

# UPDATE: USITC to Investigate Censorship as a Non-Tariff Barrier to Trade

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**UPDATE:** On May 6, 2021, following a request from the U.S. Senate Committee on Finance, the U.S. International Trade Commission (ITC) announced that it was instituting a second investigation into foreign censorship (*Foreign Censorship Part 2: Trade and Economic Effects on U.S. Businesses*, Inv. No. 332-586) and accelerating the comment and hearing schedule for the first investigation (*Foreign Censorship Part 1: Policies and Practices Affecting U.S. Businesses*, Inv. No. 332-585). On January 26, 2021, the ITC announced that it would initiate a new factfinding investigation, "Foreign Censorship: Trade and Economic Effects on U.S. Businesses," on the effects of foreign censorship policies and practices on business in the United States.

The ITC invites the public to submit comments in both investigations. Written comments in the first investigation are now due no later than 5:15 p.m. on **July 22, 2021**. These comments should cover foreign censorship policies and practices that U.S. businesses believe impede trade or investment in foreign markets; details of how such policies have evolved in the last five years, including instances of extraterritorial censorship; and, qualitative analysis of the trade and economic effects of such policies on U.S. businesses. Written comments in the second investigation are due no later than 5:15 p.m. on **January 14, 2022** and should cover the foreign censorship's qualitative and quantitative impact on employment, direct costs, foregone revenue and sales, "self-censorship," and other relevant factors.

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## Practice Areas

Digital Trade

International Trade

Telecom, Media & Technology

The ITC will hold a virtual, joint hearing for both investigations at 9:30 a.m. on **July 1, 2021**. Requests to appear at the hearing should be filed no later than 5:15 p.m. on **June 17, 2021**.

Reports for the first and second investigations are anticipated on December 30, 2021 and July 5, 2022, respectively.

For additional information regarding opportunities to participate, please contact one of the attorneys listed on this alert.

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On January 4, 2021, Senator Chuck Grassley (R-IA) filed a request with the U.S. International Trade Commission (ITC) for a Section 332 investigation on censorship as a non-tariff barrier to trade. The request follows a June 30, 2020 Senate Finance Committee hearing on the issue. While Section 332 investigations are general factfinding proceedings and do not directly result in any formal trade actions, this request from the Chairman of the Senate Finance Committee could represent a significant development in U.S. trade policy. A formal shift towards treating censorship as a trade barrier could have wide-ranging implications for industries like social media, film, news, and traditional publishing.

Senator Grassley's request asks the ITC to identify and describe "various foreign censorship practices, in particular any examples that U.S. businesses consider to impede trade or investment in key foreign markets," and to analyze "the trade and economic effects of such policies and practices on affected businesses in the United States." While it does not single out any particular country, it is likely targeted primarily at China, whose censorship regime, including the "Great Firewall" and strict controls on distribution of foreign films, publications, and other audiovisual products has been a perennial source of commercial and political tension.

The United States has historically avoided direct trade-related challenges to censorship regimes, including China's, in order to separate economic issues from human rights issues. Over the last decade, however, the distinction has become increasingly untenable in the wake of high-profile events like Google's formal withdrawal from the Chinese market in 2010. The 2010 annual report of the Congressional-Executive Commission on China, for example, noted that "the controversy between the Chinese government and the U.S. company Google highlighted the potential for China's censorship requirements to serve as a trade barrier and to cause companies to stop providing services to Chinese citizens, further limiting the free flow of information." Beginning in 2016, the U.S. Trade Representative's National Trade Estimate report highlighted China's Great Firewall as a "significant burden" to cross-border suppliers of Internet content. While the WTO has not addressed censorship regimes directly, the Appellate Body has ruled that Chinese restrictions on trading rights for audiovisual products could not be justified under the "public morals" provision in Article XX (a) of the General Agreement on Tariffs and Trade.

Upon formal institution, the ITC will hold a public hearing and solicit written comments from interested parties. For additional information regarding opportunities to participate, please contact one of the attorneys listed on this alert.

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*Nicole Hager, a Law Clerk at Wiley Rein LLP, contributed to this alert.*