Daily News

Treasury Floats Financial Services Data Fix For TPP, Legal Text To Come

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Updated: The Obama administration has briefed financial services firms and congressional committees on how it plans to address their complaints about the Trans-Pacific Partnership agreement's failure to cover the sector in a ban on local data storage requirements, according to informed sources.

The proposal would apply to future trade agreements and not change TPP, nor would the administration seek a side letter to the TPP deal, these sources said. The industry had initially advocated for a side letter to TPP.

The proposal was verbally described by administration officials to industry representatives and congressional aides earlier this week. It would prohibit U.S. and foreign regulators from imposing barriers to cross-border data flows and data localization requirements on financial services firms, sources said.

But that prohibition would have an exception if regulators could prove that they cannot gain access to firms' data they need for legitimate regulatory and supervisory functions, they said.

Under the proposal, regulators would have to undertake a number of procedural steps before they could impose a localization requirement, such as giving a firm the opportunity to supply them with the needed data.

It also would require a notice and comment process before a regulator could issue a regulation imposing a data localization requirement. The commitments laid out in the proposal would be backed by state-to-state dispute settlement.

Financial services industry sources said they see this as a strong step by the administration, though they caution they have not seen agreement text. These sources said they expect that in a matter of weeks.

“When incorporated into binding international agreements, I believe this new approach will provide relief from data protectionism while giving governments the access to data they need for legitimate regulatory and supervisory functions," said Stephen Simchak, director of international affairs at the American Insurance Association.
“I am looking forward to continuing the discussion on incorporating these provisions into binding international agreements,” he said. According to Simchak, there has been a growing trend of foreign governments around the globe forcing the localization of data storage or restricting data transfer.

Another industry source said the administration's willingness to address the industry's complaints is a clear indication that it believes there is a chance TPP can come up for a vote this year. That is the only reason the administration went through the internal deliberations that led to the proposal, the source said.

U.S. Trade Representative Michael Froman said in an e-mailed statement that this proposal will help build momentum for consensus in other areas of TPP. “It shows that when we dig into the details with stakeholders and members of Congress we can find common ground approaches that satisfy a range of priorities,” he said. “As we continue our collaborative work on how TPP will be implemented and enforced, we expect the already strong support for TPP to continue to grow. "

The administration's hope for a TPP vote this year is shared by some TPP supporters. But other pro-TPP lobbyists seem resigned to the fact that TPP may not come up for a vote this year given the overwhelmingly negative political atmosphere.

For example, the U.S. Chamber of Commerce on May 25 made clear it is not expecting a vote on TPP when it urged the next president of the United States to pursue pro-trade policies starting with the approval of the TPP and the Transatlantic Trade and Investment Partnership (TTIP).

“Signed earlier this year, the [TPP] deal still requires approval from Congress, and it may very well need a major push from you to get it over the finish line,” the Chamber said in an open letter. It is addressed to “dear 45,” which is a reference to the forty-fifth president of the United States.

The administration intends to insert the provisions it has floated into ongoing and future negotiations. The ongoing negotiations officials cited were the Trade In Services Agreement (TISA), the Transatlantic Trade and Investment Partnership (TTIP) and the U.S.-China bilateral investment treaty (BIT).

The U.S. is pushing for conclusion of the TISA this year, but the TTIP and the China BIT negotiations are lagging and highly unlikely to be finished this year.

However, if the administration succeeds in adding the provision into the TISA, it would reach seven out of 11 TPP members. They are Australia, Canada, Chile, Japan, Mexico, New Zealand and Peru.

U.S. regulators do not impose localization requirements now but sought the TPP language to ensure they could impose them in the future.

To help explain its proposal, the administration has prepared a concept paper that Treasury and the Office of the U.S. Trade Representative have used in congressional briefings.

“The proposal adds a new data localization obligation that broadly prevents a Party from requiring companies to use or locate computing facilities in its territory when the Party's financial regulators have access to information stored abroad,” according to a copy obtained by *Inside U.S. Trade.*

On data transfer restrictions, the proposal “adds a new movement of information obligation, clarifying that a Party may not prevent the cross-border transfer of information for the conduct of business within the scope of the financial services license,” according to the concept paper

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A NEW APPROACH TO DATA LOCALIZATION AND FINANCIAL SERVICES

Background

Our trade and investment agreements currently prohibit restrictions on the transfer of financial information abroad for data *processing*, but do not expressly prohibit data localization measures that require local data *storage* for financial services companies. Over the last few months, Treasury and USTR have worked to develop a new approach for addressing concerns about the treatment of financial services under data localization obligations in our trade and investment agreements through extensive consultation with U.S. financial regulators, as well as feedback from Congress and stakeholders. Treasury and USTR have been working to balance two important policy objectives: eliminating protectionist and trade-distorting data localization measures imposed by foreign governments in the financial services sector and ensuring that U.S. financial regulators have access to the information they need for regulatory and supervisory purposes. Below is a summary of the Administration's new proposal that would be used for ongoing and future negotiations, such as the Trade in Services Agreement, the Transatlantic Trade and Investment Partnership with the EU, and the U.S.-China Bilateral Investment Treaty. This proposal goes further than any previous U.S. trade or investment agreement in seeking to ban data localization requirements for financial services.

Summary of Proposed Framework for Ongoing and Future Negotiations

1. **Broad Prohibition on Data Localization Requirements.** Measures requiring local data storage or processing will be prohibited when financial regulators have access to information stored abroad.

    - The proposal adds a new data localization obligation that broadly prevents a Party from requiring companies to use or locate computing facilities in its territory when the Party's financial regulators have access to information stored abroad.

2. **Broad Prohibition on Data Transfer Restrictions.** Restrictions on the transfer of information by electronic or other means will be prohibited.

    - The proposal adds a new movement of information obligation, clarifying that a Party may not prevent the cross-border transfer of information for the conduct of business within the scope of a financial services license.

3. **Process to Address Data Access Concerns with Regulators.** Financial regulators concerned about access to information stored abroad will be required to provide companies with the opportunity to engage with them before imposing data localization measures.

    - A Party must in the course of its rulemaking procedures provide companies an opportunity to comment before adopting a regulation imposing data localization.

    - A Party must also provide a company with the opportunity to address potential concerns about access to information before the Party imposes a data localization requirement on that company.

4. **Enforcement through State-to-State Dispute Settlement.** The United States can hold our trading partners accountable for any failure to comply with these obligations through binding state-to-state dispute settlement.