



November 2, 2009

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### October, 2009: MSCI Advocacy Newsletter

Welcome to the October 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 page](#) for other updated materials.

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## Health Care Reform

Washington has been almost entirely fixated on health care reform in the month of October. As of this writing both the House and the Senate are each at the critical stage of finalizing packages and counting votes. The House is one step ahead of the Senate and will likely pass its reform legislation before the Senate is able to deliver a final package to the floor.

Last week, the House Democratic leaders introduced their long-awaited health care reform package. The new bill, the Affordable Health Care for America Act H.R. 3962, is a merged version of the proposals passed by each of the House Ways & Means, Energy & Commerce, and Education & Labor Committees (previously numbered H.R. 3200). The following are key provisions in the House bill:

- ❖ An individual mandate requiring that most people purchase health insurance coverage or pay a fine (2.5% of income). Adults can stay on their parent's health insurance until 27 years old. 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. Businesses with payrolls greater than \$750,000 who failed to do so would have to pay a fee equal to 8 percent of their payroll.



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- ❖ Insurance plans cannot deny coverage on the basis of pre-existing conditions and they cannot set lifetime limits on coverage.
- ❖ A “public option” that will allow health care providers such as hospitals and physicians to negotiate with the government on pricing. Prior, and more politically volatile, versions of the plan would have set payment according to Medicare reimbursement rates.
- ❖ Costing nearly \$900 billion over ten years, more than \$460 billion will be paid for with 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.

We encourage all MSCI members and their employees to contact their representatives to express their concerns about the huge tax increase contained in H.R. 3962. Your timely communication is very important since debate on the bill and a vote could occur within the next week. In your communication, ask for a bill that will truly reduce costs and not create a new massive Federal entitlement. To contact your legislators click [here](#). For more information visit the U.S Chamber of Commerce’s [Healthcare Toolkit](#).

House Republicans have unanimously vowed to vote against this package, citing cost, significant growth in bureaucracy, and its failure to address issues such as medical malpractice reform. It is not yet known whether the party will offer alternatives when the bill comes to the floor or just vote against the Democratic plan. To date, the Republicans have not offered a comprehensive health care reform bill of their own.

The Senate Finance Committee earlier in the month passed its own long-negotiated health care reform measure. Chairman Baucus (D-MT) was criticized by his own caucus for “giving too much away”. Unlike the House package, the Finance Committee bill does not include a public option, choosing instead to permit states to set up non-profit health insurance cooperatives that can compete with private insurers in the state-wide health insurance exchange. Also unlike the House bill, Baucus’s measure would not add a surtax on wealthy individuals. Instead, it funds reform partially through an excise tax on the most expensive health insurance plans, an attempt at discouraging over utilization of care. This approach also has its critics, including labor unions and other strongly Democratic entities 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.

Once the Senate Finance Committee passed its version, 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. Reid is not expected to reveal a combined bill until the Congressional Budget Office reports back to him with cost information. However, last week, he announced that a “public option” would be included in this final package.



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He described the “public option” as an “opt-out” public option, meaning that states could choose not to permit a public option to compete with private insurers in their state-wide health insurance exchange. According to Reid, the state legislature would have to vote to opt-out of the option and doing so would have the added effect of denying the state the ability to establish a non-profit health insurance cooperative to compete with private insurers. Many Republicans have identified this “opt-out” as nothing more than a smokescreen since few state legislatures and governors would want to travel down the politically treacherous path of voting on and signing such a law.

Reid's insistence is not surprising but could be problematic. First, the only Republican to support any version of health care reform was Senator Olympia Snowe (R-ME) with her vote in the Senate Finance Committee. With that vote, Senator Snowe made clear that she would not support any final bill that included a public option. Further, the announcement caused a stir in Reid's own caucus, prompting Senators Landrieu (D-LA), Nelson (D-NE), Bayh (D-IN), Lincoln (D-AR), Pryor (D-AR) and Lieberman (I-CT) each to show pause. Senator Lieberman went so far as to say that he would support a Republican filibuster against a final bill that included the public option.

Given that the Democratic caucus now stands at 60, Reid cannot lose a single vote if he expects to avoid a Republican filibuster. The parliamentary rules in the Senate require a super majority--not a simple majority--to bring a bill up for a vote. Only after the procedural vote, can the Senate deliberate, debate, and vote on final passage of a bill. Ironically, the vote for final passage requires only a simple majority to prevail. This leaves moderate Democrats in a bind. They are skeptical of the public option and their constituency is skeptical of a public option. If they vote with Reid on the procedural motion then they will have no leverage when it comes to final passage where only 51 votes will be needed. On the other hand, not supporting Reid on the procedural motion puts them at risk of being perceived as aligned with the Republicans in opposition to the entire package.

This week will likely be host to many closed door meetings between Reid and the moderate segment of his caucus. The goal of each will surely be a good faith effort to find a middle ground that will permit the party to prevail on President Obama's chief priority while ensuring that moderate and vulnerable Democrats can be re-elected at home. Some of these moderates are known to be pushing for inclusion of a "trigger" option rather than the public option that Reid said he would include. The trigger option would permit the operation of a public option only after a number of years and only if the private insurers cannot demonstrate sufficient cost savings to beneficiaries.

Given a strong Democratic majority in the House and recent indications of support from the caucus, a bill will pass that chamber with a public option included. Should Senator Reid fail in his quest for a public option in the Senate, it is worth keeping in mind that the House and Senate versions, assuming both chambers pass legislation, will need to be “conferenced”. During that final negotiation between key members, the public option will still be on the table as a component of the House measure, and there will be great pressure from House Democrats, and likely the White House, to keep it in any final package.



**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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## Climate & Energy

The House of Representatives successfully passed a comprehensive climate change bill on June 26 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, as expected, has moved at a snails pace in bringing up legislation of its own. Given the structure of the Senate – both procedurally and politically – moving legislation with such enormous impact will pose a far greater challenge.

First, in the Senate, at least five committees – Senate Environment and Public Works, Finance, Agriculture, Commerce, and Foreign Relations – can lay claim to jurisdiction over the legislation. That means that 5 different committee chairman have the discretion as to whether to force a "mark-up" in their committee of any climate bill, providing them with significant influence over the timing and substance of the final package. Second, the legislation is not necessarily supported along clear party lines. While a few Republicans may be inclined to support the bill given a perceived benefit, or at least mitigation of harm, to their home state industries, some Democrats, particularly coal state and manufacturing state Democrats, are less sure that they can support the bill. This will make for a significant geographical breakdown. And finally, the package will need to yield 60 votes to get past procedural hurdles on the Senate floor. With 43 votes in the "likely yes" column and 25 more on the fence, the math is possible. However, there is no denying that is a razor thin margin to be negotiating around, particularly where any one compromise is likely to alienate a number of other legislators. Success is likely to require a deft diplomatic hand throughout the process.

Interestingly, when Senator Boxer (D-CA), Chair of the Senate Environment and Public Works Committee (EPW), first introduced her legislation in September, she chose to list her name second to Senator Kerry (D-MA). It is highly unusual in the Senate for the Chairman of the Committee of principal jurisdiction to relinquish lead sponsorship. It appears that Senator Boxer intends to move the legislation through her committee, focused upon the environmental issues that are important to her. Most speculate that Senator Kerry will then act as an



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ambassador for the legislation as it moves to each of the other committees of jurisdiction. His goal is likely to be focused more on attaining 60 votes than it is maintaining the integrity of the EPW-passed language.

Senate action on the bill kicked off last week with three high profile hearings before the Environment and Public Works Committee. The hearings were followed up by an Environmental Protection Agency (EPA) cost report on the Senate bill. According to that report, the total cost to consumers of the legislation would be less than \$100 per year. Touted as a favorable message by Democrats, the report was met with resounding hostility from Republicans who said that the cost analysis makes a number of irrational assumptions and that full modeling was needed to better assure that this legislation will not have enormous unintended costs associated with it. The Republicans called for a more thorough analysis before they would be willing to proceed to a mark-up and committee vote on the Kerry-Boxer bill. Senator Boxer denied that request and is scheduled to hold a mark-up in her committee the morning Tuesday, November 3<sup>rd</sup> under Republican protest.

It is doubtful at this juncture that any Republicans will even show up for the committee meeting. Typically in the Senate you need two members of the minority party present to proceed, but in this case an interpretation of the committee rules permits consideration to go forward with a majority of committee members present, whether all one party or a combination of both. Senator Boxer's position is that the Republican request for additional EPA analysis is nothing but a stalling tactic and that those members have no intention in voting on the legislation whatever the analysis says. 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". The showdown begins Tuesday morning at 9 a.m. although some believe that Boxer may yet be persuaded by some in her own caucus to delay the full course of the mark-up a few days or a week.

Despite this specific partisan flare up, work continues around the Senate with a longer term view of finding middle ground on climate change legislation. Senator Kerry recently announced a pact with Senator Lindsay Graham of South Carolina (R-SC) to work toward a bi-partisan compromise. This is likely to include provisions for additional off-shore oil drilling and stronger incentives for nuclear energy production. Senator Stabenow (D-MI) has also been actively authoring 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.

Also in the interest of the manufacturing sector are the pollution permits set aside for energy intensive industries such as the steel and cement. 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 a compliance carbon market.



Finally, 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.

Most observers in Washington believe that final consideration of the climate legislation will halt after the Senate Environment and Public Works and perhaps one other Committee of jurisdiction are done with their mark-ups, leaving further debate and vote pandering until early next year – after the December U.N. conference on climate change in Copenhagen. In the background, it should be remembered that the EPA already has authority under the Clean Air Act to regulate carbon emissions. Given the underlying source of EPA's authority, an agency initiated program would be more burdensome than the proposals currently under consideration in the legislature. This creates a real incentive for negotiation rather than obstruction, particularly when the National Association of Manufacturers has pointed out that the EPA's "legal authority to exempt small manufacturers and businesses from permits mandated by the Clean Air Act is unclear at best."

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

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

[House Climate Bill Summary](#)

[Senate Environment and Public Works Committee Climate Bill \(considered in committee this week\)](#)

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

[EPA Cost Analysis on Climate Measures](#)



## Trade & Economic Matters

Some attention has been directed in recent weeks at the “Buy American” provisions included in the economic stimulus package earlier this year. The provision was originally included to ensure that only iron, steel and other goods manufactured in the United States are used in stimulus-funded construction projects. In a meeting called by the House Ways & Means Committee Republicans, members and certain trade associations, including the U.S. Chamber of Commerce, argued that the provision has been more a hindrance to job creation than anything. Republicans stated that “shovel ready” projects were delayed at the state and local level as a result of the Office of Management and Budget’s (OMB’s) implementation rules. The U.S. Chamber of Commerce also raised concerns that the real effect of “Buy American” will be retaliatory trade policies by our trading partners. Canadian MSCI members in concert with a coalition led by Canadian Manufacturers and Exporters Association and with MSCI’s support have raised the issue with Canada’s Minister of International Trade Stockwell Day and U.S. Trade Representative Ronald Kirk and have asked the two governments to resolve the cross border trade issues created by the “Buy America” provision.

Also bearing on trade, the recent Agriculture Appropriations bill included a provision to ban poultry from China. This was a highly controversial issue in the Bush Administration when China, upon notice of the ban, protested the move at the World Trade Organization and decided to ban some U.S. chicken imports in retaliation. Nonetheless, the final FY '10 appropriations package will allow Chinese poultry imports only if the Agriculture Department determines that the poultry meets U.S. safety standards, a move that could be indicative of the disposition of this Congress toward trade with China.

Finally, the Commerce Department’s Bureau of Economic Analysis last week released data showing that real GDP increased 3.5 percent at an annual rate in the third quarter, after declining in five of the preceding six quarters. The gain marked the largest quarterly advance since the third quarter of 2007. In response, Commerce Secretary Locke gave credit to the White House and Congress for economic stimulus and bail out efforts that, according to him, prevented a substantially worse economic decline and helped us to get back on the road to recovery. This, of course, is all tempered with a fairly recognizable concern in Washington about the value of the U.S. dollar. The issue has uncharacteristically prompted some members of Congress, including Senators Kyl (R-AZ) and Schumer (D-NY) to acknowledge concern, albeit without a solution. Others are less concerned and believe that the shrinking value of the U.S. Dollar is a temporary set-back with little practical importance in the long run.



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### Miscellaneous

- ❖ **Tax and Unemployment Insurance Matters:** Majority Leader Reid (D-NV) late Monday called for a procedural vote on legislation to extend Unemployment Insurance. A final vote on in the Senate is expected later in the week. Included in that legislation are various tax provisions of interest to manufacturers. First, the existing homebuyer tax credit (enacted earlier this year) will be extended through April and will be 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 includes 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 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 legislation to be voted on later this week would expand the scope of this law 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.
- ❖ **Financial Services Regulation / Derivatives for Manufacturers:** The House Financial Services Committee and the House Agriculture Committee each have passed a 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 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 result is that companies such as Caterpillar, who use derivatives to hedge against risks such as fuel price and interest rate spikes, will not have to post increased cash margin in order to utilize the tool. Having to comply with the requirements aimed at banks, according to these end-users, would make the derivative products prohibitively expensive.
- ❖ **Financial Services Regulation / the Consumer Finance Protection Agency Act (CFPA):** The House Financial Services and Energy and Commerce Committees also passed the Consumer Finance Protection Agency 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 the definitions of 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 MSCl, is also concerned about the language in the CFPA and its



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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.

- ❖ **Transportation:** The House and the Senate continue to struggle with an expiring surface transportation law. As discussed in prior issues, House Transportation Committee Chairman Oberstar (D-MN) preferred to tackle the \$500 plus billion dollar transportation reauthorization this year. However, President Obama pushed back as his political plate was too full to conceive of dealing with another hot button issue like the "gasoline tax". Congress extended the program for a short period until December 18<sup>th</sup> of this year. Oberstar favors an additional short extension to keep pressure on legislators to address the program. However, most in the Senate and on the other side of the aisle would prefer a six month extension of current law. A coalition of industry, union and interest groups also sent a letter to Congress last week urging passage of a six-month extension. The White House would like to delay consideration of re-authorization until March of 2011.
- ❖ **Labor:** Sen. Tom Harkin (D-IA), lauded by many union leaders as a strong worker advocate, was chosen to succeed Ted Kennedy as chairman of the Senate Health, Education, Labor and Pensions Committee. While Harkin recently stated that the committee will focus on education issues for the remainder of the year, he also intends to continue to press for Senate floor consideration of the Employee Free Choice Act which seeks to make it easier for unions to organize workers. His new Chairmanship increases the chance that the measure will get attention, but with the severely crowded legislative calendar and insufficient support among Senate Democrats, this issue is likely to languish awhile longer.

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