



December 7, 2009

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### **November, 2009: MSCI Advocacy Newsletter**

Welcome to the November 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](http://www.winston.com) and click on "Publications" or "Newsletters" under the "Resources" tab. Or, visit MSCI's [policy agenda](#) for other updated materials.

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### **Health Care Reform**

Washington continues on the long march toward health care reform. In November, the House successfully passed their version of a health reform package by razor thin margins. Only one Republican joined the Democrats. That package included: an individual mandate, requiring that most people purchase health insurance coverage or pay a fine (2.5% of income); federal government subsidies are 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



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"exchange". Additionally, in a last hour attempt to secure sufficient conservative Democratic votes, the House attached a provision to restrict health insurers who operate in the exchange from providing abortion coverage.

The primary mechanism of paying for this legislation in the House (\$900 billion over ten years) is 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. The Senate does not have this provision but includes problematic policy options of its own.

The Senate has all month been bogged down in closed door negotiations on its health care proposal. In October, the Senate Finance Committee passed its reform measure which drew criticism from the left for "giving too much away" and from the right for not sufficiently constraining costs or addressing such things as medical malpractice reform. The Senate Finance Committee measure did not include a public option, abortion restrictions or a surtax on high earners.

However, it does include a tax on high value or "cadillac" insurance plans as a means of paying for roughly half of the bill. This excise tax on the most expensive health insurance plans is an attempt at discouraging over utilization of care, a policy supported by the analysis of the Congressional Budget Office (CBO). The CBO analysis stated this approach had the 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. The Senate plan also includes cuts in the "Medicare Advantage" program. Republicans argue that this private sector delivery model should stay in place because of all the good that it has done for beneficiaries. Democrats, supported by AARP, argue that this particular program amounts to \$460 billion in waste and inefficiency over ten years.

Once the Senate Finance Committee passed its bill, Majority Leader Reid (D- NV) took over the task of merging it with the previously passed Senate Health, Education, Labor and Pensions Committee (HELP) bill. From the start, Reid promised that he would add a "public option" to the reconciled bill. This drew enormous fire from moderate Democratic Senators whose constituents are not in favor of the option.



Over the course of the past couple weeks, realization has set in that Reid will need all 60 Democratic and Independent votes to pass this measure. Getting to 60 will require significant concessions with regard to the public option. While Senator Lieberman (I-CT) has stated that he will not vote for any bill that includes any public option, Senators Nelson (D-NE), Carper (D-DE) and other moderates are working together quietly to come up with some alternative. Most recently, Senator Carper has suggested a public option that only kicks in on a state by state basis and only where insurers in that state are not able to reach affordability standards. The other controversial piece is the abortion restriction. Senator Nelson (D-NE) is intent in offering an amendment on the floor and will receive significant support. However, he is unlikely to reach 60 votes, which would require 20 Democrats to come his way.

The Senate is still set on completing work on health care reform by Christmas. Many are highly skeptical that it can get done. MSCI has officially joined 460 other organizations and companies in the Start Over Coalition. The coalition opposes 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 are watching the Senate process closely and will take an official position when appropriate.

**Materials may be found at the following links:**

[House Health Care Bill](#)

[House Bill Summary](#)

[Various House Background Materials](#)

[Senate Finance Committee Bill](#)

[Senate Finance Committee Report](#)

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## Tax & "Jobs" Legislation

While health care certainly has center stage, legislators, in some cases as a matter of necessity, are also heavily focused on taxes and jobs. At the beginning of November, the Congress enacted legislation on various tax provisions of interest to manufacturers. First, the existing homebuyer tax credit (enacted earlier this year) was extended through April and expanded to allow non-first time buyers and buyers in a significantly higher income bracket (up to \$200k for a couple) to take advantage of the credit. Second, the legislation included an extension of the net operating loss provisions included earlier in the year in the economic stimulus package. Prior to that, net operating losses could generally only be carried back



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for two years. The stimulus bill extended that period from two to five years for small businesses with \$15 million in gross revenue or less. The November legislation expanded the scope further to include ALL businesses, permitting them to carry back either 2008 or 2009 losses for five years. Additionally, small businesses that already carried back 2008 losses will now be able to carry back 2009 losses as well.

The hot topic in Washington at the moment (besides Health Care) is the "jobs package". Despite Friday's mildly encouraging news that the national jobless rate is down to 10% from 10.2% the month before, the Congress and the White House continue to be interested in pushing a new legislative package on "jobs." To manage the process, Senators Richard Durbin (D-IL) and Byron Dorgan (D-ND) have stepped in to receive recommendations and facilitate negotiations.

This package is undefined at the moment and every lobbyist in Washington is lining up to have their clients' interests heard. Provisions that have been discussed include 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. For its part, the House is planning to have a package up and off the floor in December. It is unlikely that the Senate will be able to complete with that time line. As background support to this initiative, the "White House Job Summit" was held last Thursday with Department of Labor Secretary Solis. It was mostly a media and listening session aimed at hearing concerns and proposals directly from citizens.

Also under consideration for the jobs bill is an extension of "Bonus Depreciation". While it is not included in the House talks as of yet, it is reported to be on the short list of priorities for Chairman Baucus in the Senate. Many are keenly interested to see that this provision makes it into the final tax package, particularly given that it was extended earlier this year in the economic stimulus package. In brief, the bonus depreciation provision will allow 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.

Additionally, 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. In some instances, with highly effective and politically popular tax code provisions, the Congress even considers whether to extend tax laws that will not expire for another year or more to come. The rationale behind this typically is that investors need certainty beyond tomorrow before committing scarce capital to deals that may only be sufficiently attractive when tax incentives are involved. The poster child for this sort of extension has been the wind energy and solar energy facility tax credits. In fact, Senator Grassley (R-IA) just introduced



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an [energy tax package](#) that includes certain long term extensions, including wind. Senator Baucus (D-MT), Chairman of the Senate Finance Committee (D-MT) is likely to add a number of his own energy-related tax provisions before the Senate's "extenders" bill takes full shape, but he is so far holding his proposal rather close to the vest.

On the House side, the Ways & Means Committee has been more forthcoming with the contents of their proposed tax extender package. In fact, last week the Committee leaked a draft summary of their extenders bill. Provisions to be extended include: 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 House is expected to consider this package on December 9<sup>th</sup>.

The one tax proposal that is getting "stand alone" attention is the "Estate Tax". Without congressional action, the estate tax law will lapse in January of 2010 for one year before lapsing back to a more onerous requirement that exempted only \$1 million in assets and applied a 55% inheritance tax. Under current law, \$3.5 million is exempt and assets in excess of the \$3.5 million are 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. For its part, the National Association of Manufacturers (NAM) stopped short of endorsing any of the House bills that did not index the exemption for inflation and reduce the rate. That organization is considering making this vote one of their key criteria next year on their "report card" evaluating members of congress and their records in supporting manufacturers and business interests.

Last week, the House passed a permanent extension of the current estate tax law. However, it did not index the numbers for inflation, meaning that over time more and more high wealth individuals will get trapped by the tax. 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 asset exemption. Senators Carper (D-DE) and Voinovich (R-OH) have introduced legislation that would at least index the exemption amount to inflation. The general prognosis is that the Senate will never get the 60 needed votes now to pass this and are likely to have to settle for a quick vote on a one year extension of current law, leaving permanent reform, like so many other matters, until next year.

All of this said, the Congress and White House intend next year to tackle a true "tax reform" package. For that reason, many are seeking now to merely extend for a short period existing and important tax provisions with the objective of returning to comprehensively reform them in 2010. To this end, the



White house, through the President's Economic Recovery Advisory Board (led by Paul Volcker), is collecting tax proposals through its web site and in-person meetings. So far, more than 500 proposals have been put forth.

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## Climate & Energy

As you know, the House of Representatives successfully passed a comprehensive climate change bill on June 26<sup>th</sup> of this year, including 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. The Senate continues to slow walk its deliberation on similar legislation, largely due to its full agenda and a substantially more dynamic political profile in the upper chamber. Politics and procedure equally dictate that the Senate will not be able to pass a climate change bill until next spring at the earliest. While the President was intent on signing legislation by the end of this year, congressional leaders in mid-November conceded that official action will be put on hold until April.

Unofficial negotiations continue, however. In early November, Senate Environment and Public Works Committee Chairman Barbara Boxer (D-CA), against the counsel of a number of moderate Democrats, chose to "mark-up" her version of climate change legislation without a single Republican present to vote. The bill passed out of committee on a Democratic party-line vote with one Democrat, Chairman of the Senate Finance Committee Max Baucus (D-MT) voting against the measure. Republicans boycotted the committee vote in response to Boxer's and the EPA's refusal to conduct a more in depth cost analysis of the legislation prior to their vote. To be fair, the EPA had just weeks before produced a cost report that reflected a total cost to consumers of less than \$100 per year. Senator Boxer's position was that the Republican request for additional EPA analysis was nothing but a stalling tactic and that those members had no intention in voting on the legislation any way. Further, the EPA itself released a statement saying that "the Oct. 23 analysis should be perfectly adequate at this stage of the process, given the rigorous analysis, the lack of numerous, detectable legislative changes since the House-passed bill, and the large number of computer modeling runs in the very recent past on very similar legislative provisions". Nonetheless, Boxer's decision to move forward is largely seen as having poisoned the possibility of her legislation moving any further in the Senate process.

In response, a moderate group of Senators have begun to step out in a leadership role on this issue. First, Senators Kerry (D-MA), Lieberman (I-CT), and Graham (R-SC) have been negotiating a set of principles among the three of their staffs that they believe can be the foundation for successful climate bill in 2010. Such a bill is likely to tempt Republican support with the addition of off-shore oil drilling provisions and



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stronger incentives for nuclear energy production. Senator Kerry just yesterday introduced his [own legislation](#), outlining an "international perspective" on U.S. climate action. This bill will not itself be voted on but will help to shape the United Nations debate in Copenhagen later this month, and it signals to the Senate and stakeholders that at least Kerry believes that international cooperation is essential to ensuring a successful U.S. program. This and the beliefs of other Senate moderates on climate legislation were enshrined in a [letter](#) recently sent to the President. Taking it a step further, 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. There is a similar provision in the House package, and while President Obama opposes it, Senator Brown is integral to final passage and will likely have his way.

Senator Stabenow (D-MI) also [introduced](#) her own title aimed at protecting manufacturing and agricultural interests by ensuring a strong "offsets" program. Offsets can be generated from agricultural and forestry projects that result in carbon capturing rather than emissions. Those projects are then monetized in the form of credits that large polluters can purchase to offset their emissions. Creating a strong offset market will bring down the cost of compliance under a cap and trade scheme. Stabenow's bill enjoys broad express and implied support from manufacturers, voluntary carbon market participants, and agricultural interests.

Also in the interest of the manufacturing sector are the pollution permits set aside for energy intensive industries such as the steel and cement. In the House bill, four percent of the permits will be set aside for this category in the early years, rising to fifteen percent by 2014 and 2015. The permits are a way of insulating manufacturers from the increase in energy costs that will accompany participation in a carbon market system.

Looking ahead, the Senate will have a vigorous debate in 2010. At least five committees – Senate Environment and Public Works, Finance, Agriculture, Commerce, and Foreign Relations – can lay claim to jurisdiction over the legislation. And each of them likely will. Moderate Democrats will look to better balance industry concerns and environmental objectives, and since final passage will require 60 votes (every Democrat and Independent), their voices will be heard. As of last count by a prominent Washington trade journal, 43 votes were in the "likely yes" column and 25 more on the fence. That spells a whole lot of concession. Finally, if the bill is not on the Senate floor by mid-summer, the chances of passage in 2010 are near zero. Mid-term elections in November will demand the attention of many vulnerable members who simply will not be willing to take a controversial vote to close in time to Election Day. On the flip side, the EPA already has authority under the Clean Air Act to regulate carbon



emissions and they will continue down the track of establishing a program unless and until the Congress acts. This will put immense pressure on the Senate to get something to the floor in the spring.

**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 \(significant industry support\)](#)

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## Trade

A change in White House leadership, the banking collapse, international climate treaty negotiations, and a substantial downturn in economic production have all highlighted the importance of good trade policy. While Congress has taken little action on trade thus far, the issues continue to bubble up. The following provides a synopsis of the various issues under consideration in Washington this month:

- ❖ **Chinese export controls and trade distortion:** On November 19<sup>th</sup>, 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



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carbide, yellow phosphorous and zinc. On Friday, a [notice for public comment](#) appeared on this very issue in the Federal Register. Finally, the Europeans expressed serious concerns about over capacity in China's manufacturing, particularly with steel, cement, and plastics. The European Chamber of Commerce [suggested](#) a backlash against China could be on the horizon.

- ❖ [NAFTA and the re-negotiation of free trade agreements](#): Just a few days ago, a group of Senators [wrote to President Obama](#) to request his backing of legislation to require the renegotiation of the North American Free Trade Agreement and other trade pacts that the Senators blame for substantial losses in American manufacturing jobs. Senators Brown (D-OH) and Dorgan (D-ND) took the lead on this initiative. Similarly, another group of Democrats [called on Obama](#) earlier in the month to suspend our involvement in the Doha round of global talks and to start over with an agenda aimed at protecting labor rights and environmental rights, and an agenda that they argue will not cost American manufacturing jobs the way these other free trade agreements have.
- ❖ [South Korea et al](#): Led by the U.S. Chamber of Commerce, many are [arguing](#) for swift ratification of three Bush-era free trade agreements with South Korea, Colombia and Panama. They tout these agreements as good for jobs, but others remain concerned about the South Korean deal with regard to its potential impact on the U.S. auto sector. In addition to this, the House could take up a one year extension of trade preference programs for the Andean region as early as next week. The program covers products from Colombia, Peru and Ecuador. In the past, it covered Bolivia as well.

### Labor Developments

As previously reported, Senator Tom Harkin (D-IA), is the new Chairman of the Senate Health, Education, Labor and Pensions Committee. Although his support for the Employee Free Choice Act (EFCA) counts as a real strength for the pro-EFCA position, no action is expected on this legislation until next year at the earliest. Due to a severely crowded legislative agenda, greater advocacy priorities for the various interest groups (read "health care reform"), and the need for 60 votes in the Senate, there is still a long road ahead before the Congress will be in a position to pass the EFCA or a moderated version of it. Recently, Senator Evan Bayh (D-IN) indicated some discontent with the way the legislation is drafted. He is the latest of moderate Senate Democrats to cast doubt on the EFCA.

In other labor news, a proposed Labor Department notice regarding employee rights under the NLRA is being criticized as unbalanced and inaccurate. The new notice, which is strongly supported by the AFL-CIO, informs workers of their rights to join a union, but does not inform workers of their equal right to refrain from this activity. The Department of Labor issued the rule to implement Executive Order 13946,



which requires nonexempt federal departments and agencies to include in their contracts provisions a requirement that contractors and subcontractors post notice informing employees of their rights under federal labor laws. Further, the proposed notice has eight paragraphs of examples of unlawful employer activity, it has only one paragraph of unlawful union conduct, and it fails to inform employees of their Beck rights *not* to join a union and to pay agency fees only for representational expenditures.

The National Association of Manufacturers (NAM) is also working to address "proposed radical new procedural changes to assist union organizers" at the National Mediation Board (NMB). According to the NAM, under the new proposal, a union can be certified with only a majority of employees who participate in the elections choosing representation - as opposed to the majority of all employees as current

Finally, the Department of Labor is rescinding a final rule on union annual financial reports promulgated by the Bush Administration on January, 21, 2009. The rule revised Form LM-2 (the forms large unions use for their annual financial reports) to require additional information about compensation of union officers and employees and information about parties that buy or sell union assets. The rule also enabled the labor secretary to revoke the authorization of a small union to file a simpler Form LM-3 if the union is delinquent or deficient in its filings. The Obama administration delayed the effective date of the rule and has now rescinded it, citing the need to balance union reporting and disclosure against the union autonomy and freedom from undue burden.

We continue to follow these issues, particularly the EFCA. More information and resources can always be found on MSCI's [web site](#).

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## Financial Services / Derivatives Reform

The House Financial Services Committee and the House Agriculture Committee are set today to release a "reconciled" version of version of legislation to regulate previously unregulated over-the-counter derivatives. Lack of transparency in derivatives markets are largely blamed for the 2008 financial and economic melt-down. However, in addition to being a highly profitable financial product for Wall Street traders, derivatives serve an essential function for non-financial service businesses ("corporate end users") that use the financial product to manage risk. Both House committees recognized this reality and chose as a result to exempt certain end-users, including manufacturers, from the legislation's requirements. The intended result is that certain truly non-financial companies, who use derivatives to hedge against risks such as fuel price and interest rate spikes, will not be deterred from engaging in risk mitigation exercises



due to requirements for increased cash margin (i.e. increased cost of purchasing insurance). Having to comply with the requirements aimed at banks, according to these end-users, would make the derivative products prohibitively expensive.

The House Financial Services and Energy and Commerce Committees also recently passed the Consumer Finance Protection Act out of Committee last week. Among other things, the legislation will establish an agency to oversee consumer focused financial products such as mortgages and credit cards. While largely unrelated to the manufacturing industry, the U.S. Chamber of Commerce has raised a concern that certain key terms in the proposed legislation, including "covered person", "consumer financial product" and "financial activity" are overly broad and could effect costly changes for businesses of all sizes that receive or extend credit (broadly defined). Many of these companies have little to do with consumer finance, and some fear that even credit card transactions could be captured within the scope of the legislation. Jade West, Senior Vice President-Government Relations for the National Association of Wholesaler-Distributors and a friend of MSCI, is also concerned about the language in the CFPA and its potential harmful effects. The broad nature of the language could be a result of poor drafting, but we will continue to monitor the issue and alert our membership should the issue go unresolved.

The House package is expected to make it to the House floor on December 8<sup>th</sup> with a number of amendments to be offered. For now, the end users exemption is in play. However, increasing concern has been raised that these exemptions are narrowed substantially so that very few types of derivatives and very few end users will actually be exempted from the regulation.

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## Transportation

As discussed in prior issues, House Transportation Committee Chairman Oberstar (D-MN) preferred to tackle the \$500 plus billion dollar transportation reauthorization this year. He continues to challenge the Administration's position that we should seek an extension of current law and then deal with a long term extension and reform of our nation's transportation laws next year. The major problem, of course, is the ability to pay for the proposed \$500 billion measure, particularly when an additional gasoline tax hike is not a political sweetheart during these hard economic times. The recent short term extension of the transportation program is set to expire on December 18<sup>th</sup> without further Congressional action. As such, the preferred approach to date has been to pass a straight extension of existing law for another six months to fund ongoing highway and other transportation projects at current levels. This, of course, is in addition to the nearly \$50 billion that the transportation sector received from the economic stimulus package earlier this year.



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Most recently, Senate Environment and Public Works Chairwoman Barbara Boxer (D-CA) and House Transportation and Infrastructure Chairman James Oberstar (D-MN) cited as justification for additional temporary transportation funds a new [report](#) from state transportation departments that found \$69.55 billion worth of transportation projects across the country that could begin within 120 days. According to the report, 16 states have more than \$1 billion worth of highway projects that are shovel-ready. Boxer and Oberstar are therefore requesting that "any jobs bill Congress takes up this winter should come with nearly \$70 billion for the nation's roads, rails and airports."

According to Senator Boxer, Senators Durbin (D-IL) and Dorgan (D-ND), the two managers of the jobs package, have indicated that transportation spending will be "one of the main pillars" of the legislation. However, while it is good to have two chairmen advocating this approach, fierce competition exists from other interests to secure funding under the same "jobs" legislation. As discussed above, this jobs legislation is expected to make its way to the Senate floor by January of next year at the latest.

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