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August - September, 2009: MSCI Advocacy Newsletter

Welcome to the end of summer 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 <http://www.msci.org/commentary.aspx> for updated materials.

Health Care Reform

On September 16, 2009, after a month and a half of town hall meetings, attack advertisements throughout the country, and debates about "death panels" and "public options", Senator Baucus (D-MT), Chairman of the Senate Finance Committee, finally chose to release his DRAFT health care reform bill. The release came just days after the "bi-partisan gang of six", including Republican Senators Olympia Snowe (R-ME), Michael Enzi (R-WY), and Charles Grassley (R-IA, Ranking Republican on Senate Finance Committee) and Democratic Senators Kent Conrad (D-ND) and Jeff Bingaman (D-NM) announced that they could not come to agreement on the controversial elements of the bill.

Titled "America's Healthy Future Act", the measure is estimated to cost under \$900 billion, a mark yet to be achieved by other health care reform measures which all topped \$1 trillion over ten years. The Baucus proposal is still the favored horse in the race. That said, it represents a significantly more conservative approach than the previously considered packages in the House of Representatives and the Senate Health, Education, Labor and Pensions Committee. As a result, the bill drew immediate fire not only from Republicans who fundamentally disagree with the Democratic approach to reform, but also from Democrats. Opposition Democrats think that Chairman Baucus has sacrificed too much from the start without testing the viability of the package in Committee or on the Senate floor.



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Chairman Baucus has responded to his fellow Democrats by reminding them that it will take 60 votes to move a health care reform package in the Senate (due to parliamentary procedure that requires 60 – not 51 – votes to overcome a filibuster by any opposing member). The Chairman has been quoted as saying “I can count”, inferring that he sees no scenario where an overly controversial bill will get 60 votes. Whatever the case, formal debate on the Baucus bill has returned Congressional focus to the substantive provisions and away from pure speculation and empty rhetoric (although there remains a healthy dose of that as well).

As of the writing of this newsletter, the Senate Finance Committee has been engaged for seven days in formal negotiations to “mark-up” the bill. This process ended Friday, and will be followed by a vote next week after the Congressional Budget Office (CBO) is able to review the final package. Below is a link to the Senate Finance Committee web site where real time (day-by-day) amendments and other documents are posted. As of the end of last week, hundreds of amendments were filed in committee and dozens have since been considered and voted upon. While many of the amendments deal with specific provisions of interest to individual members, others have addressed the more controversial issues frequenting the front page of newspapers. What follows is a topical list of issues debated and a brief assessment of their status:

- ❖ The "Public Option": By far the most controversial provision in the various bills, a "public option" is a government or quasi-government insurance program that would compete head to head with private insurance products available through a national health insurance "exchange". On a level playing field with private plan choices, the public option would theoretically need to offer the same benefits, abide by the same insurance reforms, and follow provider network requirements and other consumer protections. In the House, Chairman Waxman was able to get agreement from the conservative Blue Dog Democrats to support his bill by including provisions that: (1) would require a government-run insurance plan (the public option) to negotiate payments with health providers, instead of setting rates at 5 percent above the Medicare payment, as previously proposed; and (2) allow the government to negotiate drug prices paid by Medicare while also requiring plans on the newly created “exchange” to obtain government permission prior to certain premium increases. In the Senate, Chairman Baucus has opted to take the public option off of the table and instead to adopt Senator Conrad’s (D-ND) proposal to permit a "cooperative" structure where state level cooperatives could band together to negotiate insurance rates. This option has slightly more appeal to Republicans but it has not been a silver bullet. Despite Baucus’s insistence that public option could not gain the votes needed in the Senate, two senior members offered amendments in Committee that would add a public option to the bill. The amendments, offered by Senators Rockefeller (D-WV) and Schumer (D-NY) respectively, each failed in committee by a few vote margin with Democrats like Senators Lincoln (D-AK), Nelson (D-NE), Conrad (D-ND) and Landrieu (D-LA) all voting against including the option. To complicate matters further, two Democrats (Senators Carper (D-DE) and Cantwell (D-WA)) are each offering their own proposals. Senator Cantwell’s amendment would allow states rather than individuals to receive subsidies and then negotiate with insurers to provide coverage to certain individuals in that state. The idea is that states are in a better



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position to negotiate than people in the individual marketplace. More substantive, Senator Carper's amendment would, rather than allow for a federal public option, grant flexibility to states to create their own programs to cover the uninsured, including running state insurance plans, creating cooperatives, agreeing to compacts for coverage across a multiple of states, and even opening public employee benefit programs to the uninsured.

❖ Paying For the Legislation:

(1) **Efficiencies:** The primary source of funding in the Baucus package comes in the form of efficiencies in the system, including broader coverage to spread risk, better care for chronically ill patients, and an emphasis on preventive care. Opponents of the legislation argue that all of the new coverage requirements will only serve to increase costs in the early years. Supporters argue that up front additional costs should be seen as an investment with the return to come ten or more years down the road. There is support for this position. The CBO just affirmed that the Baucus proposal would, after ten years, produce savings in excess of additional costs while covering more people. Additionally, the math appears to be on the side of reform proponents in that two of the more recent reforms – the Medicare and Medicaid reimbursement reforms of 1997 and the 2003 Medicare Prescription Drug Act – have each cost drastically less than originally estimated due to efficiencies created as a result of the up-front expenditures.

(2) **Additional Sources:** The House was long considering a surtax on the wealthiest Americans to raise revenue (e.g. up to a 5.4% surtax on the nation's top 1.2% of taxpayers). This idea has largely fallen out of favor as has limiting the currently unlimited tax exclusion that employees enjoy on their employer-provided health care benefits. Instead, under the Baucus plan, the insurance companies will be subjected to substantial taxes for offering overly expensive health care plans. The theory is that such plans benefit from income tax exclusion to the detriment of overall cost constraints in the health care system. In brief, they encourage over consumption of health care services and the government interest in providing tax benefits for health insurance should be capped at some reasonable level. Not without Democratic opponents, unions have weighed in on behalf of firefighters and police who, by nature of having particularly risky professions, often require expensive plans.

❖ Mandates: The Baucus plan includes an individual mandate to purchase health insurance – either from your employer or on the newly created exchange. The mandate is accompanied with federal subsidy for those with low incomes. The House and the other Senate proposal each included an employer mandate in addition to the individual mandate. The Baucus proposal does not impose such a mandate, but instead would fine companies who do not offer coverage (\$400 per employee). Many have raised concerns that this is not a sufficient deterrence for companies since they spend between \$4,000 and \$10,000 per



employee now. Others counter that there currently exists no employer mandate and most employers still offer coverage as an incentive to retain good employees.

Adding further pressure to advance legislation is the looming threat that the Senate Democrats could move health care reform legislation without 60 votes through a process called "reconciliation". This somewhat complicated and undesirable method would allow Democrats to pass many of the health care reform provisions with only 51 votes. However, the option would involve some procedural maneuvering and abandoning certain important reform provisions that would not be permitted through this process. Additionally, the move would incite heavy political attack from the Republican Party, something that President Obama may not wish to invoke given his dipping polling numbers and the various legislative proposals he must work through in the coming year.

Senator Schumer (D-NY) has in recent days indicated a split in opinion with his colleagues on the Senate Finance Committee (Senator Baucus and Senator Conrad principally) in that he believes a health care reform package with a public option can prevail on the floor of the Senate. It is unknown whether he contemplates achieving such an objective using reconciliation or by somehow swaying a large number of currently opposed Democrats. In either case, the Chairman does not agree.

Reference Materials: (updated)

- ❖ Senate Finance Committee Bill: [Real time updates and Amendments](#)
- ❖ House [Bill](#) (Substitute Amendment, as passed by the Energy & Commerce Committee)
- ❖ House Bill [Summary](#)
- ❖ HELP Committee [Bill](#) (Prior to Committee Mark-Up -- latest version yet to be released by the Committee)
- ❖ HELP Committee [Summary](#) (Prior to Mark-Up)

Climate & Energy

On Wednesday of last week, Senators Boxer (D-CA) and Kerry (D-MA) unveiled much anticipated climate change legislation. Boxer is the Chair of the Environment and Public Works Committee, which has primary jurisdiction over the bill, and Kerry is the Chair of the Senate Foreign Relations Committee, which in this heightened state of globalism and international trade, is ever more important. Most see this legislation as a starting point in the Senate with long arduous days of negotiation ahead. According to the President's chief energy adviser, Carol Browner, President Obama does not expect a final climate bill signed into law before the closely watched December UN Climate meetings in Copenhagen. However, the President is eager to have action,



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and will highlight the House-passed bill and the working document produced by Boxer and Kerry as indicative that the United States is taking its global warming responsibilities seriously.

Senator Boxer has expressed a desire to move forward in the month of October despite the logjam that health care reform has created for all other Senate considerations. She, along with Senator Kerry have stated that they expect to release a second draft of their legislation in about two weeks (a "Manager's Amendment"), which will presumably reflect further fine tuning in some provisions and substance where the current draft is left either blank or without substantial detail. Following this release, Senator Boxer intends to hold a formal "mark-up" session in her committee, which will draw debate and amendments. She would like to do this at the end of the month. In addition to the Environment and Public Works Committee, five other Committees could assert some level of jurisdiction. The most likely to do so are the Senate Agriculture Committee and the Senate Finance Committee, which together have jurisdiction over offset programs, market regulation, and allocation of emission allowances across the various affected industries. Each of these jurisdictional areas are vitally important to industries with significant carbon footprints.

In general, like the House bill, the Senate measure will provide for a cap and trade scheme for greenhouse gas ("GHG") emission controls. It will work by setting an aggregate cap on GHGs and establishing a market for entities to trade GHG emission allowances and offset credits. Electric utilities, liquid fuel producers and importers, and large industrial sources of GHGs will have to hold an emissions allowance permit for each ton of carbon dioxide equivalent emitted, produced or imported. The compliance obligation will be phased in and the number of emission allowances declines over time so that entities are permitted to emit less and less GHGs.

The Senate bill requires a 20% reduction in GHG levels below 2005 levels by 2020. This is a more stringent approach even than the House passed bill and has drawn fire from many industry stakeholders. The House bill only calls for reducing pollution to 17% below 2005 levels in 2020, 42% below 2005 levels in 2030, and 83% below 2005 levels in 2050. Representatives of the iron and steel industry have already weighed in to express their concern that the Senate bill has taken a step back from the House and will place an enormous burden on the steel industry in particular, which is energy intensive and trade sensitive. That position should find sympathy from the coal state Democrats such as Senators Baucus (D-Mt), Casey (D-PA), Specter (D-PA), Rockefeller (D-WV), and Byrd (D-WV), each of which are on the record as saying that available technologies for mitigating carbon are simply not sufficiently advance to meet the stated emission reduction requirements with reasonable cost. However, opponents have recently seen fallout from outright objecting to the bill. The Chamber of Commerce has lost as members a few large utility companies in the past week, and Nike has stepped down from its Chamber Board position, all citing the Chamber's obstructionist position on climate change legislation and expressing their support for a more moderated approach.

To address compliance costs, both the House and Senate bills allow entities to buy credits from each other if their emissions are greater than their allowances, and to purchase credits from domestic and foreign offset sources



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under certain conditions. These offset credit sources are typically agricultural or forestry sustainability projects that sequester carbon and therefore offset equivalent amounts of carbon emitted by industry sources. There already exists a robust voluntary market place for such credits in the United States, largely driven by large manufacturers who seek to label their products as green. The Senate bill is less lenient on international offsets, allowing only 25% of credits to come from non-domestic sources while the House would permit 50%. Many industry advocates say that international offset credits are necessary as the domestic market simply has not produced enough supply. Others argue that there is a substantial credibility gap since many offset projects have not in the past adequately verified the source of the credits, monitored the projects for ongoing compliance, or ensured that credits are only sold one time into the marketplace. This will be a highly debated topic in the Senate Agriculture Committee, where farm-state Members have a vested interest.

Senator Lincoln (D-AK) recently took the helm of that Committee and has expressed concerns over how agricultural interests may be affected under any final legislation. Known not to be a wholehearted supporter of the "cap & trade" approach, Senator Lincoln is keeping an open mind and has not committed yet to how her committee will proceed. That said, given that her new Staff Director has just come over from the Commodities Future Trading Commission, we should expect to see heavy scrutiny over how markets are regulated and offsets are produced and sold. Finally, Senator Stabenow (D-MI), a strong supporter of her home automotive and other manufacturing industries, has taken an active role in drafting the offsets provisions of the bill. Although the Boxer-Kerry bill already includes offsets language, it is expected that Stabenow will be the lead negotiator on strengthening those provisions in favor of industry. Senators Dorgan (D-ND), Bayh (D-IN), Conrad (D-N.D.), McCaskill (D-MO), Tester (D-MT), and Nelson (D-NE) will all have agriculture concerns and fight to support agricultural interests.

Senator Kerry and Senator Boxer have proudly stated that due to certain mechanisms built into the system, the bill will be "deficit neutral". While an important consideration for taxpayers, the real point, as some argue, is that the legislation amounts to an "energy tax" on industrial pollution sources that will eventually get passed on. The Congressional Budget Office earlier in the year [estimated](#) favorably that the total cost of the cap and trade system would be \$175 per household in 2020. However, regardless of the price, one certainty is that utilities will pass through the expense to ratepayers, including large manufacturers who demand intense power supplies. Such cost concerns inevitably must be managed so that U.S. companies are not disadvantaged in a global market place.

To address international competitiveness, the House bill included a title called, "Transitioning to a Clean Energy Economy". The title is specifically designed to benefit industrial sectors, including iron, steel, aluminum, cement, glass, ceramics, chemicals, and paper. Companies in these industries will likely receive a percentage of their allowances for free until 2025, and if the company is able to emit less through energy efficiency, the company can sell the additional allowance permits into the marketplace. Also included in the House bill were "transitional



rebates" for certain energy-intensive manufacturers burdened by strong international competition. Specifically, the rebates will likely cover the cost of direct (from manufacturing process) and indirect emissions (associated with energy consumption) until 2025. In addition importers of competing products would have to purchase special international reserve allowances to make up for emissions associated with manufacturing in their unregulated home countries. The provisions are controversial and have been called "protectionist" by some in the trade community.

The Senate measure contemplates similar protections, and many are looking to manufacturing state Democrats to see how hard they will work to protect their home state industries. Senators Brown (D-OH), Stabenow (D-MI), and Levin (D-MI) are each expected to rise to the challenge. Senator Brown has already come out in support of keeping the trade provisions in the bill, and he should be expected to take an active role as the legislation moves forward.

Most have acknowledged that the generally more conservative nature of the Senate and the need for 60 votes to override a filibuster will make for a much steeper climb than in the House. Attention remains on a group of about 15 Democratic moderates and a handful of Republican moderates who are on the fence. Expert estimates place roughly 45 senators in support of climate legislation, and others are on the fence. Assuming all 45 votes exist, securing the additional 15 yes votes from the fence-sitting and "no" category could be an enormous challenge. Senator Baucus is seen to have the key to unlocking those votes. Since the bread and butter of industry protection is in how the allowances are distributed (i.e. auctioned at a cost to the emitter or offered for free in the early years), and Senator Baucus's Finance Committee has jurisdiction over that part, his position will be integral to the success or failure of the bill. Baucus has the ability to bring fence-sitters over to the "yes" category by assuaging the fears of certain industry-intensive states, and providing their industries with free allowances in the early years.

Reference Materials:

Senate Legislation [here](#)

Summary of Senate bill [here](#)

Senate Legislation Section by Section Analysis [here](#)

House-Passed Legislation and Accompanying Materials [here](#)



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Trade & China

Trade, and particularly trade with China, continues to occupy the headlines. As various industries push President Obama and his cabinet for action against our less than favored trading partner, others express their concerns about sending protectionist signals around the world. Most recently, the President sent a strong signal to China by declaring that he would levy tariffs on tires imported from China. Many see this as a sign that the President is taking trade laws seriously and will seek to enforce them in protection of the American workforce and their employers.

In the first of such actions, the President used a finding by the U.S. International Trade Commission that import surges had hurt U.S. tire industry workers to apply a 35% tariff on Chinese tires. The President was quoted as saying: "This administration is committed to pursuing expanded trade and new trade agreements. But no trading system will work if we fail to enforce our trade agreements, those that have already been signed. So when — as happened this weekend — we invoke provisions of existing agreements, we do so not to be provocative or to promote self-defeating protectionism; we do so because enforcing trade agreements is part and parcel of maintaining an open and free trading system." The tire industry workers are represented by the United Steelworkers Union. Opponents argued that this action merely send protectionist signals and distracts from important but neglected negotiations on free trade agreements with Colombia and Panama.

Senator Baucus, Chairman of the Senate Finance Committee with jurisdiction over trade, has expressed his frustration that the President has not moved forward with a Colombia trade agreement. Most recently, Majority Leader Hoyer (D-MD) told the National Association of Manufacturers (NAM) that he would like to turn the attention of the Congress to these outstanding free trade agreements as soon as debate on health care reform is over, which is likely not to occur this year. The United States is Colombia's top trading partner (33% of its trade). Colombia is the United States' 27th overall largest trading partner. There are a large number of House members who are vocally against such an agreement (citing human rights, labor abuses and other concerns) while an equal number of others are actively and forcefully supporting Colombia. The proponents argue that Colombia has come a long way under President Uribe and that drug cartels and guerilla warfare have largely been marginalized. Companies such as Caterpillar Inc. have advocated that the new administration to send the trade deal to Congress for approval.

Additionally, the Foreign Manufacturer Legal Accountability Act of 2009 (S. 1606) was recently introduced in the Senate. Although the bill remains a long way from becoming law, it may draw support from those in Congress increasingly concerned about safety issues arising from products manufactured overseas, particularly those manufactured in China. Although much of the concern focuses on China, it would be inconsistent with U.S. international trade obligations to single out China for special treatment, so the bill in fact addresses *all* foreign



manufacturers. Therefore, if passed, the bill will substantially alter the risk of litigation facing *all* foreign manufacturers currently beyond the reach of U.S. courts.

Finally, the Senate Finance Committee announced Thursday that it was, after months of negotiations, taking action on a "miscellaneous tariff bill". Senators will have to submit duty suspension and reduction requests for inclusion in the bill by the end of October with a deadline of enactment by December 31, 2009. Stay tuned for follow up information on this bill.

Transportation

House Transportation and Infrastructure Committee Chairman Oberstar (D-MN) earlier this summer [proposed a re-authorization bill](#) for the nation's highway and transit programs. However, it appears that this bill is officially on the back burner, and the Congress is amendable to President Obama's call for an 18 month delay before tackling what is expected to be a \$500 billion package. Given the full plate of Congress and the recent money pumped into transportation through the stimulus package, it is a calculated decision on behalf of the White House that this significant undertaking can wait. Further, the extension is likely to come with additional and controversial debate about the merits of a gasoline tax – something Obama would like to avoid for now.

In the mean time, the Senate has a challenge on its hands. While Senate leaders have agreed on a three-month highway bill extension, some procedural problems involving the split jurisdiction of "authorizing" and "appropriations" committees will likely require more time to sort out. As a result, a one month extension has passed the House and will likely make it out of the Senate in the form of a "Continuing Resolution", buying everyone until the end of October to work out a longer extension – perhaps 18 months as the President has suggested.

Equally of interest are current spending programs on highway and other infrastructure programs. In a recent hearing Transportation Secretary LaHood noted that nearly \$30 billion of the \$48 billion in economic stimulus dollars allocated to highway, transit, rail, and maritime transit had already been obligated, launching more than 5,000 highway projects and creating more than 120,000 jobs. In the same hearing, Secretary LaHood noted the success of the famed "Cash for Clunkers" program, emphasizing that nearly 700,000 vehicles had been sold by 21,000 dealers across the country.



Tax

Senator Baucus, Chairman of the Senate Finance Committee and man of the hour on Capitol Hill, a few months ago introduced a comprehensive tax bill. This authoritative legislation deals with numerous tax provisions set to change or expire in 2010. A number of important federal tax provisions will also expire at the end of 2009 without intervention. Given the Finance Committee's around the clock preoccupation with health care reform legislation and with climate and tariffs on the next burner, it is yet to be seen when Baucus will find the time to deal with expiring tax provisions. Further, Congress has let business tax provisions expire in the past only to later reinstate them retroactively, a form of Congressional action loathed by businesses who must make investment decisions with these provisions in mind.

That said, some very important tax provisions, including the estate tax, will expire without further action – a motivation that most believe will be sufficient to force timely Congressional action. The only remaining questions, should Congress choose to act, is whether such action will produce temporary (1 year) or more permanent (10 years) extensions, and whether such extensions will require offsets in the form of revenue raising provisions. In the past, Congress has taken the position that extending tax provisions does not require an offset.

Finally, as stated in prior issues, Senator Baucus's tax proposal, should it come into the picture, 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; (6) make permanent the 45 percent estate tax rate (\$3.5 million exemption per individual, indexed for inflation); and (7) repeal the last-in, first-out (LIFO) accounting for inventories.

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