



April 1, 2009

**Labor**

**FY '10 Budget Overview**

**U.S. Auto Industry**

**Climate**

**Trade**

**Selected Regulatory Matters**

**Looking Ahead**

**March, 2009: MSCI Advocacy Newsletter**

Welcome to the March 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. Both the Congress and the Obama Administration continue to pursue a robust legislative and regulatory agenda. The following issue covers a number of broad topics that will affect the metals industry and builds a framework upon which details can be added in the coming months. For additional information on these and other law-related topics, go to [www.winston.com](http://www.winston.com) and click on "Publications" under the "Resources" tab.

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**Labor**

On March 10, just days after President Obama renewed his pledge to sign the legislation, the Employee Free Choice Act (EFCA) was officially re-introduced in both the House (H.R. 1409) and Senate (S.560). For more information, see <http://www.msci.org/EFCA.aspx>. As discussed in a prior newsletter, the EFCA would amend the National Labor Relations Act to allow unions to bypass secret ballot elections and demand employer recognition of the union's representative authority through a process called "card check." Specifically, the legislation:

- ❖ Eliminates employee opportunities to vote on union representation in secret ballot elections supervised by the National Labor Relations Board;
- ❖ Allows unions to demand employer recognition upon presentation of signed authorization cards from a majority of the workforce to be represented;



## Legislative and Regulatory Affairs

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- ❖ Requires binding arbitration of first contracts within 120 days in circumstances where an employer and a newly certified union are unable to reach an agreement;
- ❖ Dramatically limits advance notice to the employer of a union's organizing efforts, limiting the employer's opportunities to communicate with employees about the workplace issues involved in a union organizing drive; and
- ❖ Establishes new fines to be levied against employers for an expanded list of unfair labor practices.

The elimination of a federally-supervised, secret ballot election, coupled with mandatory, binding arbitration for first contracts, will affect companies of all sizes. Organized labor and special interest groups in support of the EFCA have engaged in a multi-million dollar public relations campaign to make this their top legislative priority for the Democratic Congress and White House.

In response, Congressional Republicans introduced their own legislation, the "Secret Ballot Protection Act". The Republican bill would amend the National Labor Relations Act to ensure that a secret ballot election conducted by the National Labor Relations Board would precede union recognition by an employer, making it an unfair labor practice for an employer to recognize a union in the absence of such a secret ballot election. While this legislation is unlikely to get serious attention, it serves as a marker of Republican intentions.

Further, Senate Republicans have made clear that they would seek to filibuster any Democratic effort to bring the EFCA to the floor. While the large Democratic majority in the House all but assures passage out of that chamber, the Senate needs 60 votes to overcome a filibuster. With only 59 Democratic votes on hand, they will need at least one Republican to break ranks. In the last Congress, Senator Specter (R-PA) was the only member of his party to indicate support. This Congress, however, Specter has already made clear that he will not provide the winning vote, suggesting instead that the Congress should seek a compromise solution that includes reforming the NLRB without eliminating secret ballots. While passage of the EFCA remains uncertain, employers are well advised to prepare for enactment by fostering a positive work environment that demonstrates to employees that third-parties are unnecessary.

MSCI will continue to monitor this legislation and will provide not only updates but opportunities for its members to communicate with their elected representatives about the legislation. We'll be sharing updates in the weekly MSCI News, on our website and Bob Weidner, MSCI's president and CEO, will continue to provide you special notifications as warranted.



## FY '10 Budget Overview

Last month, President Obama included a new cap-and-trade climate change placeholder in his budget proposal to Congress. Accordingly, cap and trade was expected to raise nearly \$650 billion in revenue to pay for clean energy development and middle-class tax cuts. The President also included room in his budget for more than \$600 billion in health care reform costs. Finally, and significantly, the President proposed to repeal the "Last-In, First-Out" ("LIFO") accounting method as a means of raising \$61 billion in federal revenue. Unfortunately, his plan did not include additional explanatory information other than to indicate that the repeal would not be effective until 2012.

The Congress is now working to complete a "Budget Resolution" that can pass both the House and the Senate by the end of the week. As part of that plan, Senate Budget Committee Chairman Conrad (D-ND) and House Budget Committee Chairman Spratt (D-SC) have included place holders for new healthcare, energy, and education spending. Specifically, the Senate Budget Committee included a provision that would give the government 10 years to cover the cost of the health-system overhaul. That provision would allow the government to spread out the costs and help meet rules that new initiatives don't add to the deficit. It would also give health care reform laws a chance to generate savings, thereby allowing legislators to rely less on new taxes to pay for their plan. One such tax already proposed would involve limiting the cap on the tax break the government gives to workers on the cost of employer-provided health coverage.

One controversial issue is whether the budget will include "reconciliation" instructions related to these same priority areas. Reconciliation instructions, if included, would make it possible for the Senate to avoid a filibuster on health care reform and cap and trade legislation later in the year. Instead of needing 60 votes to set time limits on debate, reconciliation instructions allow for a bill to be passed with only 51 votes. The Republicans strongly oppose using reconciliation instructions in this way, but important legislation such as the 2001 tax cuts were enacted through this process under the Bush Administration as well.

Finally, it is unclear whether the LIFO repeal is included in the operative congressional documents. We should presume that the repeal is still on the table, and that it will re-emerge either in the final approved budget or elsewhere this year. MSCI opposes the repeal of LIFO and continues to be actively involved in coalition efforts to educate Congress and the Administration on its importance to the metals industry. More information on MSCI's activities can be found [here](#).

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## U.S. Auto Industry

In the fall of last year, Congress and the then Bush Administration sought to prevent auto industry bankruptcies by providing federal loans to the manufacturers in return for the assurance that they would trim labor and operating costs while reducing their overall debt levels. In total, GM received more than \$13 billion and Chrysler more than \$4 billion. The loans were meant to provide operating



capital to GM and Chrysler through March of 2009. In anticipation of the deadline, both manufacturers suggested that they would need at least double the capital already loaned to them in order to avoid bankruptcy.

On Monday, the President delivered a televised statement in which he insisted that the current restructuring efforts at GM and Chrysler were not sufficient in their current form to save the manufacturers. The President stated that his administration would “offer GM and Chrysler a limited period of time to work with creditors, unions and other stakeholders to fundamentally restructure in a way that would justify an investment of additional tax dollars; a period during which they must produce plans that would give the American people confidence in their long-term prospects for success.” Allowing for government-backed bankruptcy as an option, the President specifically limited his support to sixty days of additional working capital for GM and thirty days for Chrysler, a period presumed long enough for Chrysler to complete a deal with Fiat.

The President noted that “a government-backed bankruptcy restructuring would not be a process where a company is broken up, sold off and no longer exists” or one where either carmaker is “stuck in court for years unable to get out.” It would, according to the President, provide for an “orderly” reorganization. In order to address consumer concern, the President announced a new government plan that would guarantee the warranties on any new car or truck purchased from GM or Chrysler during their ongoing restructuring. Finally, as a condition of further assistance, the President requested that GM CEO Rick Wagoner step down from his post to make way for new leadership. Fritz Henderson was named the new CEO. As expected, Congressional Republicans and Democrats were split in their support for the President’s plan. Many Republicans suggested that the President was usurping the marketplace and the courts by deciding the fate of the manufacturers in such a blunt fashion and by imposing arbitrary timelines for success. A detailed account of the President’s plan for the two manufacturers can be found [here](#).

In the fall, auto suppliers also sought inclusion in the manufacturer bailout legislation. Most suppliers sought only loan guarantees, arguing that the downstream impact of declining auto sales would trigger default covenants in their own industries and a resulting ceasing of capital. They advocated for federal guarantees as a remedy. While the bailout legislation did not ultimately provide for such guarantees, the Obama Administration recently announced the [Auto Supplier Support Program](#) to provide up to \$5 billion in financing, “giving suppliers the confidence they need to continue shipping parts, pay their employees and continue their operations.” More specifically, the program will (1) provide suppliers with access to government-backed protection that money owed to them for the products they ship will be paid no matter what happens to the recipient car company; and (2) allow participating suppliers to be able to sell their receivables into the program at a modest discount. The program is available to “any U.S.-based supplier that ships to a participating auto manufacturer on qualifying commercial terms”, but decisions about which suppliers and which receivables will receive protection are made by the participating auto companies.



## Legislative and Regulatory Affairs

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In addition to providing capital to the manufacturers and guarantees to the suppliers, the government will accelerate government fleet purchases, publicize a new tax benefit that would allow consumers to deduct the cost of sales and excise taxes on cars purchased between Feb. 16 and the end of this year, and seek to reward consumers who turn in old, less fuel-efficient cars and trucks to purchase new, more fuel-efficient ones.

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### Climate

Climate change and renewable energy continue to occupy an important seat in this Congress and with this administration. On Tuesday, Representative Waxman (D-CA), Chairman of the House Energy and Commerce Committee, and Representative Markey (D-MA), Chairman of the relevant subcommittee, introduced a 650 page draft global warming and energy [bill](#). Among other things, the legislation would set a cap on greenhouse gas emissions (GHGs) and establish a market for businesses to trade GHG emission allowances. Specifically, the plan would limit emissions to 3% below 2005 levels in 2012, 20% in 2020, 42% in 2030, and 83% in 2050.

The bill leaves unaddressed some of the more controversial components of setting up the cap and trade regime described above. Most notably, it does not resolve how emission allowances will be distributed. President Obama has gone on the record as supporting a 100% auction, a position with little industry support. The decision to leave this section unresolved probably signals a desire by the bill managers to distribute a certain percentage of allowances for free in the early years, a position favored by Democrats in industry-heavy districts. With a 36-23 margin of Democrats to Republicans on the Energy & Commerce Committee, Chairman Waxman can only lose votes from 6 Democrats and still secure committee passage of his bill. While this may seem a significant margin, many believe that compromise is necessary for the Chairman to keep his voting block in line. Three key Committee Democrats advocating for a more industry-friendly approach are Representatives Rick Boucher (D-VA), Mike Doyle (D-PA), and Ray Inslee (D-WA). Each is expected to get concessions in any final legislation.

Another unresolved issue is what to do with the revenues that the government will receive from the allowances. Last month, the President estimated nearly \$700 billion in revenue over 10 years, attracting a broad range of recommendations. While a certain percentage will be used for reinvestment into renewable energy and energy efficiency technologies, the rest could be divided among consumers to offset rate increases, income tax cuts, and deficit reduction.

To address concerns that some industries are particularly vulnerable to international competition and will be disadvantaged by a cap and trade scheme, the bill includes a section called, "Transitioning to a Clean Energy Economy". That section authorizes rebates to companies in certain industrial sectors, including iron, steel, aluminum, cement, glass, ceramics, chemicals, and paper to offset increased



## Legislative and Regulatory Affairs

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costs. The provision squares well with a recent statement by Energy Secretary Chu that the United States should consider placing duties upon goods imported from foreign countries if those countries do not implement a cap on carbon emissions when one is adopted here. This, according to the Secretary, would help maintain a level playing field.

Chairman Waxman has set a time table that includes hearings the week of April 20<sup>th</sup>, Subcommittee and full Committee mark-ups by May 11<sup>th</sup>, and consideration on the House floor by Memorial Day. If this seven week time table holds, it will force the myriad of industry and environmental interests to fast track negotiations on the measure. Most believe that this timeline is realistic given the added pressure from the White House to get something done and the universal acknowledgment that the Senate will mount the greatest resistance.

Finally, the Obama administration has signaled their intent to prioritize climate change policy by issuing a proposed rule through the EPA earlier this month that would require large emitters of GHGs to submit annual reports of their emissions to the agency. The proposed rule would require both upstream and downstream sources of GHG emissions to report, including facilities in certain source categories such as aluminum production, petrochemical refineries, and cement production; as well as vehicle and engine manufacturers. Covered businesses would be required to start collecting data on January 1, 2010, and would have to submit their first GHG emissions report on March 31, 2011. Subsequent reporting would be required on an annual basis.

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## Trade

On March 24, 2009, the Senate confirmed former Washington Governor Gary Locke as Secretary of Commerce. [Secretary Locke](#) was President Obama's third choice behind Governor Richardson (D-NM) who withdrew himself from consideration due to a short-lived financial scandal and Senator Judd Gregg (R-NH) who withdrew due to policy differences. Locke won an easy nomination, and he appeared to satisfy Senate Commerce Committee Members on both sides of the aisle that he would try to open markets for American-made goods and take a tough stance on enforcement of United States trade laws.

In mid-March, the Senate voted to confirm former Dallas Mayor Ron Kirk as U.S. Trade Representative by a vote of 92-5. Like many recent high-level nominations, Kirk had tax troubles emerge through the vetting process. Unlike others, Kirk seemed to assuage concerns over these tax issues. During his nomination hearings, Kirk promised to review Colombia, Panama and South Korea trade agreements that had been negotiated by the Bush Administration, but never ratified by the Congress. The President's March 1 [report](#) on this year's trade policy agenda indicated that the earliest movement would come on the U.S.-Panama Free Trade Agreement.



## Legislative and Regulatory Affairs

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In our last issue, we noted that many in the trade community had become increasingly concerned about the global recession's influence on "protectionist" trade policies. In January, European members of the WTO expressed concern that U.S. aid for the "Big Three" auto manufacturers would violate existing trade agreements by creating unfair advantages. Further, with enactment of the American Recovery and Reinvestment Act, many foreign countries warned against including "Buy American" provisions that were designed to ensure the use of U.S. steel and other supplies in stimulus-funded infrastructure projects. Those foreign voices also found support here in the U.S. who feared that "Buy American" could serve as a catalyst for like responses from trading partners. Most recently, the Mexican Government imposed tariffs on [certain U.S. exports](#) in retaliation for Congress ending a pilot program that allowed approved Mexican trucking companies to send vehicles beyond a 25-mile border zone. Although few if any of the items subject to retaliation are related to our industry, the action by such a close trading partner is worrisome. Secretary of Transportation LaHood has assured us that he is working toward a resolution of this impasse that is consistent with the U.S. requirements under the North American Free Trade Agreement (NAFTA).

On March 20<sup>th</sup>, an unusual coalition of business and social interests teamed up in a [letter](#) directed to President Obama and Congressional leaders. The letter outlined steps the coalition of interests deemed necessary to promote global economic stability. Co-signers included the Business Roundtable, the Center for Global Development, the Emergency Committee for American Trade, the ONE Campaign, Oxfam America, the United States Council for International Business, Bread for the World, the National Foreign Trade Council, and the United States Council of Catholic Bishops, among others. The letter firmly asserted that "it is necessary to recognize that the economic welfare of Americans is inextricably linked with the well-being of men, women, and children across the globe", citing recent reports from the International Monetary Fund, World Bank, and World Trade Organization that called for prompt action to address the impact of the global crisis on developing countries. Specifically, the coalition called on the President and the Congress to successfully conclude the Doha Round, reaffirm the G-20 commitment to rejecting protectionism at the London summit in April, review and reform U.S. trade preference programs, and to reinforce the U.S. commitment to increase development assistance.

In response, President Obama's recent [op-ed](#) has received a great deal of attention around the world. In it, he called for "solutions that reject destructive protectionism", and he encouraged the world to "embrace a collective commitment to encourage open trade and investment, while resisting the protectionism that would deepen this crisis." The President also noted that the economic crises is having a disproportionate effect on developing nations and that "the G-20 should quickly deploy resources to stabilize emerging markets, substantially boost the emergency capacity of the International Monetary Fund and help regional development banks accelerate lending." To this final point, the Obama administration has proposed a \$500 billion expansion of International Monetary Fund lending authority to keep international trade and investment flowing. The President has the support of Senate Foreign Relations Chairman John Kerry (D-MA) and the Ranking Republican, Richard G. Lugar (R-IN).



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## Selected Regulatory Matters

- ❖ **COBRA:** The American Recovery and Reinvestment Act provided for a 65 percent premium subsidy for individuals (up to \$125k AGI) who lost their jobs after September of 2008 to help cover the cost of COBRA premiums for up to 9 months. On March 19, 2009, the Department of Labor (DOL) issued much-anticipated model notices and updated frequently asked questions (FAQs) for employers and employees on the subsidy program. While the DOL guidance is helpful, most are still awaiting definitive guidance to answer the question as to what constitutes an “involuntary termination” under the Act. Hopefully, additional guidance on this question will be forthcoming in the next few weeks.
- ❖ **Import Administration Actions:** The Department of Commerce posted a number of "Import Administration Actions" in the Federal Register this month. Among them were: a [final rule](#) to extend the Steel Import Monitoring and Analysis (SIMA) system until March of 2013; a [countervailing duty order](#) on circular welded austenitic stainless pressure pipe (CWASPP) from the People’s Republic of China (PRC); a [notice of preliminary results](#) of the full sunset review of the suspended antidumping duty investigation on certain cut-to-length carbon steel plate (“CTL plate”) from Ukraine; [sunset reviews](#) of the antidumping duty finding/orders on pre-stressed concrete steel wire strand from Brazil, India, Japan, the Republic of Korea, Mexico, and Thailand; and a [new shipper review](#) of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand.
- ❖ **OSHA:** On March 26<sup>th</sup>, the Occupational Safety and Health Administration (Department of Labor) issued a request for comment on information collection requirements as they relate to "Reports of Injuries to Employees Operating Mechanical Power Presses". This information is required under current law (29 CFR 1910.217(g)). Comments are due by May 26<sup>th</sup> and can be submitted electronically at <http://www.regulations.gov>. For additional information, see the [federal register](#) or contact Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) telephone (202) 693-2222.

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## Looking Ahead

- ❖ **Surface Transportation Reauthorization:** New legislation to reauthorize expiring federal surface transportation programs must be passed this year. The earliest we should expect to see serious consideration of this measure is June.



- ❖ Additional Energy: This week the Senate Energy and Natural Resources Committee began consideration of a broad energy agenda, including legislation that would (1) require that an increased percentage of our nation's energy come from renewable sources; and (2) provide resources to overhaul our power grid. The target date for Senate passage is June. In the mean time, popular energy efficiency bills related to manufacturing and appliances (S 661, S 598) along with a bill to conserve water used in producing energy (S 531) should pass more easily.
- ❖ Tax: Last week, Senator Baucus, Chairman of the Senate Finance Committee, introduced a comprehensive tax bill. While action is not expected immediately on the measure, this package should be seen as the authoritative legislation dealing with numerous tax provisions set to change or expire in 2010. In brief, the package would: (1) allow the top two tax brackets to rise to 36 percent and 39.6 percent, up from 33 percent and 35 percent respectively; (2) make permanent the 15 percent capital gains rate for taxpayers in the 25 percent and 28 percent income tax brackets and the zero rate for those in the 10 percent and 15 percent income tax brackets while increasing the capital gains rate to 20 percent for higher income brackets; (3) make permanent the increased standard deduction for married filers; (4) make permanent the 35 percent credit for child care expenses up to \$3,000 (one child) and \$6,000 (two or more children); (5) make permanent the \$46,700 AMT exemption for individuals, \$70,950 AMT exemption for married couples filing jointly and index exemptions for inflation; and (6) make permanent the 45 percent estate tax rate (\$3.5 million exemption per individual, indexed for inflation).

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