What's New in Washington

Akin Gump STRAUSS HAUER & FELD LLP

July 2019

If you missed the fireworks on Independence Day, don't worry because they will continue for the entire month of July on Capitol Hill. The July calendar is full of legislative priorities and political debates pressuring congressional leaders to clear the plate as much as possible before the month long District Work Period in August.

The Democratic Majority in the House made significant progress on Fiscal Year (FY) 2020 appropriations in June, passing two minibus packages to fund all but two of the appropriations bills. The remaining two bills (Homeland Security and Legislative Branch) are not expected to be considered in the House until September. While appropriations progress in the House has been steady, the Senate Appropriations Committee has yet to begin markups due to the lack of agreement on the overall spending level for FY '20, which is currently set for a dramatic reduction thanks to the Budget Control Act of 2011. Budget cap negotiations are ongoing, but have largely remained at an impasse. With no sign of a deal on the horizon, Senate Appropriations Committee Chairman Richard Shelby (R-AL) announced that his committee would not begin markups until progress has been made which may help to jumpstart the talks. At some point this fall, the difference in funding levels will create a critical moment for congressional leaders and the White House to reach a consensus or find themselves defending large sequester cuts to federal programs prior to an election season that will entrench both parties even further. The budget caps deal is also likely to address the debt ceiling, which will need to be suspended again in the coming months, possibly as early as mid-September according to new analysis from the Bipartisan Policy Center.

On June 27, the FY2020 National Defense Authorization Act (NDAA) passed the Senate 86-8. The House Armed Services Committee completed its markup in June and will take the bill to the House floor this week. It is possible that NDAA will move to a conference committee to reconcile the differences between the two bills before this work period adjourns. Spending levels and limiting the President's authority to use military force against adversaries will be the drivers of the anticipated conference negotiations. In addition, House Democrats reluctantly approved a Senate-passed bill to provide $4.8 billion in border aid. Immigration reform remains mostly an untouched third rail among party officials, but the dire humanitarian crisis at the southern border forced Congress to act despite concerns from many House Democrats leading up to the vote.

Progress was also made in June on tax extenders, health extenders, drug pricing, and surprise medical billing legislation, all of which are expected to see further action in Committees and/or on the House or Senate floor in July.

The limited July calendar allows for a narrow window for Congress to move on a number of legislative items before the August recess. In addition to NDAA, the House is expected to consider the Intelligence Authorization Act and legislation to increase the minimum wage, as well as legislation to continue funding of the September 11 Victims Compensation Fund, address arms sales to Saudi Arabia, and bolster election security. The House is also likely to act on a bill to repeal the Cadillac Tax after the bill crossed the 290 co-sponsors threshold for consideration via the new House Consensus Calendar rules. In the Senate, we expect continued confirmation of nominees, possible consideration of several tax treaties approved by the Foreign Relations Committee in June, and, per a statement by Leader Mitch McConnell (R-KY), a vote related to funding for the September 11 Fund.

Additional health care legislation is possible in both chambers in July, depending on progress made by relevant committees.

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UPDATE ON HEALTH CARE COST CONTAINMENT LEGISLATION

Update on Health Care Cost Containment Legislation

Congress continues to move forward with legislation to address surprise medical billing, with further action expected in the House and Senate in the coming weeks. The Senate Health, Education, Labor and Pensions (HELP) Committee marked up its Lower Health Care Costs Act (S. 1895) on June 26. The package, which addresses health care costs broadly, includes sections on surprise billing, drug pricing, and price transparency. The bill adopts a benchmark payment rate approach with respect to determining reimbursement for providers in out-of-network billing scenarios. Specifically, providers would be paid the median in-network rate based on their geographic area. It is expected that the HELP legislation will be combined with a Senate Finance Committee health care costs package, which has yet to be released, and a Senate Judiciary Committee package that was reported out just before the July 4 recess to address intellectual property concerns, such as so-called patent thicketing and product hopping, purported to impact drug prices. Congress will be in session for only a few weeks before the August recess, leaving a small window of time for action on a final Senate package.

The House Energy and Commerce Committee may hold a markup of surprise billing legislation as soon as this week. The Committee held a hearing on the issue on June 12, during which Members from both sides of the aisle expressed concerns with the No Surprises Act released by Chairman Frank Pallone (D-NJ) and Ranking Member Greg Walden (R-OR). Like the HELP Committee's legislation, the bill sets a benchmark payment amount based on the median local in-network rate. Meanwhile, the House Ways and Means Committee has yet to release its own surprise billing proposal, though Health Subcommittee Chairman Lloyd Doggett (D-TX) has expressed strong interest in addressing the issue. During the week of July 15, the Ways and Means Committee is expected to mark up health legislation; although, specific bills have not yet been identified. The House will consider health care cost legislation on the floor during the last week in session before the August recess.

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COMMITTEES READY KEY HEALTH CARE EXTENDERS

Committees Ready Key Health Care Extenders

While Congress continues to debate issues around drug pricing and surprise medical billing, lawmakers are also preparing for action later this year on a number of expiring health care programs and provisions. On June 4, the House Energy and Commerce Committee held a hearing to examine a dozen bills that would extend key programs such as community health centers, the National Health Service Corps, the Certified Community Behavioral Health Clinic demonstration, the Medicare Special Diabetes Program, the Teaching Health Center Graduate Medical Education Program and the Patient-Centered Outcomes Research Institute Trust Fund. The Committee aims to advance the slew of health care "extenders" before the August recess, with floor consideration before the end of the fiscal year on September 30 when these programs expire.

The Committee also considered a bill from Rep. Eliot Engel (D-NY) that would fully repeal scheduled Medicaid Disproportionate Share Hospital (DSH) payment cuts set to take effect on October 1. Outright repeal is a costly approach; however, many on the Committee are instead calling for another two year delay in order to give Congress time to overhaul the DSH formula. Senate Finance Committee Chairman Chuck Grassley (R-IA) is developing his own legislation that could pair a one year delay with changes to the DSH allotments and how they are distributed.

On June 26, the House Ways and Means Committee marked up the Beneficiary Education Tools, Telehealth, and Extenders Reauthorization (BETTER) Act (H.R. 3417), which extends several expiring Medicare provisions. The legislation includes a three year extension of the work Geographic Practice Cost Index (GPCI) floor; additional funding for State Health Insurance Assistance Programs; and an extension of funding for quality measure endorsement, input and selection under the Medicare program.

Meanwhile, the Senate Health, Education, Labor and Pensions (HELP) Committee approved its Lower Health Care Costs Act (S. 1895) on June 26. The legislation includes five year funding extensions for community health centers, the National Health Service Corps and the Teaching Health Center Graduate Medical Education Program.

It is unclear exactly how Congress will address all of the health care extenders, but it is likely they will be incorporated into a larger health care package or other moving legislative vehicle following the August recess.

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TO SEND THE BILL OR NOT TO SEND THE BILL, THAT IS THE USMCA QUESTION

To Send the Bill or Not to Send the Bill, that is the USMCA Question

The passage of the United States-Mexico-Canada Agreement (USMCA), one of the Trump administration's top trade priorities, enters a make-or-break window starting today, July 9. Under the Trade Promotion Authority (TPA), this is the earliest date that the President can submit an implementing bill to Congress, an action that triggers a 90-session day countdown to up-or-down votes in the House and Senate (see timeline here). However, if the administration sends Congress the bill before it is welcome by Speaker Nancy Pelosi (D-CA), she may choose to turn off the TPA countdown clock by amending the House rules, a maneuver that in 2008 effectively stalled passage of a free trade agreement with Colombia for three years.

Speaker Pelosi has made clear that the bill will only have her support when the priorities identified by House Democrats – labor, the environment, access to medicines and enforcement – are sufficiently addressed. In June, Speaker Pelosi assigned eight Members to a working group with pairs of lead negotiators for each of the four priority issues, and the working group met with Ambassador Robert Lighthizer for the first time on June 25 to discuss access to medicines. The administration and Republicans on Capitol Hill are publicly advocating for a vote before the August recess, but this will be difficult to achieve in light of the need for solutions on the House Democratic priorities. Although discussions between the United States Trade Representative (USTR) and House Democrats remain cordial, Rep. Earl Blumenauer (D-OR), Chair of the House Ways and Means Subcommittee on Trade said, it is "not going to happen" when asked about the likelihood of passing the USMCA this summer.

These fraught politics mean that sending the bill to Congress will kick start the battle for the USMCA, but when the administration sends the bill will determine whether that battle is uphill or downhill toward passage.

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CEASEFIRE IN TRADE WAR REACHED WITH CHINA BUT UNCERTAINTY REIGNS

Ceasefire in Trade War Reached with China but Uncertainty Reigns

At a press conference in Osaka, Japan, at the G-20 Summit on Saturday, June 29, President Trump announced the resumption of talks between the United States and China to address U.S. concerns about certain Chinese practices, such as forced technology transfer, and China's concerns about the U.S. tariffs that were imposed in response to such practices. The President's announcement followed an 80 minute meeting with President Xi Jinping, which was the first meeting between the leaders since December 2018. "We discussed a lot of things, and we're right back on track," President Trump told reporters. Since the President's announcement, negotiators from the United States and China have restarted regular communications. A delegation from the United States is expected to travel to China in the near future.

First, the President pledged that while the talks continue the United States would not move forward with the proposed tariffs on $300 billion of imports from China included on List 4. However, existing additional tariffs on $250 billion of imports from China on Lists 1, 2 and 3 will remain in place. In addition, the President said the United States would ease sanctions on Chinese technology company Huawei, which had been a key ask of President Xi. Although the details have not yet been released, President Trump said that U.S. companies would be allowed to sell products to Huawei that are unrelated to U.S. national security concerns. Last, President Trump also said that China agreed to buy a "tremendous amount" of American food and agricultural products, though details on amounts and specific commodities have not been shared yet either. Significantly, no deadline for the resumed talks was announced, leaving the negotiation open-ended and uncertain but also relieving the pressure that comes with a hard end date.

The key elements that must still be negotiated between the countries include: (1) how China would implement changes in its own laws and regulations to protect intellectual property and refrain from unfair trade practices like forced joint ventures; and (2) the schedule for removing the remaining tariffs that President Trump has placed on Chinese exports to the United States.

With Lists 1, 2 and 3 still in place, the exclusion request process continues to be an important avenue for seeking tariff relief. On June 24, USTR published a Federal Register Notice outlining the process for requesting exclusions from List 3 and launched a new web portal (http://exclusions.ustr.gov) for interested parties to request an exclusion and get information about pending requests. Exclusion requests for List 3 may be submitted until Monday, September 30, 2019. If granted, exclusions will apply retroactively to the date the tariff took effect, but will expire after one year from the date USTR grants the request. According to the notice, "responses to individual exclusion requests are due 14 days after the request is posted on USTR's online portal. Any replies to responses to an exclusion request are due the later of seven days after the close of the 14 day response period, or seven days after the posting of a response." The USTR will periodically release the exclusions as they make their determinations. To date, only about 20 percent of the more than 10,000 exclusion requests for List 1 have been granted with over 2,000 requests still under review. And nearly 3,000 requests have been made on List 2 but none have been granted and over 1,600 are still under review.

While the announced truce was undoubtedly a positive development for companies with imports on proposed List 4, the threat of tariffs still looms, and the tariffs in place still impact supply chains with likely little relief until a deal addressing the underlying issues can be reached.

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FINANCIAL SERVICES UPDATE

Financial Services Update

Some things never change. This summer the House and Senate will continue to debate reauthorizations of the Terrorism Risk Insurance Act (TRIA), the Export-Import Bank (EXIM), and the National Flood Insurance Program (NFIP). All three of these programs share the unfortunate trait of running into expirations or short-term straight-line reauthorizations. NFIP is in a short-term extension that lapses on September 30. The good news for the EXIM is that, having finally broken the nomination logjam in the Senate, the bank finally has a quorum. The bad news is that its current authorization also expires at the end of September. By comparison, TRIA is in fairly good shape, with the program authorized through the end of 2020.

If past is prologue, the calendar will dictate the pace of Congressional resolution of these programs. In other words, reauthorization will only occur when expiration is looming. Still, Congress is preparing for these debates. In June, the Senate Committee on Banking, Housing and Urban Affairs held a hearing on TRIA. Committee Chairman Mike Crapo (R-ID) stated that the Committee has started meeting with key stakeholders and is exploring whether there are additional balanced reforms to improve the program and reduce taxpayer exposure without having a material negative effect on the cost and take-up rates for terrorism coverage. Overall, there was bipartisan agreement that that TRIA has been successful program, one that remains crucial to the continued stability of the property terrorism insurance market. While TRIA has never been utilized, in large part to the billions spent on counter-terrorism activities designed to prevent another large-scale attack, there is support for continuing the program to ensure the U.S. economy could recover quickly and in orderly fashion if needed.

In May, the Senate confirmed Kimberly Reed to be President and Chairwoman of the EXIM. Chairwoman Reed committed to focusing on strong standards of conduct, increased transparency, sound risk management practices, and eliminating fraud and abuse at the Bank.

The Senate Banking Committee also held a hearing on reauthorizing the EXIM, where they discussed changes to promote small- and medium-sized businesses, while continuing to ensure minimal risk to the American taxpayer. House Financial Services Committee Chairwoman Maxine Waters (D-CA) and Ranking Member Patrick McHenry (R-NC) negotiated a bill that would reauthorize the bank for seven years and expand its potential supply of loan guarantees for foreign buyers of U.S. goods. However, Chairwoman Waters has temporarily postponed a planned markup of the legislation after a number of committee Democrats raised concerns about the legislation due to its proposed restrictions on bank subsidies for sale to Chinese state owned enterprises as well as the lack of stricter environmental considerations required of its energy portfolio. Ranking Member Patrick McHenry (R-NC), and Senator Tom Cotton (R-AR) have also committed to limits on transactions with Chinese state owned enterprises.

In a moment of bipartisan legislative comity, the House Financial Services Committee unanimously approved a five year reauthorization of NFIP. This is among the most parochial of issues that Congress deals with on a regular basis, and the fate of a long-term reauthorization, instead of yet another short-term extension, lies with the ability of members from flood-prone states and districts to negotiate with those who would like to see more market-oriented reforms to the program.

As the 2020 presidential election unfolds, the need to pay for newly proposed programs is requiring a growing list of revenue offsets. Among the latest is the proposal of Senator Bernie Sanders (D-VT) that would enact a financial transactions tax (FTT) that would finance his plan to pay off existing college debt and make future public college tuition free. Specifically, the tax plan would include a 0.5 percent fee on all stock trades, a 0.1 percent fee on all bond trades, and a 0.005 percent fee on all derivatives trades. This proposal takes its place among other revenue increases that would impact the financial services community – Senator Elizabeth Warren's (D-MA) wealth tax; Senator Ron Wyden's (D-OR) mark-to-market on unrealized capital gains; and numerous proposals that would increase the corporate rate beyond the 21 percent set by TCJA.

Finally, eyes are on the House Financial Services and Senate Banking Committees as they receive Federal Reserve Chairman Jay Powell's semi-annual Humphrey Hawkins testimony. In addition to guidance on the overall state of the economy, Members will likely express their interest in the Fed's participation in enacting the administration's deregulatory agenda.

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TAX UPDATE

Tax Update

Legislation:

Congress sent the most meaningful Internal Revenue Service (IRS) reform in two decades to the President's desk in June, and President Trump signed it into law on July 1. The bill's passage was temporarily delayed by a controversial provision codifying the IRS's "free file" program for low- and middle-income taxpayers, but the provision was eventually stripped from the package and the final bill passed the House and Senate by voice vote. Among other things, the new law puts into place an independent IRS appeals process, bars the agency from referring certain low-income taxpayers to private debt collectors and mandates that by October 2020 the IRS submit a detailed reorganization plan to Congress.

The House Ways and Means Committee moved on a number of tax bills on June 20, including their opening salvo in the tax extenders debate. The Committee approved four bills: the Taxpayer Certainty and Disaster Tax Relief Act of 2019, the Economic Mobility Act of 2019, the Child Care Quality and Access Act of 2019 and the Promoting Respect for Individuals' Dignity and Equality (PRIDE) Act of 2019. The tax extenders bill renewed the currently expired provisions, and extenders that expire at the end of 2019, through 2020 and offered tax breaks to disaster victims. The other bills expanded the earned income tax credit and made the child tax credit fully refundable, and permitted same-sex married couples to amend their filing status for income tax returns outside of the statute of limitations. While the PRIDE Act passed by voice vote, the other measures were generally party line votes while several Democrats expressed concerns with the cost of the overall package. Chairman Richard Neal (D-MA) framed the effort as an attempt to move the extenders debate to the "negotiating stage."

Meanwhile, the five Senate Finance Committee tax extenders "task forces" continued their work in June with several having written submission deadlines and stakeholder meetings. The task force members are charged with evaluating the temporary tax provisions in their jurisdiction, including feedback from other Senate offices and stakeholders. The task force must then report back to the Committee by mid-July with a possible solution to provide more certainty, which may include a recommendation to make a provision permanent, to allow it to expire or something in between such as a phase-out or modification. Senate Finance Committee Chairman Chuck Grassley and Ranking Member Ron Wyden introduced legislation earlier this year that would renew all of the tax provisions that expired at the start of 2018 through the end of 2019.

Regulations:

June was a busy month at the Treasury Department as work writing regulations implementing the Tax Cuts and Jobs Act continued. Final Regulations implementing new limits around the state and local tax deduction, anti-abuse rules pertaining to the international system's 245A deduction and rules implementing the Global Intangible Low-Taxed Income (GILTI) provisions were all released prior to the June 22 deadline to issue retroactive regulations. Proposed rules were released for cooperatives and their patrons using the new small business (199A) deduction, for an exception to the GILTI tax for income that is earned in high tax jurisdictions and for the new levy on college endowments. Among others, rules governing the new 163(j) interest expense limitation, the Base Erosion and Anti-abuse Tax and the Foreign Derived Intangible Income deduction are all slated to be finalized before the end of the year.

Tax Treaties:

The Senate Foreign Relations Committee cleared four long-stalled tax treaties in June, setting up for potential floor debate in July. The treaties–with Switzerland, Spain, Japan, and Luxembourg–all passed by voice vote. However, Sen. Rand Paul (R-KY), who has been blocking the treaties for years due to privacy concerns, has said that he would not allow the treaties to proceed on the floor via unanimous consent. Three treaties–with Hungary, Poland, and Chile–are still held up at the Committee due to potential changes needed due to the Tax Cuts and Jobs Act's Base Erosion and Anti-Abuse Tax.

Presidential Debates:

A variety of tax policy ideas were discussed during the first two Democratic presidential debates, from Sen. Kamala Harris (D-CA) saying she wanted to totally repeal the Tax Cuts and Jobs Act, to entrepreneur Andrew Yang's idea for a 10 percent value added tax to pay for universal basic income, to multiple candidates advocating for carbon taxes and dividends. Sen. Bernie Sanders (D-VT) announced just prior to the debates that he would advocate for a financial transactions tax to pay for erasing all student loan debt and has previously floated a wealth tax to pay for universal health care.

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PRIVACY NEGOTIATIONS STALL IN THE SENATE

Privacy Negotiations Stall in the Senate

As the window continues to close for a privacy agreement before the August recess, the Senate's Gang of Six (Sens. Roger Wicker (R-MS), Jerry Moran (R-KS), John Thune (R-SD), Maria Cantwell (D-WA), Brian Schatz (D-HI) and Richard Blumenthal (D-CT)) have temporarily paused privacy negotiations, cancelling their meeting on June 26. Ranking Member Cantwell now reportedly aims to negotiate directly with Chairman Wicker. Members of the group, including Chairman Wicker, remain optimistic that the August timeline is still possible. Meanwhile, Sen. Moran has contemplated dialogue with key lawmakers on the House side in order to enhance the Senate working group's efforts thus far.

June featured the introduction of the following privacy-related bills:

- Reps. Anna Eshoo (D-CA) and Zoe Lofgren (D-CA) teamed up to draft the Online Privacy Act of 2019. The pair recently released a draft framework of the legislation and have solicited feedback from stakeholders on the framework, which is due by July 12, 2019. For more information on the legislation, please visit Akin Gump's summary of the framework here.
- On June 24, Sens. Josh Hawley (R-MO) and Mark Warner (D-VA) unveiled the DASHBOARD Act, which would require companies with over 100 million monthly active users to disclose to each consumer how much data they have collected from them and how much this data is worth. The legislation would also mandate an annual report on the aggregate value of a company's data collection activities and grant users the right to deletion for all data collected.
- On June 14, Sens. Amy Klobuchar (D-MN) and Lisa Murkowski (R-AK) introduced the Protecting Personal Health Data Act, which would require the Department of Health and Human Services to implement regulations for new health technologies. The bill would ensure that the regulations account for differences in sensitivity between genetic data, biometric data and general personal health data, while also granting consumers the ability to access, amend and delete copies of their personal health data.

On June 25, the Senate Commerce, Science and Transportation Committee held a hearing on tech companies' use of Internet algorithms. During the hearing, Sen. Deb Fischer (R-NE) discussed her introduction of the DETOUR Act and she raised concern about how platforms are accessing personal information. Witnesses emphasized the importance of a platform's business model, noting that companies such as Facebook pose the question of how they can provide users with a free service without using data. They also asserted that the business model for data collection should change to a fiduciary role.

The Senate Banking, Housing, and Urban Affairs Committee held a hearing on June 11 to assess the impact of data brokers on financial data privacy, credit, insurance, employment and housing. Chairman Mike Crapo (R-ID) expressed concern about government agencies and private companies collecting an increasing amount of personally identifiable information (PII), and Ranking Member Sherrod Brown (D-OH) noted that many consumers do not have power over their personal information, as data brokers often sell the information to other firms.

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NATIONAL DEFENSE AUTHORIZATION ACT UPDATE

National Defense Authorization Act Update

On Thursday, June 27, the Senate voted 86 to 8 to approve its version of the Fiscal Year (FY) 2020 National Defense Authorization Act (NDAA). The measure authorizes a total of $750 billion in FY2020 funding for national defense-related activities.

The Senate version supports a modern military to ensure the U.S. maintains its comparative combat advantage and prioritizes strategic competition to address central challenges facing U.S. national security and prosperity. The bill prioritizes investments in research and engineering for the purposes of maintaining technological advantages through innovation. The legislation supports science and technology efforts critical to implementing the National Defense Strategy, particularly in the areas of artificial intelligence (AI), quantum sciences, 5G, cyber and university research, among other areas. The Senate NDAA strengthens Department of Defense efforts to develop and deploy AI systems and research in support of national security in a number of critical defense areas and extends the National Security Commission on AI. Additionally, the bill highlights the importance of establishing secure 5G wireless network technologies for the warfighter.

The House plans to take up its version of the bill in the near future. The NDAA approved by the House Armed Services Committee in June would authorize $733 billion, slightly less than the Senate.

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ARTIFICIAL INTELLIGENCE UPDATE

Artificial Intelligence Update

House Science, Space, and Technology Committee leaders announced that they are preparing to craft legislation to support a national strategy on Artificial Intelligence (AI). Chairwoman Eddie Bernice Johnson (D-TX) supports increasing government investment in AI, including thoughtful ethical consideration to reassure U.S. leadership in international standards-setting. Rep. Jim Baird (R-IN), the top Republican on the Subcommittee on Research and Technology, believes the Committee must reconcile how industry, academia and the government can collaborate on AI challenges, including the role of ethical and societal boundaries.

Moreover, the full House recently approved an appropriations amendment introduced by Rep. Don Beyer (D-VA), a member of the Science, Space, and Technology Committee, that would require the National Science Foundation to assess and report to Congress on the societal impact of artificial intelligence research it funds.

Rep. Beyer’s amendment was approved amidst a time when concern regarding the ethical implications of AI is growing. For example, on June 26, the congressional Task Force on AI convened a hearing entitled, “Perspectives on Artificial Intelligence: Where We Are and the Next Frontier in Financial Services”. Members of the Task Force agree that the financial services industry is facing a period of rapid disruption and innovation with AI at its forefront. The hearing centered on addressing the challenges present to the financial industry including needed regulations and guardrails, unintentional AI discrimination in algorithmic design, job displacement and malicious use of AI.

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Confidential Commerical or Financial Information is Exempt From FOAI

The Supreme Court held that the ordinary meaning of “confidential”—used at the time Congress enacted the Freedom of Information Act (FOIA) in 1966—should control its meaning. Where commercial or financial information is treated as private by its owner and provided to the government under an assurance it will be kept confidential, the information is exempt from disclosure under FOIA Exemption 4. Click here for more information.

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