unfair competition from international entities. He has said that he will not support a bill without "carbon tariffs" on products from countries that do not similarly regulate greenhouse gas emissions. Senator Stabenow (D-MI) also [introduced](#) her own title aimed at protecting manufacturing and agricultural interests by ensuring a strong "offsets" program. Creating a strong offset market will bring down the cost of compliance under a cap and trade scheme.

Materials may be found at the following links:

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

[House Climate Bill Summary](#)

[Senate Environment and Public Works Committee Climate Bill](#)

[Senate Environment and Public Works Committee Climate Bill Summary / Differences](#)

[EPA Cost Analysis on Climate Measures](#)

[Senator Kerry's Climate Bill \(Concepts and Principles for Copenhagen\)](#)

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

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



[Copenhagen Accord](#)

"Jobs" Legislation & Tax Law

Not so silently behind health care reform and climate legislation stands a "jobs" bill. As mentioned in the last issue, Senators Richard Durbin (D-IL) and Byron Dorgan (D-ND) were tapped by Majority Leader Reid in August to begin preparing legislation to create jobs in America. Senate staff has indicated as recently as a few days ago that they have 121 job-creation proposals on a list of possibilities. They are now tasked with narrowing down that list to only those proposals that create the most jobs for the best value to the taxpayer. While it is impossible to know exactly which proposals the staff are considering, they have indicated that proposals should fit within categories that include small business job creation, infrastructure work, green and energy-related job creation and public sector employment. It will probably be a few weeks before we see anything more specific since the Senate does not intend to move this legislation until the health legislation is wrapped up.

However, in the past, specific priorities of the Senate have included transportation projects, unemployment insurance extension, extension of COBRA benefits, aid to states and localities to support fire, police and other jobs, and "cash for caulkers" type programs that help contract laborers get work while achieving national energy efficiency goals. Also under consideration for the Senate jobs bill was an extension of "Bonus Depreciation". That particular proposal was already extended in 2009 with enactment of the economic stimulus package. It allowed businesses to accelerate the costs of capital expenditures made in 2009 by permitting them to immediately write-off 50% of the cost of depreciable property acquired for use in the United States. Presumably, a further extension would do the same in 2010.

In contrast, the House has already passed its version of a "jobs" bill. The package included \$48 billion for infrastructure projects. In addition, it provided \$27 billion to public sector jobs (lay-off prevention); \$41 billion for unemployment insurance; \$12.3 billion for COBRA; \$24 billion to support state Medicaid programs; \$2 billion for Energy Department loans for rapid deployment of renewable energy and electric transmission projects; \$1 billion for low income housing; and \$354 million for Small Business Administration loan programs. The House bill also includes a new "Buy America" provision, requiring that American made materials be used for construction, alteration, maintenance or repair of transportation or infrastructure projects funded by the bill. While the government can waive the requirement, this bill requires a much more transparent process than its sister provision in the 2009 Economic Stimulus Package.

The Congress is also under a great deal of pressure to address tax laws. For one, the President has made a priority out of moving a "tax reform" package this year. The White house, through the President's Economic Recovery Advisory Board (led by Paul Volcker), continues to collect tax proposals through its web site and in-person meetings. Both Senators Baucus and Grassley expect to visit these recommendations in the spring.



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Before then, there is a "must do" list of tax law extensions in front of them. At the end of every calendar year the Congress is forced to consider which tax benefits and liabilities are expiring in law and which of those should be extended. The House passed its tax "extenders" bill in December, but the Senate has yet to act. The House version included more than \$5 billion in individual tax relief; more than \$17 billion in business tax relief; \$1.2 billion to encourage charitable giving; \$2.6 billion for expiring community assistance programs; \$2.3 billion to extend certain disaster tax relief provisions; and just over \$1 billion to extend certain expiring energy tax provisions. Of specific interest, the bill will extend the research and development tax credit and the deduction of state and local general sales taxes. The Senate will likely follow suit in the first quarter of 2010 and add a few provisions that the House did not include, particularly in the energy space.

Looming above all other tax extenders is the "Estate Tax". The estate tax law lapsed at the beginning of this month since the Senate was not able to act in time. Until lapsing, the estate tax provided for a \$3.5 million exemption and assets in excess of the \$3.5 million to be taxed at a 45% rate. Republicans and some Democrats have pushed for a permanent 0% inheritance tax. The majority of the Congress does not support that approach but does seek permanence in the law and some sort of modification in the structure. The House passed a permanent extension of the current estate tax law in December. In the Senate, Senators Lincoln (D-AR) and Kyl (R-AZ) are pushing for permanent extension and a reduced rate of 35% with a \$5 million exemption. Senators Carper (D-DE) and Voinovich (R-OH) have introduced legislation that would at least index the exemption amount to inflation. The pressure is now on for the Senate to pass something. It is expected that the final estate tax will be applied "retroactively" so that it is as if it never lapsed.

Trade

Trade continues to occupy an important space on the radar screen. The following is a list of trade related updates of potential interest to the metals industry:

- ❖ Steel Tubes from China: On December 30th, the International Trade Commission [ruled that](#) subsidized Chinese imports of oil industry tubular products (steel tubes and pipes used for oil drilling), have unfairly harmed the domestic steel industry. The Commerce Department suggested imposing duties ranging from 10.36 percent to 15.78 percent, but the ITC has not yet spoken on duty amount. [Senator Sherrod Brown \(D-OH\)](#) said of the decision that "steel pipe workers of my state have quite simply had the rug pulled out from under them due to one of the most inexcusable floods of dumped and subsidized products in history."
- ❖ China Dumping Steel Grating: On December 29th, the United States Commerce Department made a [preliminary finding](#) that China is dumping certain steel grating in the U.S. market at 14% below the normal value. Customs and Border Protection will now collect a cash deposit or bond until commerce



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makes a final determination. As part of that determination, the International Trade Commission must find that Chinese steel grate imports materially injure or threaten to cause injury to the U.S. domestic steel grate industry.

- ❖ Bilateral Investment Treaties (BITs) in Focus: The AFL-CIO, Sierra Club and United Steelworkers recently held a briefing in Washington to raise concerns about the use of bi-lateral investment treaties. They argue that such treaties ultimately send jobs overseas, reduce worker rights and circumvent environmental standards. They raised particular concern that the United States must tread carefully in negotiating a BIT with China (begun in 2008 under Bush). Many fear that protecting the interests of Chinese state owned businesses that compete in the United States may tie the hands of the U.S. Government in protecting American workers. On the other hand, the Chamber of Commerce fully supports the notion that "pursuing strong, high-quality BITs that achieve a high standard of protection for investors is central to our international competitiveness."
- ❖ Chinese export controls and trade distortion: On November 19th, the U.S.-China Economic and Security Review Commission sent its annual report to Congress, commenting on, among other things, China's use of subsidies and other trade distorting measures in violation of international commitments. The report specifically states that "China continues to use trade-distorting measures in violation of its WTO commitments. In line with this conclusion, the U.S. Trade Representative's Office in early November announced that it would [request](#) a WTO dispute settlement panel regarding China's export restraints on numerous raw materials critical to US manufacturers, including bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorous and zinc. In December, a notice for public comment appeared on this very issue in the Federal Register. The Europeans also expressed serious concerns about over capacity in China's manufacturing, particularly with steel, cement, and plastics. The European Chamber of Commerce [seemed to suggest](#) a protectionist backlash could be on the horizon.

Transportation

House Transportation Committee Chairman Oberstar (D-MN) failed again to get the Senate to consider a long term, \$500 plus billion dollar transportation reauthorization before the existing program expired in December. Instead, the Senate preferred to extend the existing program for another 60 days, buying time to further persuade Oberstar that the larger negotiation should be put off until 2011. Proponents of this position pointed out that the House passed "jobs" bill included \$37 billion additional infrastructure project funds that can be spent soon. Oberstar responded by citing a recent [report](#) from state transportation departments claiming that \$69.55 billion worth of transportation projects across the country could begin within 120 days. In his opinion, by not at least meeting this funding amount, the Congress is leaving real jobs on the table.



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Real negotiation on a long term reauthorization remains unlikely before next year. With a crowded agenda and no obvious option to pay for the reauthorization, the White House would prefer to push action down the priority list. As stated in prior newsletters, the current program is funded with a gasoline tax. Although that tax has not been increased in years, doing so now would be unpopular and it is a "declining" revenue source in that cars continue to get better gas mileage. Alternative proposals have included a "miles driven" tax. That is equally controversial.

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