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Data Localization and the TPP: Financial Institutions Beware

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After five years of negotiations, the Trans-Pacific Partnership (TPP) Agreement was finally signed in early February 2016 in Auckland, New Zealand. The TPP, which President Obama describes as a strategic "pivot" toward Asia, is a trade pact covering 40 percent of the world's economy and provides a common set of standards for the signatories on various trade issues, including where data must be stored in order to conduct business in the various territories. The TPP was signed by the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

While U.S. ratification of the TPP is unlikely before the election, the agreement's e-commerce provisions should give financial institutions some pause. These provisions are meant to simplify cross-border transfers of electronic information and prevent the "forced localization," as couched by the U.S. Chamber of Commerce, of computing facilities. In this instance, "forced localization" refers to requiring local computing facilities to be used in a territory as a condition for conducting business there. But the TPP carves out a large exception to the commerce-friendly provisions for the financial industry. The end result is that financial institutions may instead be subject to rules actually *requiring* local computing in order to conduct business in a state or territory. The TPP goes on to say that TPP states or territories are required to allow the cross-border transfer of information by electronic means, **except if that transfer is for a financial institution.**

The exclusion of financial institutions in measures designed to facilitate global trade is of great concern. There appears to be a limit in the TPP on the ease with which financial institutions are allowed to engage in global commerce. Given the importance of transferring electronic data across borders, these exceptions, depending on how they are ultimately interpreted and implemented, may prove to be quite suffocating for U.S. financial institutions.

Since President Obama was granted fast-track authority to negotiate the TPP in the first place, Congress will have no voice to amend the TPP. Fast-track authority requires Congress to approve or reject a trade agreement without any amendments. Thus, Congress's approval will have a serious impact on U.S. lending institutions. Accordingly, all U.S. financial institutions that are or may seek to do business with TPP states or territories should stay apprised of the TPP's status. Indeed, this past March, Treasury Secretary Jacob Lew left open the potential for a helpful side agreement in response to the financial services industry's concerns about the data flow rules.