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NEWSLETTER

Election Law News

May 2020

Show Me the Money ... or Property: SCOTUS Overturns 'Bridgegate' Convictions

By Robert L. Walker, Brandon J. Moss, and Vesna K. Harasic-Yaksic

On May 7, the United States Supreme Court released a unanimous opinion overturning the convictions of two New Jersey officials involved in the "Bridgegate" scandal on grounds that "not every corrupt act by state or local officials is a federal crime." In finding that the scheme could not have violated federal-program fraud or wire fraud laws because it was not aimed at obtaining money or property, the Court struck another blow against prosecutors attempting to shoehorn politically motivated exercises of regulatory power into federal fraud statutes.

In *Kelly v. United States*, appellant defendants Bridget Anne Kelly and William Baroni sought

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Under Cover of Darkness and Crisis, Apparent Attempt to Revive Unconstitutional New York 501(c)(3) and 501(c)(4) Reporting Laws

By Carol A. Laham and Eric Wang

Amidst the throes of the COVID-19 pandemic, a little-noticed and opaque provision was slipped at the last minute into New York State's recently passed massive omnibus budget bill. The legislation, which was signed into law at the beginning of April, may breathe new life into onerous and complex reporting requirements for certain Section 501(c)(3) and 501(c)(4) entities

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to overturn their prior convictions for wire fraud, fraud on a federally funded program or entity, and conspiracy to commit the same, in association with the Bridgegate scandal. Ms. Kelly, as New Jersey Governor Chris Christie's Deputy Chief of Staff, and Mr. Baroni, the Port Authority Deputy Executive Director, concocted a plan to punish the mayor of Fort Lee, NJ, for his refusal to endorse Governor Christie. That scheme involved reducing, from three to one, the number of lanes reserved at the George Washington Bridge's toll plaza for Fort Lee's morning commuters. They created a cover story that the closures were related to a traffic study and asked Port Authority traffic engineers to collect data. Predictably, the changes resulted in four days of gridlock in Fort Lee. Mr. Baroni never asked to review what the study engineers found, and only learned of the results weeks later (when a journalist filed a public records request). As such, although the Port Authority engineers spent valuable time assessing the lane change, their work was never utilized in policy decisions.

Writing for the Court, Justice Kagan wrote that while "the evidence the jury heard no doubt shows wrongdoing – deception, corruption, abuse of power ... the federal fraud statutes at issue do not criminalize all such conduct." In particular, the statutes – 18 U.S.C. Sections 1343 and 666(a)(1)(A) – both target fraudulent schemes for obtaining money or property. Unless the object of the defendants' scheme was to obtain the Port Authority's money or property, they could not have violated those specific crimes. The government took the position that the schemes did just that, as the defendants sought to "commandeer" the bridge lanes and divert the wage labor of the Port Authority employees used in that effort. Both theories, it argued, involved the defendants targeting valuable rights or interests that constituted "property" under the fraud statutes. The Court disagreed, however, as "the realignment of the toll lanes was an exercise of regulatory power" and a "scheme to alter such a regulatory choice is not one to appropriate the government's property." Further, the employees' labor was just the incidental cost of implementing that regulation, not the object of the scheme. Indeed, the Court even took issue with the government's assertion that the defendants "commandeered" the lanes, noting that they "did not walk away with the lanes; nor did they take the lanes from the Government by converting them to a non-public use." Instead, the defendants "exercised the regulatory rights of allocation, exclusion, and control" albeit "for bad reasons" and "by resorting to lies."

This is not the first time the Court has stressed statutory money or property requirements in limiting prosecutors' ability to criminalize all acts of dishonesty by state and local officials. *In McNally v. United States*, 483 U.S. 350 (1987), the Court ruled that the fraud statutes were "limited in scope to the protection of property rights" and did not authorize federal prosecutors to "set[] standards of disclosure and good government for local and state officials." More recently, the Court adopted a "limiting construction" of the Honest Services Fraud Statute, 18 U.S.C. Section 1346 (enacted in 1988 in response to the Court's decision in *McNally*). On its face, Section 1346 bars fraudulent schemes "to deprive another of the intangible right of honest services" regardless of whether the scheme sought to divest the victim of any property. But in *Skilling v. United States*, 551 U.S. 358 (2010), the Court ruled the statute vague and confined it to schemes involving bribes and kickbacks and rejected the proposition that it should be construed as prohibiting all "undisclosed self-dealings by a public official." In short, as Justice Kagan reiterated in *Kelly*, "save for bribes and kickbacks ... a state or local official's fraudulent schemes violate th[e] law only when ... they are for obtaining money or property."

This ruling adds to the Roberts Court's growing body of public corruption jurisprudence – which also includes *McDonnell v. United States* – and further raises the bar for prosecutors trying to apply federal fraud laws to amorphous political schemes. It also raises questions about how the Court might view cases like those associated with the college admission scandal, where the defendants allegedly

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operating in the state. Late last year, a federal court had struck down broader requirements as being unconstitutional.

As *Election Law News* has reported on previously, at issue are two reporting requirements that were first enacted in the wee hours of the morning in June 2016. First, Section 501(c)(4) entities that spend more than $10,000 in a calendar year on certain issue advocacy "covered communications" were subject to new reporting requirements. The reports were required to publicly identify any donors who gave $1,000 or more to the entity.

Second, if a Section 501(c)(4) entity triggers a requirement to identify its donors on New York State lobbying reports (which are separate from the "covered communication" reports), then Section 501(c)(3) entities that provide certain "in-kind" support to the Section 501(c)(4) entity were required to file new reports of their own. Such reports were required to publicly identify the Section 501(c)(3)'s own donors.

As *Election Law News* reported last November, a federal district court struck down both of these provisions for being unconstitutionally overbroad and invasive to donor privacy. With respect to the reporting requirement for Section 501(c)(4) entities, the court took issue with the law's broad regulation of "pure issue advocacy." The court held that prior cases upholding campaign finance and lobbying reporting laws could not justify New York's more sweeping reporting requirements. With respect to the reporting requirement for Section 501(c)(3) entities, the court held that any interest the state had in requiring a Section 501(c)(4) entity to identify its donors on lobbying reports was too attenuated to also extend to a Section 501(c)(3) entity providing in-kind support to the 501(c)(4) entity.

The omnibus budget bill, which, like the 2016 law, was also passed in the wee hours of the morning, amends the "covered communications" definition for Section 501(c)(4) entities. Under the amended definition, communications will no longer be regulated if they discuss issues that could be the subject of "potential legislation" – a provision the court had found particularly broad and objectionable. However, communications that "advocate[] for or against" any "elected official, executive or administrative or legislative body relating to ... any proposed legislation, pending legislation, rule, regulation, hearing or decision" would still be regulated.

Moreover, instead of requiring Section 501(c)(4) entities to broadly report their donors, the amended reporting requirement only requires identification of donors who "restrict[]" their funds "in whole or in part for the support of the covered communication." It is not entirely clear whether the donor information will be made public by the Department of State, with whom reports are to be filed.

While some language in the bill text suggests donor information on "covered communication" reports will categorically not be made public, other language suggests the agency may withhold donor information only if an exemption is granted based on the likelihood of "harm, threats, harassment, or reprisals" to donors. The bill contemplates implementing regulations to be issued for the donor reporting requirement, and this ambiguity may be clarified by a rulemaking.

With respect to the reporting requirements for Section 501(c)(3) entities that provide in-kind support to Section 501(c)(4) entities, the budget bill eliminates the requirement for the Section 501(c)(3) entity to publicly report its own donors. The bill also slightly broadens the type of in-kind donations provided by a Section 501(c)(3) entity that would trigger reporting. At the same time, the bill increases the threshold at which the value of a Section 501(c)(3) entity's in-kind support triggers reporting from $2,500 to $10,000.

The budget bill also requires Section 501(c)(3) and (c)(4) entities subject to the reporting requirements described above to submit copies of their IRS Form 990 Schedule B donor lists to the New York Department of State – purportedly on a confidential basis. This is in addition to the New York Attorney General's office's preexisting requirement for all Section 501(c)(3) and (c)(4) entities registered for

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acted to obtain non-tangible privileges and benefits. However, in no way should this case be seen as giving blanket protection to all political schemes, as such schemes could run afoul of state or local anti-corruption laws or be targeted at depriving an opponent or an entity of money or property interests. Indeed, Justice Kagan's opinion warns that "a government's right to its employees' time and labor ... can undergird a property fraud prosecution," and cites examples of a mayor using on-the-clock city employees to renovate a daughter's home or a city parks commissioner having employees do gardening for political contributors. In both examples, the entire point of the official's scheme was to obtain the employees' services – it was the object of the fraud, not some "bit part of a scheme."

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Under Cover of Darkness and Crisis, Apparent Attempt to Revive Unconstitutional New York 501(c)(3) and 501(c)(4) Reporting Laws *from page 3*

charitable solicitations in the state to file copies of their Schedule B with that office – **a requirement that was upheld by the U.S. Court of Appeals for the Second Circuit**.

The budget bill further requires the Department of State to examine the reports of in-kind donations by Section 501(c)(3) entities and "covered communications" by Section 501(c)(4) entities for evidence of whether such activities are "inconsistent with the[ir] charitable purposes." The department is required to provide annual reports to the General Assembly and governor on this matter.

Oddly, the bill also appears to require the department to publish on its website the reports of in-kind support and "covered communications" filed by any entity the department determines has acted inconsistently with its "charitable purposes." However, it is unclear what this measure is intended to accomplish, since all such reports are otherwise required to be published on the department's website anyway.

The budget bill's amendments to these reporting requirements recently held to be unconstitutional appear to be an attempt to revive the provisions. It remains to be seen whether the groups that challenged the original law will launch a new challenge, and if so, whether the amendments will survive judicial review this time. Wiley's Election Law Practice will be carefully monitoring any litigation developments as well as agency interpretive guidance and rulemakings that are issued regarding these provisions.

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FEC's Prosecutorial Discretion Considered by Federal Court, Again

By Lee E. Goodman and Jeremy J. Broggi

The U.S. Court of Appeals for the District of Columbia Circuit heard arguments in *Citizens for Responsibility and Ethics in Washington (CREW) v. Federal Election Commission (FEC)* on April 24, 2020. The case involves CREW's challenge to the FEC's dismissal of CREW's complaint against a now-defunct conservative 501(c)(4) organization, New Models, alleging the organization became a "political committee," or PAC, by contributing to several independent super PACs. Because the FEC dismissed for legal reasons "and in exercise of our prosecutorial discretion" the case implicates an important and ongoing dispute in the D.C. Circuit involving the reviewability of the FEC's exercise of prosecutorial discretion when the agency pairs that discretion with substantive legal reasoning.

The Facts

New Models was a tax-exempt social welfare organization established in 2000 as a policy think tank. In its 15 years of operation, New Models never made any independent expenditures. In 2012, New Models made $3.1 million in contributions to several independent super PACs. CREW alleged that these contributions transformed New Models into a PAC, and that New Models had therefore failed to comply with certain registration and ongoing reporting obligations that the Federal Election Campaign Act (FECA) imposes on PACs. New Models argued it was a bona fide social welfare organization whose "major purpose" was the study of public policy, notwithstanding the isolated contributions it made in 2012.

The FEC commissioners voted 2-2 on the issue of whether three isolated super PAC contributions could transform an otherwise bona fide policy think tank to a PAC, resulting in dismissal of CREW's complaint (four affirmative votes are necessary to find "reason to believe" a violation has occurred and open an investigation). The two controlling commissioners issued a **statement of reasons** explaining why they found no "reason to believe" New Models had violated FECA. First, New Models did not become a political committee by making occasional (albeit large) contributions to a super PAC in a single calendar year. Second, and in any event, New Models was a defunct organization and the statute of limitations for civil penalties had long passed. "For these reasons, and in exercise of our prosecutorial discretion," the controlling commissioners voted to dismiss.

CREW sought judicial review of the FEC's dismissal. The district court dismissed based on a **2018 D.C. Circuit decision**, also captioned *CREW v. FEC* (hereinafter "*CHGO*" based on the name of the organization involved in that case), by Senior Judge Randolph, joined by then-Judge Kavanaugh, holding that the FEC's exercise of prosecutorial discretion is unreviewable.

The Law

The D.C. Circuit's 2018 *CHGO* decision applied to the FEC a principle established by the U.S. Supreme Court in the seminal case ***Heckler v. Chaney***. There, the Supreme Court dismissed as "unreviewable" a challenge to a decision by the U.S. Food & Drug Administration that rested on the agency's legal conclusion and its exercise of enforcement discretion. Two years later, the Supreme Court **reaffirmed that decision**, describing as "misguided" the argument "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable."

CHGO applied the *Chaney* presumption to the FEC because it found that "nothing in the [FECA] overcomes the presumption against judicial review" of enforcement decisions. The court concluded that because the controlling commissioners had "placed their judgment squarely on the ground of prosecutorial discretion," the court could not review their decision. The court acknowledged that if the FEC declined to bring the action "based entirely on its interpretation of the statute" that decision would be reviewable, but opined that it would "be mistaken" to "carv[e] reviewable legal rulings out from the middle of non-reviewable actions."

Judge Pillard dissented from the panel decision, and later, from **the D.C. Circuit's order denying rehearing en banc**. She argued that *CHGO* was a departure from the D.C. Circuit's prior practice of reviewing FEC dismissal decisions and not required by *Chaney*.

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The Divide

Earlier this year, a different panel of the D.C. Circuit – comprised of Judge Tatel, Judge Garland, and Senior Judge Edwards – did not decide the reviewability question implicated by *CHGO*. Finding that question "complicated" and the merits straightforward, the panel affirmed the Commission's dismissal on the merits in a **per curiam decision**. Senior Judge Edwards concurred, but **wrote separately** to express his view that *Chaney*'s presumption "do[es] not apply to matters in which a complainant seeks review of Commission actions under the Federal Election Campaign Act." In his view, *CHGO* was mistaken.

CHGO was front and center at oral argument last month in the New Models case. Judge Katsas and Judge Rao pressed CREW's counsel on its theories that *CHGO* had left open the possibility that a decision citing both legal reasons and prosecutorial discretion remained reviewable, and that the agency could not exercise discretion through an evenly divided decision. Judge Millett, by contrast, directed most of her questions to the FEC's attorney, probing potential defects in the substantive legal reasons given by the controlling commissioners and the ambiguity around the influence of those legal grounds on the exercise of enforcement discretion.

The decision in the New Models case, expected this summer, may provide additional clarity on the application of *CHGO* to FEC dismissals that pair an exercise of prosecutorial discretion with legal reasoning. It may also sharpen the philosophical division on the D.C. Circuit. So far, the more conservative judges have tended toward the traditional rule that enforcement decisions are unreviewable even when they rest in part on an assessment of the legal merits. The more liberal judges, on the other hand, appear to prefer a rule that would permit courts to review nearly all enforcement dismissals, at least at the FEC where dismissals by nature tend to be deregulatory and are often decided by evenly divided votes of the six-member Commission.

It remains to be seen whether the en banc D.C. Circuit will take up these issues and, if it does, how they will be decided. While no other judge joined Judge Pillard's dissent from denial of rehearing en banc in *CHGO*, Judge Wilkins indicated that he **would have reheard the case**, and Judge Griffith wrote to express **his view** that it would be worth considering these issues more fully "in the right case." The developments this year, likewise, suggest that the issue may not be fully settled.

In the absence of additional clarity, it seems that the best way for a group of controlling commissioners to ensure that a decision based on prosecutorial discretion is not reviewed is to make explicit in their statement of reasons that the exercise of discretion is independent of the substantive legal merits. Respondents before the FEC, in turn, should be prepared to equip the agency with the reasons why discretion is appropriate apart from the merits of the case, and then be prepared to pursue those reasons in district court and, if necessary, to the D.C. Circuit.

The case number in *CREW v. FEC* (New Models) is No. 19-5161.

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Deadline Extensions for Lobbying Filings Due to COVID-19

By Brandi L. Zehr and Hannah J. Miller

Jurisdictions across the country are postponing filing deadlines due to the COVID-19 pandemic.

For example, Illinois has extended the deadline for the lobbyist employer monthly expenditure report from May 20 to August 18. Connecticut has also extended the deadline for the monthly Client Lobbyist Financial Report from May 10 to July 10.

In March, New York extended the deadline for all lobbyist filings to April 15; however, at time of writing, the state has not announced further deadline extensions.

While not extending deadlines for all filers, the California Fair Political Practices Commission (FPPC) announced in an April 10 press release that it would consider documented obstacles to timely filing of lobbying reports due to the COVID-19 pandemic as a mitigating factor in decisions to bring enforcement actions.

These extended deadlines should not be used absent extenuating circumstances. The reports will all eventually be due, and accuracy is most likely when the reporting information is newest in mind. Further, filers should not assume that deadlines have or will be extended and should check with each jurisdiction.

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Wiley Updates Its Essential FARA Handbook for 2020

Wiley has updated its indispensable handbook on the Foreign Agents Registration Act (FARA). A long-standing disclosure statute, FARA seeks to ensure that all persons engaged in certain covered activities within the United States – on behalf of foreign entities and foreign persons – properly disclose their activities to the U.S. government.

This handbook provides a general overview of FARA, such as the factors that govern whether an entity must register with the U.S. Department of Justice (DOJ); the registration process; the obligations of registered agents; and the penalties that may be imposed for FARA violations. The handbook addresses key themes including:

- Registration requirements under FARA
- Penalties for noncompliance
- Recent developments in FARA enforcement
- Additional indictments under FARA

Notably, the handbook discussed DOJ's new online, web-based FARA eFile system, which was launched in September 2019 for new registrants.

Wiley has a well-established FARA practice, and routinely advises a wide range of clients (including foreign governments, lobbyists, public relations firms, law firms, and tourism agencies) on whether registration is required under FARA and the requirements for registration. The firm's attorneys actively assist clients with completing and executing their FARA filings while ensuring full compliance with the law. The team also regularly drafts advisory opinion requests on behalf of clients to the National Security Division of the DOJ, with a solid track record of success, and assists clients in navigating FARA audits.

The updated handbook can be read **here**.

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Oregon Supreme Court Opens Door to Contribution Limits for State Elections

By Andrew G. Woodson and Caleb P. Burns

The State of Oregon, whose campaign finance laws have long allowed unlimited political contributions, is now one giant step closer to having them. In an important opinion issued late last month, the Oregon Supreme Court overruled a decades-old decision that had interpreted the state constitution to bar such monetary limits. Now, state regulators and campaign finance lawyers are scrambling to determine the impact of the court's decision and are even asking whether contingent monetary limits adopted by voters in 2006 for state-level officials have already gone into effect.

The case began when Multnomah County officials adopted new campaign finance ordinances to implement a local ballot measure passed in 2016. Most importantly, the ordinances limited the amount of money that individual contributors and most PACs could give to county officials to $500. The new ordinances also limited and/or banned independent expenditures about candidates.

In finding that contribution limits – at least in the abstract – did not violate Oregon's Constitution, the Oregon Supreme Court overruled its own 1997 decision that had struck down limits on contributions and expenditures. The court reasoned that its prior decision was wrong in treating contributions as subject to the highest category of scrutiny under state law – i.e., those laws that are directed at the "substance of any 'opinion' or any 'subject' of communication." Instead, while acknowledging that contributions can often be used for expressive activity, the court noted that campaign contributions may be used to pay staff, or for officeholder expenses, that are removed from disseminating opinions directly. Accordingly, the court found that the contribution limits were subject to lesser scrutiny and, ultimately, that they were facially valid under the state constitution.

In reaching this conclusion, the court noted – but ultimately discounted – the fact that voters had rejected a 2006 ballot measure that would have overturned the court's 1997 decision. A separate ballot measure actually adopted that year, however, did enact state-level contribution limits pending approval of the companion ballot measure – which did not happen – or the Supreme Court overruling its 1997 decision. Now, according to press reports, state officials and campaign finance lawyers are trying to determine whether the contingent, state-level limits have gone into effect given the Supreme Court's action. So far, it appears that the Secretary of State and Attorney General have concluded that the limits are not in effect, although their reasoning is unclear. One potential factor: The Oregon Supreme Court remanded the case back to the lower courts for a determination of whether the $500 limit is too low under U.S. Supreme Court precedent.

In a shorter passage at the end of its opinion, the Oregon Supreme Court determined that the expenditure limits were unconstitutional.

The case is styled *Multnomah County v. Mehrwein.*

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In a Time of Social Distancing, Virtual Lobbying Is Still Lobbying

By D. Mark Renaud and Louisa Brooks

In these unprecedented times, individuals and businesses across the country have changed the way they do almost everything, from picking up food, to attending a meeting, to celebrating a birthday. Not surprisingly, the current circumstances have also led to innovation in the methods of communication between citizens and government leaders. Recent weeks have seen mayors host virtual town halls; legislatures and city councils conduct legislative business via Zoom meetings; and courts hold live hearings streamed on YouTube. In addition, there are those who continue to show up in person to communicate, organizing protests across the country to urge lawmakers to lift restrictions and reopen the states.

As we often remind our clients, any time someone is communicating with a government official or employee, he or she may be engaged in lobbying. And with few exceptions, most jurisdictions do not distinguish among media when it comes to lobbying communications; lobbying is lobbying, whether it is conducted in person or via Zoom. Below are few types of communications that are increasing in frequency and may constitute lobbying, depending on state or local law:

- Communications with government officials or employees to influence a gubernatorial or mayoral executive order, whether in person, in writing, or via electronic communication.
- Communications with government officials or employees at a virtual meeting or in a videoconference.
- Communications that encourage the general public to contact government officials or employees to influence official action.

This last example, in which a person (or entity) encourages others to contact government officials, is known as "grassroots lobbying" and is regulated under many state lobbying laws. Depending on state law, the grassroots lobbying regulation may be broad enough to include expenses and communications in connection with organized efforts like the "reopen" rallies we are seeing nationwide.

Wiley's Election Law group regularly counsels clients on state and local lobbying laws and can answer questions about your business's lobbying activities.

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Maryland Pay-to-Play Report Due June 1

Please note that Maryland's semiannual pay-to-play report is due on June 1 from certain state and local government contractors, even if no reportable contributions have been made.

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Election Law

JUNE 16, 2020 | PUBLIC AFFAIRS COUNSEL (PAC) WEBINAR

Virtual Workshop: Online and Social Media Compliance for PAC and Grassroots during COVID-19

Remain compliant while engaging in political involvement, PAC communications and advocacy online. Our political law and digital experts will help you understand what to do – and not to do – online, including how to navigate regulations that govern online advocacy.

Click to RSVP

MAY 1, 2020 | POLITICAL LAW PODCAST

The 2020 Election During a Pandemic

Wiley's **Lee Goodman** and Don Palmer, a Commissioner on the Federal Election Assistance Commission (EAC), discuss how COVID-19 will impact the 2020 Election and ways that citizens can still safely vote.

Listen on-demand

APRIL 22, 2020 | WILEY WEBINAR

Entering Federally-Funded Government Contracts Because of COVID-19? Look Out for Byrd Amendment and Lobbying Restrictions Pitfalls.

Wiley's **D. Mark Renaud** leads attendees through a discussion of the Byrd Amendment and potential lobbying pitfalls.

Listen on-demand

APRIL 15, 2020 | WILEY WEBINAR

COVID-19 Lobbying by CEOs and Executives and Registration/Reporting Under the Lobbying Disclosure Act (LDA)

D. Mark Renaud, a partner in Wiley's Election Law & Government Ethics Practice, led attendees through a discussion of the LDA and its application in these unusual times.

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APRIL 1, 2020 | WILEY WEBINAR

No COVID-19 Relief for Lobbying Disclosure, Filing Your April Lobbying Reports

This webinar helps identify registration and reporting triggers in the states, as well as best practices for keeping track of deadlines and dates. Wiley's **Carol A. Laham** and **Louisa Brooks** also walk you through best practices for collecting and reporting information required by the Federal Lobbying Disclosure Act.

Listen on-demand

Corporate

Contractual Performance in Light of COVID-19

By Thomas W. Antonucci and Richard W. Smith

The COVID-19 global pandemic has caused unprecedented restrictions on businesses and impacted the economy in such a way that many organizations are looking to terminate, modify, or postpone events, vendor, or other commercial contracts while minimizing or eliminating liability. Companies in this position need review their contracts and analyze state law principles of impossibility, impracticability, or frustration of purpose may apply.

A) Does COVID-19 trigger the *force majeure* provision in the contract?

Whether you can cancel or modify your performance under a contract on the basis of *force majeure*, primarily will depend on the interpretation of the specific language of the *force majeure* provision in the contract, along with an analysis of the context of your company's and the counterparty's actions and circumstances.

First, you will want to examine the list of specific events that your contract defines as a *force majeure event and see whether COVID-19 clearly (or at least arguably) fits into the items or categories listed. Most force majeure clauses specify acts of* God (like earthquakes, hurricanes, and fires), acts of war or terrorism, civil disturbances, strikes, and labor disputes. While it is not common for a global pandemic to be specifically listed, some provisions will include governmental actions or orders, which could cover the travel restrictions, business shutdown orders, and social distancing requirements that have been issued in response to the COVID-19 pandemic. *Many contracts also include "catch-all" language that excuses performance upon the occurrence of "other events outside a party's reasonable control."* It is important to note, however, that most courts will distinguish between governmental ordered shutdowns and public health safety requirements (which generally will be considered a *force majeure* event) and an unforeseen financial crisis or an economic downturn (which generally will not excuse performance).

Second, if it can be established that the events caused by COVID-19 are covered in your contract's *force majeure* provision, then that is not the end of the inquiry. You next must be able to show that the occurrence of the event actually prevents, hinders, or delays your performance. Typical *force majeure* clauses require that a triggering event make performance "impossible," "illegal," "inadvisable," or "impracticable." The analysis of whether an event excuses performance depends on the degree of difficulty, expense, injury, and/or loss that would result if your company was required to perform under the circumstances.

For an unforeseen increase of cost to excuse performance, generally the increase must be substantial enough to rise to the level of being unjust and unreasonable. Performance also may be excused if the risk of injury (to your company or its personnel) is disproportionate to the expected contractual benefits. Of relevance to the current situation, some courts have held performance of a contract to be impracticable where the public would be exposed to potential health risks.

B) Applicable State Law: Impossibility/ Impracticability and Frustration of Purpose

Even in the absence of a useful *force majeure* clause, most jurisdictions recognize principles of impossibility/impracticability, and frustration of purpose.

If an event (not caused by the party) makes it impossible for the party to perform its obligations under an agreement, then the party's performance will be discharged. This concept does not require that the performance literally be "impossible", but generally is interpreted to mean that the performance is impracticable. The Restatement (Second) of Contracts § 261 provides that "[w]here,

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after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary."

Related to the concept of impossibility/impracticability is the doctrine of "frustration of purpose." This applies generally when a change in circumstances makes one party's contract performance worthless to the other party. The Restatement (Second) of Contracts § 265 provides that this defense contains three elements: (i) the party's principal purpose in making the contract is frustrated; (ii) an event occurred whose non-occurrence was a basic assumption underlying the contract; and (iii) the party invoking the defense was not at fault.

C) What actions should you take?

Whether a *force majeure* provision, or any statutory or common law impracticability or frustration of purpose remedies, may apply to your situation will depend on (i) the written terms of any *force majeure* or similar provision in your agreement; (ii) the statutory and common law principles of the state law that governs the agreement; and (iii) the facts and circumstances of your situation, including the subject matter of the agreement, and each party's actions, reasonable expectations, and performance obligations in connection with the agreement and the circumstances that have led to the current situation.

In addition, pay close attention to whether: (A) there is a requirement for you to provide the counterparty with written notice of the event and/or your decision to terminate or otherwise suspend performance; (B) you have an obligation to take steps to minimize disruption or other steps to mitigate your losses; (C) there is a distinction between excusing the performance of monetary vs nonmonetary obligations; and (D) the contract requires payment of liquidated damages that is triggered/increased depending on the date of cancellation

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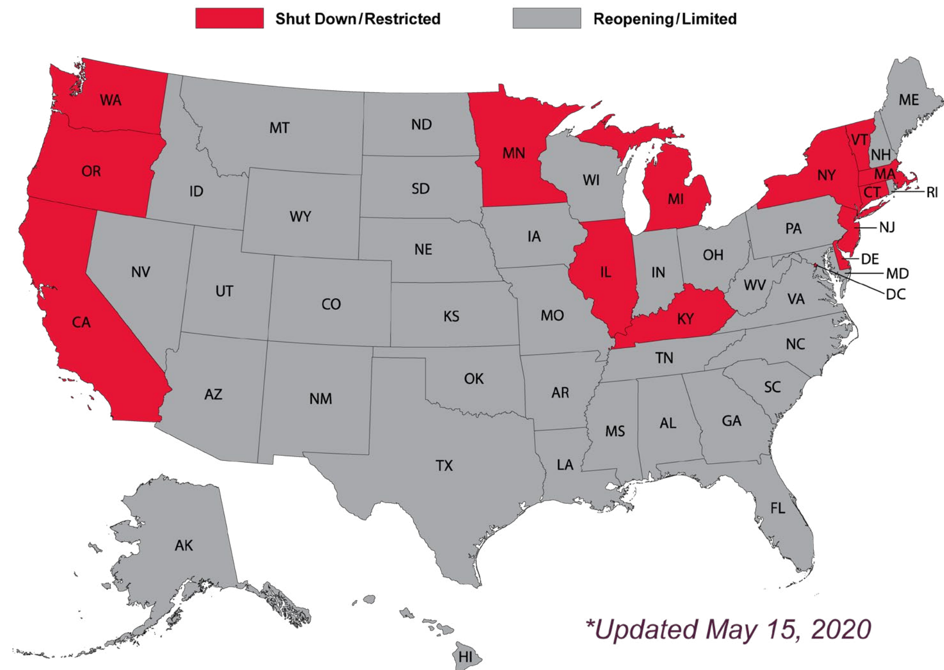
Employment & Labor

An Employer's Guide to State Reopening Orders

By Todd A. Bromberg, Christine E. Connelly, Olaoluwaposi O. Oshinowo, and Martha G. Vázquez

MAY 15, 2020

**Wiley continues to closely monitor the constantly evolving state reopening plans and will update this alert as new information is available. This alert was originally published on May 8, 2020, and last updated May 15, 2020.*



As governors begin to release new executive orders and plans for reopening businesses, employers are again confronted with a lack of uniformity and inconsistent guidance – much as they were just weeks ago when states issued their closure orders. Some reopening orders apply to the entire state, while others carve out specific counties or localities. Some orders permit a county or municipality to adopt more restrictive measures, while others do not. Gatherings of 10 or more employees are permitted under some orders but prohibited under others; masks are required under some orders but only recommended under others. The landscape can be confusing enough for an employer with a single location, but for those operating across states, or even across county lines, keeping track of what is required will be quite the endeavor.

Employers will need to work through the many questions associated with these state orders, including whether phased returns are required or even appropriate for their businesses, whether they must supply personal protective equipment (such as masks) or if the business can require employees to supply their own, how to procure required personal protective equipment if the employer must or wants to provide it, and how to comply with a state's social distancing, hygiene protocols, and cleaning and disinfecting requirements. Additionally, as employers consider reopening, they will need to focus on other employment issues such as whom to rehire and what to do if an employee tests positive for COVID-19 after the reopening.

To assist in addressing these issues, Wiley has compiled the state reopening orders in one place – listing the states that have moved toward reopening thus far, and providing easy access to all the orders that specify which businesses will be allowed to reopen, what restrictions and requirements will stay in place, and key timelines for returning to the workplace. Wiley has created an Employer's Guide to Reopening the Workplace that provides an overview of legal obligations and best practices to consider before opening the workplace, after the workplace is reopened, and into the future, as well

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as a list of COVID-19 Frequently Asked Questions for Employers to provide answers to some of the most pertinent questions employers have during this crisis, with a section devoted to Returning to Work.

Below is a list of the states that have begun reopening and their executive orders or plans as of the issuance of this alert:

- Alabama
  - Amended Order
- Alaska
- Arkansas
- Arizona
- Colorado
- Florida
- Georgia
  - Additional Order
- Hawaii
- Idaho
- Indiana
- Iowa
  - Part Two: Order Continued
  - Part Three: Order Continued
- Kansas
- Louisiana
- Maine
  - Restarting Maine's Economy: Plan
- Maryland
- Mississippi
  - Additional Order
  - Additional Order
- Missouri
- Montana
- Nebraska
  - Guidance
- Nevada
- New Mexico
- North Carolina
- North Dakota
  - Plan
- Ohio
- Oklahoma
- Pennsylvania
- Rhode Island
- South Carolina
  - Additional Order
- South Dakota
  - South Dakota's "Back to Normal" Plan
- Tennessee
  - Additional Order
  - Additional Order
  - Additional Order
- Texas
- Utah
  - Guidelines
- Virginia
  - Additional Order
- West Virginia
- Wisconsin
- Wyoming

Wiley is closely monitoring these state level plans and how they will impact employers as businesses look to the months ahead. As these reopening plans are constantly evolving, we will be updating the list of orders in the coming weeks, which will be noted by an updated reference date. We encourage employers to check their local ordinances and consult with counsel regarding their options.

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Intellectual Property

COVID-19 Internet Scams Are On the Rise, But Intellectual Property Rights Provide a Tool to Fight Back

By David E. Weslow and Ari Meltzer

Organizations trying to navigate the unprecedented conditions caused by the global coronavirus (COVID-19) pandemic have one more thing to worry about: a barrage of opportunistic online scams seeking to exploit fears about the virus and take advantage of IT vulnerabilities related to the rapid transition many have made to teleworking and online shopping. In recent weeks, we have seen a substantial uptick in scams targeting household corporate names that have long been targets of such scams, but also targeting foundations and associations that are seeking to help members and consumers during the pandemic. The COVID-19 Internet scams generally fall into three categories: (1) email phishing scams using COVID-19 as a call to action; (2) unauthorized use of the trademarks of respected brands to provide legitimacy to fake coronavirus cures; and (3) attempts to deceive the increasing number of online shoppers into downloading viruses and malware onto their devices.

Organizations must remain vigilant in these times to protect their employees, members, and customers from becoming victims to these scams. Fortunately, there are steps that organizations can take to guard against such scams including asserting trademark and copyright claims as a means to disable the scams. And, in a bit of welcome positive news, we have noticed an increasing willingness by technical service providers to protect consumers by disabling their services when used by Internet scam artists.

The Anatomy of a COVID-19 Internet Scam

In the first scam category, perpetrators are sending phishing emails that prey on persons seeking information about the virus or programs intended to provide assistance during the pandemic. One form of these emails purports to disseminate information about the virus from the Centers for Disease Control and Prevention and the World Health Organization, information about stimulus benefits from the U.S. Department of Treasury or the Internal Revenue Service. Emails purporting to originate from corporate managers, IT departments, or even legitimate service providers such as foundations and financial institutions will ask users to provide sensitive information, to download software, or login to an online resource to facilitate remote operations or remote access to an account. These scams can be particularly effective when the perpetrators send the emails from a typosquatted domain name that is only a letter two off from the company's legitimate domain name (e.g., "compony.com" or "conpony.com" instead of "company.com").

The second category of scam involves the use of well-known and respected brands to sell herbs, oils, and other unregulated home therapy products with vague promises of "virus defense" or worse, yet, actual purported cures and treatments for the coronavirus. These scams begin by distributing links through email and social media to fake news websites that purport to tout the benefits of the product at issue as a potential remedy for the virus. In other instances, fraudsters are claiming to sell hand sanitizer, masks, wipes, and other products—often under the guise of coming from a name brand—all designed either to steal a consumer's billing information or to enroll the consumer in a recurring charge program for fake and unreliable products. Although this scam targets consumers more than businesses, the reputational risk to companies whose marks are used to perpetuate the scams should be a concern.

The third scam category involves a proliferation of fake coupon sites that seek to capitalize on the shift from in-person to online commerce during the coronavirus response. These sites claim to offer discount codes for e-commerce, but in actuality provide links to download viruses or malware.

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COVID-19 Internet Scams Are On the Rise, But Intellectual Property Rights Provide a Tool to Fight Back
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Tools for Monitoring for Scams and Disabling Scams

Brand abuse monitoring tools are available via subscription from specialized vendors, but free and inexpensive tools are also available online to obtain alerts for unauthorized brand uses (e.g., www.google.com/alerts) and domain name registrations (e.g., www.domaintools.com/resources/user-guides/monitors#brand-monitor). If you find that your company's name and/or trademarks are being used as part of an illicit online scam, the first step is to identify the company hosting the online content or registering the domain name at issue (in most cases, these companies merely provide hosting, registration or other services to third parties and may not be responsible for the content of the site). There are a number of free online sites, including www.whoishostingthis.com/ and www.hostingchecker.com, that will identify the host provider for any website. For domain names, the ICANN Domain Name Registration Data Lookup at https://lookup.icann.org/ will provide the name and contact information for the domain name registrar.

The next step is to file an abuse report with the hosting provider and/or domain name registrar. Although some service providers have in the past been reluctant to act in response to reports of abuse, we have found many service providers to be more responsive in recent weeks to address coronavirus-related scams.

If you have any questions or require assistance responding to an online scam, please contact one of the authors of this alert or the Wiley attorney who regularly handles your intellectual property matters.

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Intellectual Property

JUNE 10, 2020 | WEBINAR

Recent Developments and Ongoing Trends in Copyright Law

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Government Contracts

MAY 27, 2020 | WILEY BOOT CAMP WEBINAR (**ONLY OPEN TO WILEY CLIENTS.*)

Wiley Boot Camp: Coronavirus Impact on Grantees

The coronavirus (COVID-19) pandemic has greatly impacted federal grant recipients performing for government agencies nationwide and around the world. It has also created new opportunities for grantees to assist in the battle against the coronavirus. Listen to Wiley's **Brian Walsh** and **Kendra P. Norwood** discuss COVID-19 related memoranda issued by OMB and other agencies concerning federal financial assistance during and relating to the pandemic and how to avoid compliance missteps and preparing for subsequent audits and investigations for waste, fraud and abuse.

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International Trade

MAY 19, 2020 | WILEY WEBINAR

Sections 232 and 301 Investigations, and the International Emergency Economic Powers Act (IEEPA)

In this webinar, attorneys from Wiley's **International Trade** group will discuss certain provisions of the trade laws that have received increased attention during the current Administration, including Section 232, Section 301, and IEEPA, as well as the effects on tariffs due to coronavirus (COVID-19). The webinar will provide an overview of these provisions and how they may be used by domestic industries to remedy unfair trade practices and protect national security.

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National Security

MAY 14, 2020 | WILEY WEBINAR

The Office of Foreign Assets Control (OFAC)

Wiley partners **Dan Pickard** and **Lori Scheetz** discuss recent sanctions developments, including the restrictions imposed by the U.S. government on Iran, Venezuela, and Russia/Ukraine; U.S. cyber-related prohibitions and advisories; as well as OFAC's guidance on permissible humanitarian assistance and corporate compliance expectations during the coronavirus (COVID-19) pandemic.

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White Collar Defense & Government Investigations

States Likely To Ramp Up FCA Enforcement Amid COVID-19

By Peter S. Hyun

The COVID-19 pandemic has not only ravaged the health of Americans, but it has also decimated state tax revenues and state coffers.[1] Echoing the steps taken in response to the financial crisis of 2008, states are likely poised to adopt austerity measures that will reverberate for years as state tax revenue plummets.

Cutting costs, however, will not be the only means of protecting state funds. States are also likely to aggressively recover taxpayer dollars lost to waste, fraud and abuse.

How will they do this?

Following the 2008 financial crisis, states began to aggressively ramp up enforcement of nonhealth care-related fraud committed on state taxpayer funds.

In New York in 2011, for example, then-Attorney General Eric Schneiderman created, within the office for the first time ever, the Taxpayer Protection Bureau.[2] The bureau was comprised of a newly minted team of attorneys who, separate from its Medicaid Fraud Control Unit, would investigate state False Claims Act violations where non-Medicaid funds were at issue.

Despite that being a time period where New York was imposing budget cuts and hiring freezes,[3] the state attorney general's office invested in a new unit with dedicated staff. And that bet paid off for New Yorkers.

The Taxpayer Protection Bureau settled cases with entities in the range of millions of dollars in the first year,[4] including the notable $330 million settlement against the cell phone carrier Sprint Communications Inc. for failing to pay state and local sales taxes on calling plans sold to New Yorkers. [5]

The same playbook is likely to be used by states and localities this time around through their analogous whistleblower statutes, commonly known as the False Claims Act.

As procurement lawyers know, the federal FCA was first enacted during the Civil War as "Lincoln's Law" to root out fraud in government contracting.[6] The law allowed the federal government to obtain significant damages against those who defrauded, for example, the Union Army by fraudulently providing broken-down and used wartime equipment.[7]

Since then, the FCA has been used repeatedly to recover billions of federal taxpayer dollars lost through fraud committed against government programs, ranging from health care fraud to procurement fraud, grant fraud and mortgage fraud.[8]

States and localities have traditionally used the statute to recover against those who defraud state Medicaid programs — creating, within the attorney general's office of each state, a unit known as the Medicaid Fraud Control Unit.[9]

In recent years, state attorneys general have broadened their FCA portfolio of cases beyond just health care cases. In addition to New York state, other states are now taking a much more aggressive tack to expand their FCA enforcement matters, in cases ranging from tax avoidance schemes to government mischarging schemes under state contracts.

This prioritization of nonhealth-care fraud cases is reflected in recent legislative efforts as well. Several months ago, California Assembly member Mark Stone, D-Scotts Valley, with the strong endorsement of California Attorney General Xavier Becerra, introduced statewide legislation to expand the reach of the California FCA to cover tax fraud.[10] The bill had previously failed to move in the legislature due to intense opposition from the business community.[11]

Significantly, in the same press release that backed the proposed legislation to expand the California FCA, Becerra highlighted the impact of the law by

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States Likely To Ramp Up FCA Enforcement Amid COVID-19 *from page 18*

pointing to an eye-popping $102 million settlement his office entered into with BP PLC over alleged overcharges for natural gas under three successive state contracts.[12]

These kinds of state-enforced, nonhealth-care-related cases brought under a state FCA are becoming more commonplace. In Illinois, for example, the state attorney general's office has resolved a string of Illinois FCA cases for tax fraud.

And several notable multistate settlements have also occurred, even without the federal government's lead. In July 2019, the state attorneys general for Illinois, Massachusetts, New Jersey, New York, and Tennessee, along with the Baltimore City Solicitor, entered a $5.8 million settlement with research company LexisNexis Risk Solutions and several of its affiliates for withholding fees from law enforcement agencies when the research company resold information on automobile crash reports.[13]

Likewise, the New Jersey Attorney General in 2018 reached a $1.5 million settlement with Ranco Construction Inc., a construction company, regarding failure to pay prevailing wages on government contracts.[14]

This focus on state FCA enforcement is atop of what state attorneys general are already well-known for: consumer protection enforcement, including privacy violations, and antitrust enforcement.

This is a foreshadowing, and state attorneys general will likely continue to ramp up their use of FCA authority to recover taxpayer dollars for their state interests. Indeed, the whistleblower bar is similarly tracking the growing state authorities under which cases can be filed, and will likely be pushing states to do more in this area.[15]

So what does this mean for industry?

While government contractors and their outside counsel typically have fluency on federal contracting rules — including relevant regulatory flow-down clauses and programmatic functions within each relevant agency – states and municipalities operate differently.

In this way, government contractors must now become fluent in ensuring that their broader federal regulatory and contractual compliance programs are also in sync with various state regulatory and contractual requirements. For example, for public contract work in New York, the state's applicable prevailing wage rates differ on a county-by-county basis and may be dissimilar from federal requirements (and could therefore serve as the basis of a state FCA violation).[16]

It is therefore incumbent on those in a compliance and legal function within a government contractor to conduct regular audits that ensure the company and its personnel are attentive to and abiding by state regulatory and contractual rules, which can differ from federal rules.

The consequences of ignoring such requirements can lead to significant penalties under the state False Claims Acts and otherwise. State attorneys general are increasingly likely to accept referrals from state agencies where audits show irregularities in contracting invoices that could lead to full-blown investigations.

And of course, state and local whistleblowers are becoming more aware of the various avenues of recovery through whistleblower rewards programs. It will therefore remain imperative for companies to develop robust internal whistleblower programs as well, to allow for thorough investigation of any whistleblower report related to the receipt of state funds. These initial investments can help mitigate the risk of state attorney general FCA investigations that are certainly on the horizon.

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States Likely To Ramp Up FCA Enforcement Amid COVID-19 *from page 19*

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JUNE 4, 2020 | WEBINAR

Managing Consumer Protection Risks: State AG Priorities and Enforcement in the COVID-19 World

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White Collar Defense & Government Investigations

APRIL 27, 2020 | POLITICAL LAW PODCAST

The U.S. GAO: Its Role in Congressional Investigations and Oversight

Wiley Partner **Peter S. Hyun** and Signal Executive Vice President Charlie Moskowitz discuss the U.S. Government Accountability Office (GAO) and its role in congressional investigations and oversight including, the GAO's role in COVID-19 relief oversight, what the private sector should know about the GAO, and the GAO's resources and expansive mission, including its role in resolving federal contracting disputes.

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APRIL 7, 2020 | WILEY AND SIGNAL GROUP WEBINAR

COVID-19: Impact on Congressional Oversight & Investigations

Wiley Partner **Peter S. Hyun** and Signal Executive Vice President Charlie Moskowitz discuss the new Congressional oversight landscape (including the creation of a new inspector general authority) as the government continues to grapple with responding adequately to the pandemic.

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MARCH 25, 2020 | WILEY WEBINAR

The Pandemic Response and Insider Trading: How Trading Around Governmental Actions Will Be Evaluated by SEC, DOJ, and the Congressional Ethics Committees

The volatility in the securities markets resulting from the global Coronavirus (COVID-19) pandemic, and governmental responses, presents opportunities and risks for a variety of market participants. This webinar explores how allegations of insider trading by members of Congress and their staffs, executive branch employees, and members of the public will be evaluated by the U.S. Securities and Exchange Commission (SEC), U.S. Department of Justice (DOJ), and Congressional Ethics Committees with a focus on trading based on governmentally sourced information.

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MARCH 25, 2020 | SIGNAL GROUP AND WILEY WEBINAR

Coronavirus Disinformation: Costs and Consequences for Brands and Companies

The coronavirus (COVID-19) pandemic is unsettling the economies, communities, and healthcare worldwide. Some disruptors are using this opportunity to market products and make claims that are inaccurate and could exacerbate the outbreak – and government agencies are beginning to issue warnings and penalties.

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