Girl Scouts of Manitou Council and the Application of Franchise and Dealership Laws to Nonprofits

Gary W. Leydig and Angela Toscas Gordon

A body of literature exists extolling the benefits of structuring and operating nonprofit organizations using a franchise-like format.[1] Although the nonprofit literature often eschews the word *franchise* in favor of the word *federation* as the preferred label,[2] the terms are used synonymously for what would be recognized as an archetypal franchise: a central organization that licenses its trademark or service mark to independent, local operators who, using formats and programs established by the central organization, provide services associated with the organization's mark. In return, the local operators pay fees or other forms of consideration to the central organization. Many well-known nonprofit organizations are organized along these lines.[3] What has not been addressed in either the nonprofit or the legal literature, however, is the application of state and federal franchise laws to those nonprofits choosing to utilize a franchise format. Decisional law, too, has been nonexistent on the topic.

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Recently, the U.S. Court of Appeals for the Seventh Circuit handed down a pair of decisions in *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America*,[4] addressing the application of the Wisconsin Fair Dealership Law (WFDL)[5] to the relationship between two nonprofits: the Girl Scouts of the United States of America (GSUSA) and one of its local councils. The WFDL, which pulls within its coverage a broad swath of both dealerships and franchises, was found by the court to possess no express or implied exemption for nonprofits. Accordingly, the WFDL's prohibition of cancellations, terminations, nonrenewals, or changes to the competitive circumstances of a "dealership" without "good cause" was fully applicable to GSUSA's effort to eliminate a local council as part of GSUSA's nationwide restructuring of councils. Girl Scouts, the court found, was "not readily distinguishable from Dunkin' Doughnuts."[6]

The *Girl Scouts* case serves as a wake-up call to the segment of the nonprofit sector that operates within a franchise framework. The Seventh Circuit's holdings, have broad implications for nonprofits operating in any state that has an applicable franchise or dealership statute. Further, though the WFDL is a "relationship law" (i.e., one regulating various aspects of an ongoing franchise relationship, including its renewal, transfer, and termination), there is no reason that the court's analysis is not equally applicable to a state's "registration and disclosure law" (i.e., one regulating the offer and sale of a franchise).[7] This article will analyze the *Girl Scouts* decisions and their potential impact on nonprofits operating in states having similar regulatory schemes.

The *Girl Scouts* case also serves as a convenient premise for examining the application of the Federal Trade Commission's Disclosure Requirements and Prohibitions Concerning Franchising (FTC Franchise Rule, FTC Rule, or Franchise Rule)[8] to nonprofits. Since its promulgation in 1978, the FTC has chosen not to apply the Franchise Rule when both the "franchisor" and the "franchisee" are nonprofits. That choice, however, is not dictated by the language of the Franchise Rule or the FTC Act.[9] Rather, it is a function of the FTC not presently enforcing the limits of its jurisdiction over nonprofits engaged in franchising. This article explores and questions the rationale for that choice.

WFDL: Applicability to Nonprofits

The terms *franchise* and *dealership* are statutorily defined, and those definitions differ from state to state. Whether the parties' relationship qualifies as a franchise or a dealership under these statutes requires a factual determination of such things as whether the alleged franchisor has granted the putative franchisee the right to sell or distribute goods or services; whether that grant is accompanied by a license to use the grantor's trade mark, service mark, or other brand identification; whether the relationship between the parties reveals a sufficient level of involvement or control by the grantor over the grantee's operations to rise to the level of a "marketing plan" or a "community of interest"; and whether any consideration paid by the grantee to the grantor is both in an amount and of a type to qualify as a "franchise fee."[10]

The *Girl Scouts* litigation presented the first opportunity for an appellate court to determine if the relationship between two nonprofit corporations could satisfy these definitions.[11] Addressing the specific definition of *dealership* contained in the WFDL, the court determined that there was full coverage. Because the court's inquiry was, and in

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these types of inquiries generally is, heavily fact driven, we will spend some time here on the facts developed in *Girl Scouts*. These facts reveal many similarities between Girl Scouts and other nonprofit organizations. The Girl Scouts organization is not unique.

Structure of Girl Scouting

Girl Scouts of the United States of America is a congressionally chartered nonprofit corporation whose stated purpose is "to promote the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, cheerfulness, thriftiness, and kindred virtues among girls."[12] GSUSA disseminates Girl Scouting throughout the United Sates through a network of local councils. In 2005, there were 315 such councils, each standing as an independent nonprofit corporation "governed by its own independent board of directors, employ[ing] its own officers and professional staff, and [being solely] responsible for its own financial health."[13]

GSUSA issues charters to councils in consideration for payment of a nominal fee. The terms of the charter, and the numerous organizational documents that the charter incorporates by reference, constitute the contract between the parties and define the parties' relationship.[14] The charter's provisions include, among other things, detailed standards and criteria by which a council's performance is judged; procedures for how charters are renewed or terminated; and procedures for how a council's territory, or "jurisdiction," can be enlarged or contracted.[15] Each council's charter establishes an exclusive territory within which GSUSA grants the council "the right to develop, manage, and maintain Girl Scouting," including the right to use the Girl Scouts name and proprietary marks.[16]

Manitou Council became a chartered Girl Scouts council in 1950, and its charter was routinely renewed every few years thereafter.[17] Its charter granted Manitou Council a jurisdiction covering all or parts of seven counties in eastern Wisconsin. In 2008, the council had more than 7,000 members.[18] It is engaged in no business other than Girl Scouting. It operates exclusively using the Girl Scouts brand.[19]

As the Seventh Circuit found, "'Girl Scouting' is big business."[20] At the national level, "GSUSA reported . . . revenues of nearly $123 million" in its fiscal year 2006. Of that sum, $35 million came from the membership dues collected and passed on by the local councils. Another $13.5 million came from GSUSA's wholesale sale of Girl Scout branded merchandise to the councils.[21] Not included in these numbers are any direct revenues from sales of the famous Girl Scout cookies. Although GSUSA earns a royalty from the bakeries it licenses to produce those cookies, the councils for which cookie sales are made retain all cookie sales revenue.[22]

Manitou Council, too, is a substantial enterprise. It employs a full-time staff of seventeen people. Its operations are conducted out of a building it built and owns, valued in excess of $3 million. Additionally, Manitou Council owns two camps, collectively valued in excess of $12 million, which encompass 380 acres of land and which feature more than forty buildings and an Olympic-sized swimming pool. From its cookie sales alone, Manitou Council earns more than $1 million annually. The balance of its revenues come from private donations, the sale of other Girl Scout merchandise, camp fees, and returns on investments in its reserve funds.[23]

GSUSA's Nationwide Reorganization

In 2005, GSUSA concluded that a "fundamental transformation" of its organization was necessary for it to remain viable and relevant. Through a strategy it called "realignment," GSUSA set in motion a plan that would reduce the nationwide number of councils by nearly two-thirds—from 315 to 109—by the end of 2009. Realignment called for the merger of existing councils into new, larger, "high-capacity" councils. GSUSA claimed that these larger councils "would no longer compete for top local sponsors and media attention, would have the resources to hire professionally trained staff members, and would be positioned to take advantage of economies of scale in programming, training, fund-raising, and branding." In Wisconsin, realignment meant the creation of three new, super-sized councils out of the fifteen councils then serving the state and the upper peninsula of Michigan. Manitou Council would be divided into three pieces, with approximately 60 percent of its territory used to supplement the newly formed council to the north of Manitou Council and the balance of its territory divided between the two newly created councils to the south and west. Manitou Council's voluntary board and paid staff would be disbanded. For no consideration, Manitou's substantial real and personal property assets, and its considerable goodwill in the community, would be split up and delivered to the three newly created councils.[24]

After conducting due diligence, Manitou Council's board concluded that realignment was not in its best interest. When Manitou Council refused to execute documents that would effectuate the forced mergers, GSUSA initiated a series of charter procedures culminating in the adoption of a resolution that ordered the transfer of 60 percent of Manitou Council's jurisdiction to the northern council.[25]

Other than Manitou Council's refusal to commit hara-kiri and merge itself out of existence, GSUSA did not assert that Manitou Council was a nonperforming or underperforming council.[26] To the contrary, GSUSA acknowledged throughout the litigation that Manitou Council was very successful. By any measure used for judging a council's performance, Manitou Council was one of the best.

Girl Scouts I

Manitou Council filed suit in the Eastern District of Wisconsin, seeking preliminary and permanent injunctions to prevent any changes to its jurisdiction or charter.[27] Manitou Council alleged violations of the WFDL, breach of contract, and various commercial torts.[28] The WFDL provides that no "grantor, directly, or through any officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause."[29]

The district court denied the motion for preliminary injunction, finding that the loss of 60 percent or more of the council's territory, membership, and revenues would cause no irreparable harm.[30] The district court chose not to address, with one exception, the likelihood of Manitou Council's ultimate success on its various claims. The exception was Manitou Council's WFDL claim. The court was forced to address that claim because the WFDL, in addition to authorizing civil suits for damages, expressly provides for injunctive relief when a violation has occurred.[31] Further, the statute mandates that, in the face of a violation, irreparable harm is presumed.[32]

The district court made short work, however, of the WFDL claim. Without stating or addressing the express definition of *dealership* contained in the WFDL,[33] the court concluded that it would not adopt an "expansive interpretation" of the term and would not "improperly expand 'the commonsense application' of [the WFDL]" to a nonprofit.[34] Accordingly, the district court concluded that there was no likely coverage under the WFDL and the statutory presumption of irreparable harm was not in play.[35]

On appeal, the Seventh Circuit did what the district court failed to do: it looked at the actual words of the statute and the statute's definition of *dealership*. "It matters not," the Seventh Circuit stated, "whether we would call Girl Scouts 'dealers' in everyday conversation; what matters is only how the statute defines the term, and the activities of Manitou clearly fall within its definition."[36]

This articulation of how courts read and apply statutes, i.e., that the words of the statute matter, is perhaps the single most important take-away for all nonprofits adopting a franchise business format. That a nonprofit considers itself something other than a franchisor or has never called its business model a franchise is irrelevant to a determination of whether a franchise relationship exists. Whether or not there is a franchise under the law will be determined by the particulars of the nonprofit's business relationships and whether those particulars fall within or without a specific statutory definition. In *Girl Scouts I*, the court makes clear that nonprofits are subject to the same statutory rules of construction as their for-profit counterparts.[37]

Although seemingly uncontroversial, GSUSA fought against this text-based approach to the interpretation and application of the WFDL. GSUSA insisted that the councils and the courts surrender to the "halo" effect of being a nonprofit,[38] reasoning that its nonprofit mission to educate girls was somehow beyond the reach of dealership and franchise laws.[39] The rationale for that position was, to use the court's words, "murky."[40]

> [W]e remain guided by the statute. The WFDL expresses no concern for the "mission" or other motivation underlying the sales in question; it asks only whether sales occur. Nor does the statute draw any distinction between "for-profit" and "not-for-profit" entities. Its stated concern is with "fair *business* relations," Wis. Stat. § 135.025(2)(a) (emphasis added), and it is beyond dispute that nonprofit corporations can be substantial businesses.[41]

It is likely that many (perhaps most) nonprofits operate under a similar ingrained belief. The *Girl Scouts* case requires nonprofits and their advisers to reevaluate that belief and to examine carefully the legal effects of the federations and other business models that they have established, or might wish to establish, with their local, nonprofit affiliates.

The Seventh Circuit found no blanket exemption for nonprofits in the WFDL.[42] It applies broadly to any "person," which the WFDL defines as "a natural person, partnership, joint venture, corporation or other entity."[43] Although the statute expressly excludes certain categories of businesses from its reach (e.g., motor vehicle dealers and distributors, insurance, and door-to-door sales), nonprofits are not among them.[44]

Guided by the statute's "plain language,"[45] the Seventh Circuit moved methodically through the definition of *dealership* and applied the facts of the case to the definition just as it would in any case between for-profits where the existence

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of a franchise or dealership was disputed. The court found all three elements of the definition of *dealership* present. First, there was an agreement between the parties.[46] Second, the council had been granted "the right to sell or distribute goods or services, or use a trademark, service mark, logotype, advertising or other commercial symbol." Indeed, the court broke this element down into three subparts—the presence of any one of which the court reasoned could satisfy this element—and each subpart was found to be present in the case before it.[47] The council sold and distributed goods, in particular, Girl Scout cookies and various other Girl Scout merchandise.[48] The council distributed services, namely, the educational and community services known as Girl Scouting.[49] And the council made exhaustive use of the Girl Scouts name and marks.[50] Finally, the court found the third element of the definition had been satisfied; that is, that there was a "community of interest in the business of offering, selling, or distributing goods or services at wholesale, retail, by lease, agreement or otherwise."[51]

Because all three elements were found to have been met, the court concluded that Manitou was likely to succeed on its WFDL claim and that it was entitled to the statutory presumption of irreparable harm.[52] Accordingly, GSUSA was preliminarily enjoined from making any changes to the council's jurisdiction.[53]

Girl Scouts II

Following remand to the district court and the development of a full factual record, the claims were presented to the district court on cross-motions for summary judgment. Adhering to the legal framework established by the court of appeals in *Girl Scouts I*, the district court found that Manitou Council had established its WFDL claim and, further, that GSUSA had failed to establish a defense of "good cause" for the constructive termination it would have wrought upon the council though its realignment of the council's jurisdiction.[54] The district court nonetheless entered judgment for GSUSA on the ground that application of the WFDL here would unconstitutionally interfere with GSUSA's First Amendment right of expressive association.[55] The case went back to the Seventh Circuit for a second time.

In the first appeal, the court addressed the nuts and bolts of the WFDL's statutory scheme and the application of the facts to the statute's definition of *dealership*. In the second appeal, the court had no need to retread that territory. After rejecting GSUSA's First Amendment argument,[56] the court returned to the WFDL claim but, this time, with much broader, policy-laden brushstrokes.

The surface appeal of GSUSA's argument that it and other nonprofits are not "commercial" or in "business" is, the court stated, outweighed by "the fact that nonprofit enterprises frequently do engage in 'commercial' or 'business' activities, and certainly Girl Scouts do."[57] "From a commercial standpoint," the court continued, "the Girl Scouts are not readily distinguishable from Dunkin' Doughnuts."[58]

> No gulf separates the profit from the nonprofit sectors of the American economy. There are nonprofit hospitals and for-profit hospitals, nonprofit colleges and for-profit colleges, and, as we have just noted, nonprofit sellers of food and for-profit sellers of food. When profit and nonprofit entities compete, they are driven by competition to become similar to each other. The commercial activity of nonprofits has grown substantially in recent decades, fueled by an increasing focus on revenue maximizing by the boards of these organizations, and this growth has stimulated increased competition both among nonprofit enterprises and with for-profit ones.
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> The principal difference between the two types of firm is not that nonprofits eschew typical commercial activities such as the sale of services—they do not—but that a nonprofit enterprise is forbidden to distribute any surplus of revenues over expenses as dividends or other income to owners of the enterprise, but must apply the surplus to the enterprise's mission. That does not seem to alter the incentives of the people who run such organizations much, if one may judge from the many scandals involving nonprofit colleges and universities, which seem to compete for students, faculties, research grants, and alumni gifts with a zeal comparable to that of their for-profit counterparts. "In response to the challenges they are facing from the market, nonprofits are internalizing the culture and techniques of market organizations and making them their own.". . . We have noted that the original stated purpose of the national Girl Scout organization in cutting its local councils by two-thirds was to effectuate a cost- and revenue-driven "business strategy," which is a worthy objective but no different from the objectives of profit-making firms.[59]

There being no express exemption in the WFDL for nonprofits, the court declined to read an exception into the law.[60] The district court's judgment in favor of GSUSA on the WFDL claim was reversed.[61]

The lessons learned from *Girl Scouts* are straightforward. The words of a dealership or franchise statute will be given their plain meaning. In the absence of an express exemption or exclusion for nonprofits, one will not be read into the statute. If a statute covers "corporations," it covers all corporations, including nonprofits. And when the public policy underlying these statutes is to promote fair business relations between dealers and grantors, to promote the continuation of those relationships on a fair basis, and to protect dealers against unfair treatment by grantors who inherently have superior economic and bargaining power, those policies are no less compelling when the business relations are between, or include, nonprofits.

Wisconsin's law is not unique. In the next section we identify the many statutes having franchise or dealership laws of general application. Applying the lessons learned from *Girl Scouts* to these statutes reveals that no state's law excludes nonprofits from their coverage.

Other Franchise Laws and Nonprofits

Several layers of regulation affect the franchise relationship. Twenty states, along with Puerto Rico and the Virgin Islands, have enacted laws that, like the WFDL, provide heightened protections to franchisees and dealers.[62] These protections include the franchisee's right to be terminated only for good cause; the right to have the franchise renewed unless good cause grounds exist for nonrenewal; the right to receive notice of defaults and the opportunity to cure those defaults to avoid a termination or nonrenewal;[63] and the right to injunctive relief, damages, and attorney fees if the statute has been violated by the franchisor.[64] Typically, any attempts by the franchisor contractually to draft around these or other rights created by the statute are declared void as against public policy.[65] As revealed in the Girl Scouts case, these types of relationship laws can significantly constrain a franchisor's efforts to effectuate fully a desired change within the states where these laws are present.

A second layer of regulation, again at the state level, comes in the form of statutes that require franchisors to make robust disclosures to prospective franchisees in advance of offering the sale of a franchise. Fifteen states have enacted these disclosure laws.[66] All but two of these laws also require franchisors to file and register an offering circular with the relevant state agency in advance of soliciting prospective franchisees.[67]

A third layer of regulation exists at the federal level via application of the FTC Franchise Rule.[68] Like its state franchise disclosure law counterparts, the FTC Franchise Rule seeks to remedy "a serious informational imbalance between prospective franchisees and their franchisors"[69] by requiring written disclosure of critical information in advance of offering the sale of a franchise to a prospective franchisee. The FTC Franchise Rule applies in all fifty states and U.S. territories.[70]

Thus, a business operating within a franchise model must potentially navigate compliance with all three levels of state and federal regulation. *Girl Scouts* brings into sharp focus the need for nonprofit businesses to be fully aware of these regulations.

Policies Underlying Other States' Laws Do Not Exclude Nonprofits

In *Girl Scouts*, the court held that the WFDL does not "draw any distinction between 'for-profit' and 'not-for-profit' entities. Its stated concern is with 'fair *business* relations,' and it is beyond dispute that nonprofit corporations can be substantial businesses."[71] In so holding, the court was influenced by the WFDL's express statement of purposes and policies, which include the following:

> (a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis; [and]
> (b) To protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships[.][72]

As the court concluded, there is nothing in these policies that carves out nonprofits from coverage. Likewise, there is nothing in the stated purposes and policies of any other state's franchise law that suggests a different outcome.

When legislatures express the policies underlying franchise relationship laws, the focus of such policies, as with the WFDL, is on leveling the playing field between the franchisee and the franchisor, the latter of which is seen as inherently possessing superior economic power and superior bargaining power in the negotiation of dealership and franchise contracts. Virginia's legislation, for example, is intended to "establish a more even balance of power between franchisors and franchisees."[73] New Jersey's law seeks to "protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power between national and regional franchisors and small franchisees."[74]

Even in the absence of an express legislative statement of purpose, courts have been quick to recognize that the principal feature of these statutes is to counteract the disparity between franchisee and franchisor. Thus, the Second Circuit found that the purpose of the Connecticut Franchise Act was to "prevent a franchisor from taking unfair advantage of the relative economic weakness of the franchisee."[75]

The policy of leveling the playing field for franchisees, whether expressly stated or simply implicit in the protections afforded in the state relationship laws, draws no distinction between for-profit and nonprofit businesses. The policy seeks fair treatment of franchisees across the board. Assuming that all definitional elements of a statutory franchise or dealership are met, it is difficult to articulate a sound policy basis that would exclude nonprofit franchisees from these statutes' fair treatment while affording it to others.[76]

The policies underlying state disclosure laws are also not affected by the for-profit or nonprofit status of the parties. California was the first state to pass a franchise disclosure law, which predated the FTC Franchise Rule, and its statement of legislative intent and purpose stands as the model for all disclosure laws that followed. In part, the California legislation provides thus:

> The Legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems. . . . California franchisees have suffered substantial losses where the franchisor or his or her representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.
>
> It is the intent of this law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered.[77]

The law requires disclosures in connection with a "form of business" without regard to the corporate status of the participants in that form of business. As discussed more fully in the next section of this article dealing with the FTC Franchise Rule, nonprofits are no less susceptible than their for-profit counterparts of dispensing or receiving misinformation, and no sound policy argument can be articulated that would allow misinformation to flow in the context of one franchise relationship and not the other.

The policy of leveling the playing field for franchisees, whether expressly stated or simply implicit . . . , draws no distinction between for-profit or nonprofit businesses.

Operative Definitions in Other States' Laws Do Not Exclude Nonprofits

Application of the definitions of *franchise* or *dealership* found in other states' franchise laws—both relationship and disclosure laws—would result in outcomes no different from that reached in *Girl Scouts*. Whether applying a definition that hinges, like the WFDL, on the presence of a community of interest between grantor and dealer, or a definition that looks to a franchisor's suggestion of a marketing plan and the franchisee's payment of a franchise fee, none of the statutory definitions establishes a distinction between nonprofits and for-profits. In the end, the statutes' underlying definitions of *person* prove to be all encompassing, including any corporation or any entity. Nonprofits assuredly fall within these designations.[78]

Exemptions and Exclusions Under State Laws Do Not Target Nonprofits

Most of the state disclosure and relationship statutes have specific sections expressly exempting coverage and/or expressly limiting the definition of franchise or franchise fee to exclude certain types of businesses or circumstances.[79] Although the exemptions or definitional limitations are myriad, none identifies or suggests the nonprofit.

Among the disclosure laws, the most prevalent exclusions or exemptions include the following: (1) situations in which the franchisor meets certain net worth, experience, and disclosure requirements (i.e., the large franchisor); (2) situations in which the prospective franchisee is already a franchisee of the same franchisor or in which there is a renewal on the same or similar terms and there has been no interruption in the franchise; (3) any offer or sale to a bank, savings institution, trust company, insurance company, or investment company; (4) any transaction by an executor, administrator, sheriff, receiver, trustee in bankruptcy, guardian, or conservator; and (5) any transaction covered by the Petroleum Marketing Practices Act (PMPA) or other identified dealer law.

[The surprised reaction to *Girl Scouts*] leads of the inescapable conclusion that up until now nonprofit franchisors have ignored state franchise laws . . ."

A complementary set of exemptions and exclusions find expression in the relationship laws. Typically, these include the following: (1) situations in which goods or services are marketed on a door-to-door basis; (2) concessions or leased departments at or with a general merchandise retail establishment; (3) entities subject to the PMPA; (4) franchisees or dealers without a place of business in the state; (5) the insurance business; and (6) transactions relating to bank credit card plans. These are equal opportunity exemptions—available to for-profits and nonprofits alike as long as the criteria specified in the statutes are met. None excludes nonprofits as a class from coverage of the laws.

Two additional exemptions warrant special comment: the "retailer's cooperative" exemption, present in three disclosure statutes and in one relationship law,[80] and a catchall discretionary exemption present in eleven of the disclosure statutes.[81]

A retailer's cooperative is a nonprofit entity. California's exclusion, for example, defines it as "[a] nonprofit organization operated on a cooperative basis by and for independent retailers which wholesales goods and services primarily to its member retailers."[82] Thus, in the three states that include a cooperative exemption within their legislation, the legislatures specifically contemplated nonprofit organizations. By purposefully circumscribing the reach of the statutes to only one narrow type of nonprofit, the retailer's cooperative, a negative inference arises that other types of nonprofit organizations that otherwise meet the requirements of the law do not fall outside of the statutes.

The catchall discretionary exemption enables the director or commissioner of the relevant state agency to "exempt, by rule situations not being comprehended within the purposes of this law and the registration of which the commissioner finds is not necessary or appropriate in the public interest or for the protection of investors."[83] For those who believe that nonprofits simply do not belong within the reach of franchise statutes, this broad discretionary exemption provides an avenue by which the state agents potentially could, if they concurred, implement a policy generally excluding nonprofits from coverage. However, no state agency has taken that position. In an informal survey taken by the authors of most of the state administrators with disclosure laws, no state administrator conceived of a blanket exclusion from coverage for nonprofits.[84] With remarkable uniformity, those questioned confirmed the general proposition that whether an entity or transaction was subject to their state's statute was dependent on whether the entity or transaction fit within the statutory definitions or was subject to an exemption. Each relayed that coverage is determined on an ad hoc fact-specific basis. Although the catchall exemption could be made available to a nonprofit franchise operation, the nonprofit status of the parties, standing alone, was not considered a significant factor.[85]

Nonprofits Have Skirted State Franchise Laws

The language and structure of the WFDL are consistent with every other state's franchise laws. None makes exception for nonprofits. There is nothing remarkable in the Seventh Circuit's application of the plain meaning of Wisconsin's relationship law to the facts presented in the *Girl Scouts* case. Yet, anecdotally, the overwhelming response to the *Girl Scouts* decisions from the nonprofit bar and nonprofit business sector is apparently one of surprise. That reaction, in turn, leads to the inescapable conclusion that up to now nonprofit franchisors have ignored the states' franchise laws and have likely expanded their franchise or federated systems in noncompliance with those laws, in particular, in noncompliance with the disclosure and registration laws.

But how, in the face of such plain statutory language, could nonprofit franchisors have been so blind to these laws? A cynic might suggest that they were not blind at all but simply chose to look away. Another answer might lie in the FTC's interpretation of the FTC Franchise Rule, an interpretation that has resulted in a de facto exclusion of nonprofits from the Franchise Rule. Nonprofit franchisors may have been misled to believe that an absence of enforcement by the FTC under the federal rule meant that they were equally excluded from state laws. But that would be a mistake. There is at least some textual support for the FTC's nonenforcement against nonprofits, textual support that, as we have seen, is not present in the state laws.

In this section, we moved beyond the WFDL and explored the policies and statutory language underpinning the state relationship and disclosure laws to determine if there is anything in these laws to suggest that nonprofits are not within their coverage. We conclude there is not. In the next section, we analyze the FTC Franchise Rule, its application to nonprofits, and the discretion with which the FTC is possessed to enforce the Franchise Rule against nonprofits if it so chooses.

The FTC Franchise Rule Can Apply to Nonprofits If the FTC Allows It

The Federal Trade Commission has established nationwide disclosure requirements that must be met by franchisors in connection with offers to sell a "franchise."[86] As noted earlier, the FTC Franchise Rule is intended to adjust the "serious informational imbalance" that exists between franchisors and prospective franchisees.[87] It does so by requiring franchisors to provide prospective franchisees with a Franchise Disclosure Document.[88]

Thus far, the FTC has concluded that business arrangements between nonprofits that otherwise have all of the characteristics of franchises are not subject to the FTC Rule. There is, however, no clear articulation for that position in the express language of the Franchise Rule. The definition of *person* in the rule means "any individual, group, association, limited or general partnership, corporation, or any other entity."[89] Further, like the states' disclosure laws, there is no express exemption for nonprofits.

The FTC's position, seemingly in contradiction to the plain words of the Franchise Rule, has been articulated in a series of informal staff advisory opinions.[90] In each of these opinions, the FTC staff was asked to assess facts relating to an existing or prospective relationship between nonprofit franchisors and nonprofit franchisees. In each opinion, the FTC staff concluded that a "franchise," as defined in the rule, is not present. Before addressing the rationale for these advisory opinions, however, it is necessary to first understand the statutory underpinnings of the FTC Franchise Rule.

The FTC Rule was promulgated pursuant to the FTC's rulemaking authority under the FTC Act.[91] Section 4 of the FTC Act contains an unusual definition of *corporation* that controls the reach of the act and the jurisdiction of the FTC as it relates to nonprofit corporations. According to FTC § 4, a "corporation"

> shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members. [92]

The reference to corporations "without shares of capital or capital stock" is a reference to nonprofit corporations.[93] Thus, a nonstock corporation is within the coverage of the FTC Act if it is "organized to carry on business for its own profit or that of its members." That latter requirement seems to conflict with some notions of a nonprofit and, arguably, results in essentially all nonprofits not being covered by the act. Neither the commission nor the courts, however, have read the language of § 4 to exclude all nonprofits from coverage of the FTC Act. Courts have, for example, upheld the commission's jurisdiction over, and enforcement actions against, nonprofit professional and trade associations.[94]

In *California Dental Association v. FTC*,[95] the Supreme Court weighed in on the subject and ruled that the definition of *corporation* in the FTC Act is broad enough to give the commission jurisdiction over a nonprofit organization that provides "economic benefits" for its for-profit members' businesses."[96] Other than acknowledging that some showing of "proximate relation to lucre" was necessary, the Court concluded that no minimum threshold percentage of the nonprofit entity's total activities need be shown to be aimed at its members' pecuniary benefit.[97]

The Court also explored the meaning of the word *profit* used within the FTC Act's definition of nonstock corporations and noted that a court of appeals had stated that "according to a generally accepted definition 'profit' means gain from business or investment over and above expenditures, or gain made on business or investment where both receipts or payments are taken into account."[98] Stating that it would leave it unanswered for now, the Supreme Court nonetheless acknowledged the unresolved question of

> . . . whether the Commission has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players. We therefore do not foreclose the possibility that various paradigms of profit might fall within the ambit of the FTC Act.[99]

The FTC has not hesitated to adopt an expansive paradigm of *profit* when it deemed that action was necessary to prevent unfair methods of competition and deceptive trade practices. In *Community Blood Banks of Kansas City Area Inc. v. FTC*,[100] the FTC adopted the following interpretation of *profit* in § 4 of the Act:

> The only logical meaning which the phrase "organized to carry on business for its own profit . . . " could have when applied to a corporation unable to distribute "profits" realized is that the corporation is organized to engage in some undertaking for which it will receive compensation in the form of fees, prices, or dues and is not prohibited by its charter from devoting any excess of income over expenditures or other benefit derived from doing business to its own use; i.e., for its own self-perpetuation or expansion.[101]

Though the commission's interpretation of *profit* was not adopted by the Eighth Circuit in that case,[102] the Supreme Court, as we have seen, has announced that the issue is not finally resolved.[103]

Returning to the FTC Franchise Rule, the question of whether arrangements between nonprofits can be a franchise under the FTC Rule has been addressed in a series of advisory opinions.[104] In addressing the facts presented for those opinions, however, the FTC staff chose not to confront head-on the definition of *corporation* in § 4 of the FTC Act or, for that matter, the definition of *person* contained in the Franchise Rule itself. Rather, the staff employed a roundabout and, in the end, tortured interpretation of the phrase *continuing commercial relationship* found in the Franchise Rule's definition of *franchise*.[105]

Notwithstanding the FTC staff's failure to go there, the starting point for whether or not nonprofit corporations are covered by the Franchise Rule should be the rule's definition of *person*. That definition presents the typical, very broad inclusion of all entities, including "any . . . corporation, or any other entity."[106] Clearly, that definition includes nonprofit corporations. But that unrestricted definition of corporation directly conflicts with § 4 of the FTC Act, which, as we have seen, places certain limitations on the commission's jurisdiction over nonprofit corporations. Because the commission has only such jurisdiction as Congress has conferred upon it by the FTC Act,[107] the Franchise Rule's definition of *person* cannot, and does not, change the limitations established by § 4 of the FTC Act. The seemingly unqualified use of *corporation* in the Franchise Rule's definition of *person*, therefore, must be understood to utilize the same qualified definition of *corporation* established in the Act for nonstock corporations. For unexplained reasons, the FTC staff chose to ignore these critical, definitional sections of the Franchise Rule and the FTC Act.[108]

The UCC . . . does not adjust its coverage based on the legal status of the parties to a sale, equipment lease, or secured transaction.

Instead, the advisory opinions turn to the phrase *continuing commercial relationship* in the definition of *franchise* and, through that phrase, seek to reintroduce the jurisdictional limitations of § 4 of the Act. "The Rule's 'commercial relationship' limitation," the opinions state, "is consistent with Section 4 of the FTC Act, which limits the act's applicability to 'any company . . . which is organized to carry on business *for its own profit or that of its members*.'"[109] The opinions then proceed to identify the indicia of what distinguishes a nonprofit from a for-profit corporation, such as the formal organization of the entity, its tax-exempt status with the IRS, restrictions on distributions to members, and the charitable use of profits.[110]

The problem with proceeding in this manner, i.e., addressing the entities' nonprofit status within the context of the phrase *commercial relationship*, is that it confuses the parties to the commercial relationship with the relationship itself. And, in so doing, the analysis does serious damage to any normal concept of a commercial relationship. In Advisory Opinion 99-4,[111] for example, the FTC staff was faced with a fact scenario where the putative franchisor, a nonprofit corporation, had established thirty active Challenger Center learning centers. Each learning center was operated by a putative franchisee, each of which was also a nonprofit corporation. The putative franchisees were required to pay the putative franchisor an initial fee of $700,000 for the purchase of equipment, were required to pay annual fees thereafter of $10,000, and also purchased trademarked goods at wholesale from the putative franchisor for resale at retail shops operated at the learning centers. The FTC staff concluded that these transactions and the ongoing relationship they created could not form the basis for a franchise because they were not commercial. The transactions were not commercial, the staff opined, because the parties to those transactions were nonprofits. This analysis is simply wrong and confuses the parties to the transactions with the transactions themselves.

Clearly, the payment of $700,000 for equipment is a commercial transaction. The purchase of goods at wholesale for resale at retail is a commercial transaction. It matters not who the parties to the transactions are. When the U.S. government enters into a multiyear, multibillion dollar contract to sell high-tech military equipment to a foreign government, that is a commercial transaction, and it creates a continuing commercial relationship regardless of the fact that neither government was formed for the purpose of making a profit. Nor does it matter if the weapons are sold below cost, at cost, or above cost, i.e., whether or not the seller makes a profit. The presence of a commercial transaction is not dependent on whether one side or the other to the transaction got a good deal.

The Uniform Commercial Code (UCC), unarguably the statute that regulates commercial transactions, does not adjust its coverage based upon the legal status of the parties to a sale, equipment lease, or secured transaction. The UCC covers all "persons," a term that encompasses "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, government subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity."[112] A sale is a sale and a lease is a lease regardless of the parties' legal status and regardless of the perceived economic benefits achieved between them.

Using the analysis suggested here, therefore, the first conclusion of the FTC staff should have been that the Challenger Center parties in fact had a continuing commercial relationship—and assuming the other elements of the definition were also present, which they all appeared to be, there was a franchise.

Finding the presence of a continuing commercial relationship, however, should not end the inquiry, but the FTC staff advisory opinions erroneously make it so. A threshold analysis must be undertaken. That analysis, notwithstanding the presence of a continuing commercial relationship or even a finding that all elements of a franchise are present, is whether the FTC is deprived of jurisdiction over one or the other of the parties because they fall outside the class of corporations defined in § 4 of the FTC Act. The answer to that inquiry will depend on how broadly or narrowly the FTC chooses to interpret § 4. In each advisory opinion on the topic thus far, the FTC staff chose a very narrow interpretation: if the company is chartered as a nonprofit and holds an IRS tax-exempt status, the company will be presumed not to be organized to carry on business for its own profit or that of its members and, therefore, not within the coverage of the FTC Act or the Franchise Rule.[113]

Applying that same narrow interpretation of *corporation* and *profit*, but using the two-step approach suggested here, results in the Challenger Center centers falling outside the FTC's jurisdiction, i.e., even though there was in fact a continuing commercial relationship, the two parties are nonprofit corporations with tax-exempt status and, therefore, are outside the reach of § 4 of the FTC Act. Thus, the end result we reach here is the same result reached by the FTC staff in its advisory opinions, i.e., the Franchise Rule does not apply. However, the reason for this result is because the FTC does not have jurisdiction over the parties; it is not because a blind eye is turned to the parties' commercial transactions and relationship. The paths taken here and in the FTC staff opinions to get to the same practical result are different. The path matters.

A Better Way

First, the approach recommended here does not do damage to the common understanding of what is a commercial transaction or relationship. The presence or absence of a commercial relationship between two parties should not be dependent on the FTC's interpretation *du jour* of the scope of its jurisdiction under § 4 of the FTC Act. The commercial relationship either is or is not present.

Second, regarding the scope of the FTC's jurisdiction over the parties, the interpretation of the definition relating to nonprofits contained in § 4 of the FTC Act is not fixed in stone. As we have seen, different interpretations have been pressed by the commission in other settings. The choice of a particular interpretation of § 4 as it applies to nonprofits is a choice within the commission's discretion.[114] That choice goes directly to the jurisdiction of the FTC over nonprofits otherwise engaged in a commercial relationship and otherwise satisfying the definition of *franchise*. The approach suggested here respects that discretion, but it also shines a light on the FTC's exercise of that discretion. In other words, the denial of coverage under the FTC Franchise Rule to the Challenger Center facts was not due to the failure of the parties to engage in a commercial relationship, which they surely did, but was the result of a conscious choice by the FTC staff to utilize a very limited interpretation of *profit* under § 4 of the act. That choice has real consequences. Had the FTC staff chosen instead to use the interpretation of *profit* put forth by the commission in *Community Blood Banks* (that is, the receipt of "compensation in the form of fees, prices, or dues and . . . devoting any excess of income over expenditures or other benefit derived from doing business to its own use; i.e., for its own self-perpetuation or expansion"),[115] then the Franchise Rule would in all likelihood have been found applicable to the Challenger Center parties.[116]

"'For-profit' and 'not-for-profit' are shorthand labels, not literal labels . . ." What distinguishes [the two] is what the company does with excess revenues.

There is nothing outside of the ordinary in the approach taken by the FTC in *Community Blood Banks.* Indeed, it seems to be the rational interpretation of § 4 of the FTC Act. In *Girl Scouts I*, the Seventh Circuit addressed the same question of profit in response to GSUSA's argument that it and its councils had none.

> "For-profit" and "not-for-profit" are shorthand classifications, not literal labels. A "profit" is an excess of revenues over expenditures. What distinguishes a for-profit from a not-for-profit is what the company does with these excess revenues. GSUSA understands this distinction. Quoting from *Essential Elements of a Girl Scout Corporation*, a GSUSA publication:
>
> The term "nonprofit organization" does not mean (as is most often incorrectly assumed) an organization that cannot enjoy a profit. Rather, the term means that the organization's profit may not be distributed to its members, officers, or directors in their private capacities. *Profit is defined as excess revenue over expenses*, and commonly known in Girl Scouting as a surplus . . . . *Nonprofit organizations are permitted to generate profits* but cannot pass profits on to persons as equity owners.
>
> Girl Scouts of the U.S. of Am., *Essential Elements of a Girl Scout Corporation* 10 (1999) (emphasis added). Indeed, the record indicates that both GSUSA and Manitou, although "nonprofits," operate at a substantial surplus.[117]

As we have said, the commission is not compelled to adopt this interpretation under its Franchise Rule. And, no doubt, the FTC can assert one interpretation in one setting (say, in connection with trade associations) and another interpretation in a second setting (say, in connection with franchising). But it is fair to ask, and for the commission to consider, which interpretation best advances the policies underlying the Franchise Rule. We turn to that question.

No Policy Calls for the Exclusion of Nonprofits from Franchise Laws

Because the application of franchise laws to nonprofits has not previously been analyzed, there has been no real opportunity for the nonprofit sector to articulate why it should be exempted from franchise laws; however, there would likely be overwhelming sentiment for that proposition from nonprofit franchisors.[118] To a certain extent, therefore, we are left to hypothesize what the policy arguments might be. Nonetheless, two very broad policy themes emerged from the arguments that were made, or hinted at, in the *Girl Scouts* case.

Dual Policy Themes

One theme is that, as a charitable organization, a nonprofit is not tainted by the same commercial, profit-maximizing motives as its for-profit counterparts. A nonprofit's charitable, nonprofit status, therefore, removes the risk of harm in the marketplace. A second theme—though, admittedly, difficult to cleanly extricate from the first theme—is that nonprofits are "mission" driven, not profit driven, and that a superior mission not only makes the nonprofit inherently more trustworthy but requires government regulators to keep their hands off of the mission.

The notion that nonprofits are principally charitable, not commercial, in nature is one that has a limited basis in fact. The Dickensian image of a charity may play heavily in our collective imaginations but not in the real-life activity of contemporary nonprofits. Nonprofits operating largely on donations represent a small component of the nonprofit sector. Data show that only 20 percent of the annual funds for the nonprofit sector as a whole come from donations.[119] Increasingly and necessarily, nonprofits rely on commercial income such as fees for services, product sales, and other profit-making ventures.[120] Although nonprofits are by law prohibited from distributing their profits, "[t]he vow of nondistribution is not necessarily a vow of poverty."[121] As one commentator has concluded, "business firms and nonprofit firms converge into similar enterprises, functioning in many similar ways, and, to a large degree, governed by self-perpetuating management."[122] And as Judge Posner found in the *Girl Scouts II* decision, "[n]o gulf separates the profit from the nonprofit sectors of the American Economy."[123]

Although nonprofits by law are prohibited from distributing their profits, "[t]he law of nondistribution is not necessarily a vow of poverty."

Like the for-profit sector, extraordinary growth has been achieved in the nonprofit sector through franchising. A list of the 100 largest nonprofits reveals that substantially more than half are organized using a franchise model, including such well-known organizations as YMCA, United Way, Boy Scouts and other scouting organizations, and most of the disease research organizations such as American Cancer Society and American Heart Association.[124] The motivations for franchising a nonprofit business differ little from those motivating for-profit businesses.[125] The label of *nonprofit, charitable organization*, in short, tells us very little about the actual business models or motivations supporting the organization wrapped in the label. It is unclear, therefore, why that label should matter when it comes to the application of franchise laws.

The fundamental policy underlying the FTC Franchise Rule and all state franchise disclosure statutes is that, through full disclosure, the opportunities for fraud and deception are reduced and the prospective franchisee is placed in a position to make an intelligent, informed decision on the major investment it is about to undertake. There is no sound policy explaining why a prospective nonprofit franchisee is in any less need of those disclosures. Indeed, it is not difficult to suppose that a nonprofit franchisee is in greater need of full disclosures.

In a negotiation between a for-profit franchisor and a prospective for-profit franchisee, it is likely that no matter how much faith the prospect places in the reputation, good faith, and integrity of the franchisor, there lurks—somewhere, deep in the gut of the prospect—the understanding that the franchisor is in this transaction to make money off of the franchisee. Some innate antenna likely goes up, and the prospect proceeds with some sense of caution. No such instinctual antenna may show itself when an individual or local group of good-hearted citizens is negotiating the opening of a local nonprofit branch of a federated nonprofit organization. That setting, with its likely heavy focus on mission and the very high, if not blind, trust placed in the national nonprofit organization, cloaked as it is with its halo of nonprofitness, may completely obscure the substantial financial obligations and risks about to be undertaken. People will quit real jobs and invest real money to manage and operate the new venture. Investment may be in the form of donations to the newly formed nonprofit affiliate and not in the form of capital stock, but it is nonetheless real money coming out of someone's savings account. It is extremely difficult to arrive at a policy argument that denies this individual or group the protections afforded by the franchise disclosure laws.

Although, of course, it is false that all for-profit franchisors prey upon or are "out to get" their franchisees, that reality was no impediment to the promulgation of franchise disclosure laws. There was enough misinformation being disseminated by enough for-profit franchisors, whether intentionally or not, to warrant the disclosures that this legislation requires. It is also patently false and naive to suppose that all nonprofits can do only good and that they are not as capable as for-profits of disseminating, intentionally or otherwise, false and misleading information. To dispel this notion, just conjure up the newscast images of disgraced, weepy-eyed televangelist preachers who have fleeced their flocks. Simply being a nonprofit is not a policy reason for preventing full disclosure to prospective franchisees.[126]

A second theme emerging from the *Girl Scouts* case is that the mission of a nonprofit should separate it from its for-profit counterparts and excuse the nonprofit from coverage under the franchise law. The court in *Girl Scouts* found that the WFDL expresses no concern for the mission or other motivation of the grantor.[127] The same is true of the other state franchise laws and the FTC Franchise Rule. The real or perceived merit of one franchise system's mission, purpose, goal, or quality has nothing to do with the creation or enforcement of franchise laws. The laws, for example, come down no harder on a budget motel chain than on a luxury, five-star resort franchise. Similarly, the law is, and should be, blind to whether a hamburger franchise steams or charbroils its burgers. These distinctions between products and services are not any part of the franchise laws.

A nonprofit's mission should have no different treatment. Is a system of nonprofit nursing homes inherently superior to that of a system of for-profit nursing homes? Even if someone engaged in that debate and tried to pick a winner, it seems entirely uncontroversial to suggest that state and federal regulators and the courts have no business entering the fray. It is the marketplace, not the regulators, that will choose the superior product or service. The strength of a mission is not a rational policy for excluding nonprofits.[128]

Finally, any concern that a nonprofit might have for maintaining control over its mission is no different from any franchisor's concern over maintaining control over the quality of the brand, products, and services comprising a franchise system. The franchise relationship laws, such as the WFDL, allow for terminations if the grantor/franchisor has good cause. Certainly, if a nonprofit franchisee goes "off message," the franchisor would be within its statutory rights to terminate the franchisee if the default is not cured within the typically short notice and cure periods contained in these types of statutes. Franchise relationship laws do not impede any franchisor's control over its brand, message, or mission. Control of the message or the mission, therefore, is not a policy for distinguishing nonprofits from for-profits.

Franchising Is a Choice

It is important to state an obvious point that often gets lost: franchising is a choice. Whether or not to expand a branded product or service through a franchise model is entirely within the discretion of the owner of the brand. There is no coercion. If the brand owner wants to avoid franchise regulation, he shouldn't franchise. No one—certainly not the state of Wisconsin—told GSUSA, for example, that in order to expand Girl Scouting in the state of Wisconsin it had to do so using a franchise or dealership model. Rather than establishing councils as independent franchisees or dealerships, the councils could have been established as wholly owned subsidiaries of GSUSA or as GSUSA's branch offices. Had GSUSA expanded its services (and, concurrently, ensured its absolute control over local operations) using one of these other business formats, the WFDL would have had no application.

The benefit to GSUSA in choosing a franchise format was that it was able to expand its branded services throughout the country without expending its own capital and without assuming the business risks and expenses assumed by each of the independent councils, including the expense of acquiring and maintaining enormous real estate assets, the risk of personal injury claims by campers at the hundreds of independently owned and operated Girl Scout camps, the payroll and insurance costs associated with large staffs, real and personal property lease expenses, and every other risk and expense associated with owning and operating an independent business. The franchise laws offer a fairly straightforward trade-off: if the brand owner wants to have another party assume these significant financial obligations and risks, then full disclosures regarding the nature of the business need to be made up front and, in those states with relationship laws, some level of reasonableness or good cause will be required before the investment of the franchisee or dealer can be lost through termination or nonrenewal. It is a trade-off entirely within the control of the brand owner.

The real or perceived merit of a franchise system's mission has nothing to do with the creation or enforcement of franchise laws.

Conclusion

For reasons that are unclear, nonprofits have avoided the spotlight of coverage under state franchise laws even though they have actively engaged in franchising throughout the country for years. Girl Scouts of the United States of America's aggressive restructuring of its nationwide network of councils, and one council's steadfast refusal to go along, has now directed the spotlight front and center. The Seventh Circuit has ruled that GSUSA's relationship with its council is a franchise or, more specifically, a dealership under Wisconsin law. The relationship falls squarely within the plain words used in the statute to define a dealership, and there are no express or implied exemptions or exclusions that remove either party from coverage simply because of their status as nonprofits. There is also, we have shown, nothing in the language or underlying policies of the numerous other state franchise or broadly applicable dealership statutes suggesting that nonprofits as a class enjoy any special status or treatment.

The consequence of the *Girl Scouts* decisions is that nonprofit franchisors that have been expanding in states with franchise disclosure laws without making the statutorily required disclosures or without registering with the state authorities are likely operating in violation of the law and are subject to the ramifications of those violations, both in the form of civil actions by dissatisfied franchisees and administrative actions taken by the state agencies charged with enforcing these laws. Further, in those states having franchise relationship laws, the top-down authority that nonprofit franchisors previously wielded over their independent affiliates may be more readily, and effectively, called into question now that the emperor's clothes have been revealed for what they are.

Finally, at the federal level, the FTC and its staff should reconsider the pass thus far extended to nonprofits under the FTC Franchise Rule. Although the FTC's exclusion of nonprofits can be rationalized under its current, narrow interpretation of the word *profit* found in § 4 of the FTC Act, the question is whether the exclusion can be justified. The FTC's interpretation of *profit* under the Franchise Rule is at odds with the position that it has taken in other settings. It is also at odds with the fundamental policy underlying the Franchise Rule, which is to remedy the serious informational imbalance between franchisors and prospective franchisees. The FTC must ask itself why a nonprofit franchisor engaged in a continuing, commercial franchise relationship with another nonprofit business should be immunized from the Franchise Rule's disclosure requirements.

Endnotes

1. *See, e.g.*, Philip F. Zeidman, *"Franchising" a Non-Profit Organization*, Franchise Law., Jan. 2006, at 7; Candace Widmer & Susan K. Honchin, Governance of National Federated Organizations (BoardSource E-Book Series 1999); Sharon M. Oster, *Nonprofit Organizations and Their Local Affiliates: A Study in Organizational Form*, 30 J. Econ. Behav. & Org. 83 (1996); Sharon Oster, *Nonprofit Organizations as Franchise Operations*, 2 Nonprofit Mgmt. & Leadership 223 (1992).

2. *See* Widmer, *supra* note 1, at 3 ("Although the body of research on nonprofit management and governance is increasing, only a few studies specifically address national affiliated, federated or 'franchise' organizations.").

3. Nonprofits operating within a franchise framework include United Way, YMCA, Goodwill Industries, American Cancer Society, Planned Parenthood, Rotary International, Habitat for Humanity, and Nature Conservancy. Oster, *Nonprofit Organizations and Their Local Affiliates*, *supra* note 1, at 85–86; Oster, *Nonprofit Organizations as Franchise Operations*, *supra* note 1, at 226.

4. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, 549 F.3d 1079 (7th Cir. 2008) (*Girl Scouts I*); Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, 646 F.3d 983 (7th Cir. 2011) (*Girl Scouts II*).

5. Wis. Stat. § 135.01 et seq.

6. *Girl Scouts II*, 646 F.3d at 987.

7. *See* Fundamentals of Franchising, at xvii (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008) (describing these broadly recognized categories of franchise legislation).

8. 16 C.F.R. pt. 436 (2007).

9. 15 U.S.C. § 41 et seq.

10. The WFDL defines *dealership* as "[a] contract or agreement . . . between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name . . . service mark . . . or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise." Wis. Stat. § 135.02(3)(a). This definition utilizes the "community of interest" standard for finding the requisite relationship. Other states' laws utilize this terminology. *See, e.g.*, R.I. Gen. Laws § 6-50-3. A more common approach to defining a franchise relationship, is to use the concepts of "marketing plan" and "franchise fee." *See, e.g.*, the Illinois Franchise Disclosure Act's definition of *franchise*, 815 Ill. Comp. Stat. 705/3(1). The FTC Franchise Rule's definition of *franchise* is similar. *See infra* note 105.

11. It is not, however, the first time the question has been asked. On several occasions, the FTC staff has addressed this issue in connection with the FTC Franchise Rule's definition of *franchise*. The FTC's response is addressed in the text, *infra*.

12. 36 U.S.C. § 80302(1). Though possessing a congressional charter, GSUSA is incorporated under the laws of the District of Columbia. 36 U.S.C. § 80301(a). A congressional charter bestows no particular rights or privileges on its recipient. "In effect, the federal chartering process is honorific in character. This honorific character may be misleading to the public, however, when such organizations feature statements or display logos that they are 'chartered by Congress,' thus implying a direct relationship to the federal government that does not in fact exist. In addition, there may be an implication that Congress approves of the organizations and is somehow overseeing its activities, which is not the case." Kevin R. Kosar, Cong. Research Serv., Congressionally Chartered Nonprofit Organizations ("Title 36 Corporations"): What They are and How Congress Treats Them 5 (2008) (Report RL30340), *available at* http://assets.opencrs.com/rpts/RL30340_20080714.pdf.

13. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, 549 F.3d 1079, 1083 (7th Cir. 2008) (*Girl Scouts I*).

14. *Id.*

15. *Id*. at 1083–85.

16. *Id.* at 1083.

17. *Id.*

18. Members are solicited and signed up by the local councils. Each member pays an annual fee of $10, which is collected by the local councils. These fees, however, are passed on in full to GSUSA. *Id*. at 1082 n.2.

19. *Id*. at 1091.

20. *Id.* at 1082.

21. *Id.*

22. *Id*. at 1082–83.

23. *Id.* at 1083–84.

24. *Id.* at 1084.

25. *Id.* at 1085.

26. *Id.* at 1098–99; *see also* Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 646 F.3d 983, 986 (7th Cir. 2011) (*Girl Scouts II*) ("There is no suggestion that the council has ever failed to implement the national organization's policies regarding membership diversity, or that it has even, in any respect, gone off message.").

27. *Girl Scouts I*, 549 F.3d at 1085.

28. *Id.*

29. Wis. Stat. § 135.03. The burden of proving good cause is on the grantor. *Id. Good cause* means "(a) Failure by a dealer to comply substantially with essential and reasonable requirements imposed

upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the matter of their enforcement; or (b) Bad faith by the dealer in carrying out the terms of the dealership." *Id.* § 135.02(4).

30. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., No. 08-CV-184, 2008 LEXIS 121311, *6–8 (E.D. Wis. June 5, 2008).

31. Wis. Stat. § 135.06.

32. Wis. Stat. § 135.065 ("In any action brought by a dealer against a grantor under this chapter, any violation of this chapter by the grantor is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued.").

33. *See supra* note 10.

34. *Girl Scouts of Manitou Council*, 2008 LEXIS 121311, at *6 (quoting Kania v. Airborne Freight Corp., 300 N.W.2d 63, 75 (Wis. 1981)).

35. *Id.* at *6.

36. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 549 F.3d 1079, 1092 (7th Cir. 2008) (*Girl Scouts I*).

37. A decade earlier, addressing a for-profit lift truck manufacturer's stated surprise at having formed a franchise with its dealer under the Illinois Franchise Disclosure Act, the Seventh Circuit commented, "Legal terms often have specialized meaning that can surprise even a sophisticated party. The term 'franchise,' or its derivative 'franchisee,' is one of those words." TO-AM Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 152 F.3d 658, 659–60 (7th Cir. 1998). Mr. Leydig, one of the authors of this article, represented plaintiff in this case.

38. Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Firms*, 40 N.Y.L. L. Rev. 457, 459 (1996) ("[I]f the public simply looks to nonprofit status as a signal of trustworthiness, creating this legal form of organization becomes a 'halo' on any nonprofit regardless of merit.").

39. *See, e.g.*, Brief for GSUSA at 20, *Girl Scouts I*, Docket No. 08-2488 (Aug. 11, 2008) ("GSUSA's mission is an educational one in which it strives to build girls of courage, confidence, and character. . . . To hold educational organizations such as Girl Scouts equivalent to a commercial dealer to be regulated under the WFDL is unprecedented.").

40. *Girl Scouts I*, 549 F.3d at 1092.

41. *Id.*

42. *Id.*

43. Wis. Stat. § 135.02(6); *see also* Builder's World, Inc. v. Marvin Lumber & Cedar, Inc., 482 F. Supp. 2d 1065, 1072–73 (E.D. Wis. 2007) (finding no exception for nonprofit member cooperative in WFDL's definition of *person*).

44. Wis. Stat. § 135.07.

45. *Girl Scouts I*, 549 F.3d at 1092.

46. *Id.* at 1091.

47. *Id.* at 1091–92.

48. *Id.* at 1091.

49. *Id.*

50. *Id.* at 1091–92.

51. *Id.* at 1092–94.

52. In addition to the statutory presumption, the court concluded that GSUSA's efforts to remove 60 percent or more of Manitou Council's jurisdiction would result in irreparable harm in fact. *Girl Scouts I*, 549 F.3d at 1087–90. The court also circled back on the district court's ruling that it would not adopt an "expansive interpretation" of the definition of *dealership*. *See supra* note 34 and accompanying text. "As we have shown," the court of appeals stated, "finding that Manitou qualifies as a dealer requires no expansion of the WFDL." *Girl Scouts I*, 549 F.3d at 1092.

53. *Id.* at 1101.

54. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 700 F. Supp. 2d 1055, 1073–83 (E.D. Wis. 2010).

55. *Id.* at 1083–94.

56. Although interesting and worthy of separate comment, the First Amendment issues are beyond the focus of this article. In a nutshell, the court of appeals found GSUSA's First Amendment argument pretextual. GSUSA's argument that realignment was intended to promote diversity "cannot be taken seriously in the absence of any evidence of a connection between realignment of the councils and promotion of diversity—and none was presented." Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 646 F.3d 983, 986 (7th Cir. 2011) (*Girl Scouts II*). "The possibility that a law of general application might indirectly and unintentionally impede an organization's effort to communicate its message effectively can't be enough to condemn the law." *Id.*

57. *Id.* at 987.

58. *Id.*

59. *Id.* at 987–88 (quoting Dennis R. Young & Lester M. Salamon, *Commercialization, Social Ventures, and For-Profit Competition*, *in* The State of Nonprofit America 423, 436 (Salamon ed., 2002) and citing Howard P. Tuckman & Cyril F. Chang, *Commercial Activity, Technological Change, and Nonprofit Mission*, *in* The Nonprofit Sector: A Research Handbook 629, 630 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006); Burton A. Weisbrod, *The Nonprofit Mission and Its Financing*, *in* To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector 1, 16–17 (Weisbrod ed., 1998); Michael S. Knoll, *The UBIT: Leveling an Uneven Playing Field or Tilting a Level One?*, 76 Fordham L. Rev. 857, 858–59 (2007); Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.U. L. Rev. 457, 489–90 (1996)).

60. *Girl Scouts II*, 646 F.3d at 989.

61. *Id.* at 991. Back in the district court, an order of permanent injunction was entered against GSUSA enjoining its implementation of realignment against Manitou Council. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., No. 08-CV-184 (E.D. Wis. Oct. 12, 2011) (Court Document No. 208).

62. *See* Alaska (Alaska Stat. § 45.45.700 to -790); Arkansas (Ark. Code. Ann. §§ 4-72-201 to -210); California (Cal. Bus. & Prof. Code §§ 20000 –20043); Connecticut (Conn. Gen. Stat. §§ 42-133e to -133h); Delaware (Del. Code. Ann. tit. 6, §§ 2551–2556); Hawaii (Haw. Rev. Stat. § 482E-6); Illinois (815 Ill. Comp. Stat. 705/1 to /44); Indiana (Ind. Code §§ 23-2-2.7-1 to 7.7); Iowa (Iowa Code §§ 523H.1–.17, 573A.10–.17); Michigan (Mich. Comp. Laws §§ 445.1501–.1545); Minnesota (Minn. Stat. §§ 80C.01–.30); Mississippi (Miss. Code Ann. §§ 75-24-51 to -63); Missouri (Mo. Rev. Stat. §§ 407.400–.420); Nebraska (Neb. Rev. Stat. §§ 87-401 to

-410); New Jersey (N.J. Stat. Ann. §§ 56:10-1 to -11); Rhode Island (R.I. Gen. Laws § 6-50-1 to -9); Virginia (Va. Code Ann. §§ 13.1-557 to -574); Washington (Wash. Rev. Code §§ 19.100.010–.940); Wisconsin (Wis. Stat. §§ 135.01–135.07); Puerto Rico (P.R. Laws Ann. tit. 10, § 278); Virgin Islands (V.I. Code Ann. tit. 12A, §§ 130–139). Idaho and Louisiana have very limited laws affecting the franchise relationship. *See* Idaho Code § 29-110; La. Rev. Stat. Ann. § 23:921(F).

63. *See, e.g.*, Ark. Code Ann. § 4-72-204(b); Iowa Code § 537A.10.7(b); Minn. Stat. § 80C.14 subdiv. 3(a).

64. *See, e.g.*, Ark. Code Ann. § 4-72-208; 815 Ill. Comp. Stat. 705/26.

65. *See, e.g.*, 815 Ill. Comp. Stat. 705/41 ("Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act or any other law of this State is void.").

66. *See* California (Cal. Corp. Code § 31000 et seq.); Hawaii (Haw. Rev. Stat. § 482E-1 et seq.); Illinois (815 Ill. Comp. Stat. 705/1 et seq.); Indiana (Ind. Code Ann. § 23-2-2.5 et seq.); Maryland (Md. Code Ann., Bus. Reg. § 14-201 et seq.); Michigan (Mich. Comp. Laws § 445.1501 et seq.); Minnesota (Minn. Stat. § 80C.01 et seq.); New York (N.Y. Gen. Bus. Law § 680.1 et seq.); North Dakota (N.D. Cent. Code § 51-19-01 et seq.); Oregon (Or. Rev. Stat. § 650.005 et seq.); Rhode Island (R.I. Gen. Laws § 19-28.1-1 et seq.); South Dakota (S.D. Codified Laws § 37-5A-1 et seq.); Virginia (Va. Code Ann. § 13.1-557 et seq.); Washington (Wash. Rev. Code §§ 19.100.010 et seq.); Wisconsin (Wis. Stat. § 553.01 et seq.).

67. Michigan and Oregon do not require registration.

68. 16 C.F.R. pt. 436 (2007).

69. 43 Fed. Reg. 59,621, 59,625 (Dec. 21, 1978).

70. The FTC Franchise Rule sets a floor for disclosure and thus does not prohibit state law from prescribing additional disclosures or mandating other requirements. "The FTC does not intend to preempt the franchise practice laws of any state or local government, except to the extent of any inconsistency with this Rule. A law is not inconsistent with this Rule if it affords prospective franchisees equal or greater protection." 16 C.F.R. § 436(10)(b).

71. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 549 F.3d 1079, 1092 (7th Cir. 2008) (*Girl Scouts I*) (emphasis in original).

72. Wis. Stat. § 135.025(2).

73. Va. Code Ann. § 13.1-558.

74. N.J. Stat. § 56:10-2.

75. Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 677 (2d Cir. 1985); *see also* Modern Computer Sys. v. Modern Banking Sys., 858 F.2d 1339, 1344 (8th Cir. 1988) (Minnesota statute recognizes the often superior bargaining power and economic resources of the franchisor).

76. There are critics of the assumptions underlying these statutes, i.e., they question that the playing field is tilted at all, that franchisees are inherently less sophisticated, or that they are at an economic disadvantage when negotiating franchise agreements. *See, e.g.*, William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 Franchise L.J. 23 (2008). That criticism, however, goes to the policy behind these statutes and draws no distinction between how individual franchisees are legally organized. If the policy underpinning franchise relationship laws is bad for one, it is bad for all.

77. Cal. Corp. Code § 31001.

78. The Rhode Island and Wisconsin Fair Dealership Laws are typical, defining *person* to mean "a natural person, partnership, joint venture, corporation or other entity." R.I. Gen. Laws § 6-50-2(6); Wis. Stat. § 135.02(6).

79. For an in-depth discussion of exclusions and exemptions under franchise laws, see Karen B. Satterlee & Leslie D. Curran, *Exemption-Based Franchising: Are You Playing in a Minefield?*, 28 Franchise L.J. 191 (2009).

80. *See* Cal. Bus. & Prof. Code § 20001(d)(3); Cal. Corp. Code § 31005(c); Mich. Comp. Laws § 445.1504a; Wis. Stat. § 553.22(3).

81. *See* California (Cal. Corp. Code § 31100); Hawaii (Haw. Rev. Stat. § 482E-4(b)); Illinois (815 Ill. Comp. Stat. 705/9); Indiana (Ind. Code Ann. § 23-2-2.5-5); Maryland (Md. Code Ann. Bus. Reg. § 14-214(b)); Minnesota (Minn. Stat. § 80C.03(g)); New York (N.Y. Gen. Bus. Law § 684); North Dakota (N.D. Cent. Code § 51-19-04); Rhode Island (R.I. Gen. Laws § 19-28.1-6(10)); South Dakota (S.D. Codified Laws § 37-5B-15); Wisconsin (Wis. Stat. § 553.25); Virginia (Va. Code Ann. § 13.1-560).

82. Cal. Bus. & Prof. Code § 20001(d)(3).

83. Cal. Corp. Code § 31100; *see also supra* note 81.

84. The authors contacted the relevant state administrators of most of the fifteen states with disclosure or registration laws and made inquiry as indicated in the text.

85. There is no catchall discretionary exemption from the relationship laws. Even if a franchisor secured exemption from registration and/or disclosure in those states in which the relationship provisions are housed within the disclosure statutes, the grant of the catchall exemption—or any other disclosure or registration exemption, for that matter—does not relieve the franchisor from those obligations appurtenant to the relationship portion of the statute.

86. Bus. Franchise Guide (CCH) ¶ 6190 et seq., 16 C.F.R. pt. 436 (1978).

87. Statement of Basis and Purpose [to the original FTC Rule], 43 Fed. Reg. 59,621, 59,625 (Dec. 21, 1978) (Original SBP). A new Statement of Basis and Purpose was published in connection with the updated FTC Rule. 72 Fed. Reg. 15,445 (Mar. 30, 2007) (Updated SBP). Except to the extent of any conflict between the original and updated versions of the FTC Rule, the Original SBP remains valid. *Id.* at 15,449.

88. *See* 16 C.F.R. § 436.5 (identifying twenty-five "items" of disclosure that can generally be grouped in categories relating to information about the franchisor, the franchisor's system of franchising, requirements expected of the franchisee, and disclosures about the franchise agreement itself). Echoing the policies first stated in the California Franchise Investment Law, the commission articulated its bases for requiring such disclosures as follows: "[P]re-sale disclosure is necessary to protect prospective franchisees from fraudulent and deceptive franchise sales practices. Pre-sale disclosure provides prospective franchisees with material information needed to conduct their own due diligence investigation of the offering, as well as information that prospective franchisees might not otherwise be able to obtain on their own, such as the franchisor's litigation history, failure rates in the franchise system, and audited financial information. Further, complaints from franchisees about various contractual issues are prevalent and strongly suggest that pre-sale disclosure is neces-

sary to ensure that prospective franchisees are better informed about the relationship they will be entering, including issues such as rights to protected territories and product source restrictions." Notice of Proposed Rulemaking, Franchise Rule, 64 Fed. Reg. 57,294, 57,299–57,300 (Oct. 22, 1999).

89. 16 C.F.R. § 436.1(n).

90. *See* Informal Staff Advisory Op. 02-2, Bus. Franchise Guide (CCH) ¶ 6513 (Apr. 26, 2002); Informal Staff Advisory Op. 00-4, Bus. Franchise Guide (CCH) ¶ 6508 (Apr. 7, 2000); Informal Staff Advisory Op. 99-4, Bus. Franchise Guide (CCH) ¶ 6501 (May 13, 1999); Informal Staff Advisory Op. 95-3, Bus. Franchise Guide (CCH) ¶ 6468 (Apr. 4, 1995).

91. 15 U.S.C. § 46(g); Original SBP, 43 Fed. Reg. 59,638–39.

92. 15 U.S.C. § 44.

93. Nonprofits do not have stockholders. *See, e.g.*, 805 Ill. Comp. Stat. 105/106.05 (shares and dividends prohibited for nonprofit corporations).

94. *See, e.g.*, Am. Med. Ass'n v. FTC, 638 F.2d 443, 448 (2d Cir. 1980) (FTC has jurisdiction over professional medical associations); FTC v. Nat'l Comm'n on Egg Nutrition, 517 F.2d 485, 487–88 (7th Cir. 1975) (FTC has jurisdiction over egg industry association); Cmty. Blood Bank of Kan. City Area Inc. v. FTC, 405 F.2d 1011,1017 (8th Cir. 1969) (finding that ". . . congress did not intend to provide a blanket exclusion for all nonprofit corporations . . . " but finding no jurisdiction over the solely charitable enterprise in that case).

95. 526 U.S. 756 (1999).

96. *Id.* at 767–68.

97. *Id.* at 766.

98. *Id.*. at 767 n.6 (quoting *Cmty. Blood Bank*, 405 F.2d at 1017).

99. *Cal. Dental*, 526 U.S. at 767 n.6.

100. 405 F.2d 1011 (8th Cir. 1969).

101. *Id*. at 1016 (emphasis in original removed).

102. *Id.* at 1017. The Eighth Circuit's rejection of the commission's proposed definition is difficult to reconcile with the court's statement that it would utilize the "generally accepted definition [of] 'profit' [which] means gain from business or investment over and above expenditures, or gain made on business or investment when both receipts or payments are taken into account." *Id.* at 1015, 1017. The commission's above-quoted articulation of *profit* does not stray from that meaning. The Supreme Court commented on the Eighth Circuit's apparent inconsistent treatment of *profit*, noting that the circuit court had said it would use the term's generally accepted definition while "in the same breath it noted that the term's 'meaning must be derived from the context in which it is used.'" *Cal. Dental*, 526 U.S. at 767 n.6 (quoting Cmty. Blood Bank, 134 F.3d at 1016). In rejecting the commission's articulation of *profit* in *Community Blood Bank*, the Eighth Circuit seems to rest its ruling on the "context" arising from two points: (1) though the nonprofits in question had surpluses or "profit," none was distributed outside of the nonprofit organizations themselves; and (2) the revenue realized by the nonprofits appears to have been derived principally from gifts, grants, and donations, i.e., wholly charitable sources. 134 F.3d at 1020. Other circuits have, accordingly, distinguished *Community Blood Bank* as addressing "a solely charitable enterprise." *Nat'l Comm'n of Egg Nutrition*, 517 F.2d at 488; *see also* Am. Med. Ass'n v. FTC, 638 F.2d 443, 448 (2d Cir. 1980) (*Community Blood Bank* "involved a . . . charitable organization").

103. *Cal. Dental*, 526 U.S. at 767 n.6.

104. *See supra* note 90.

105. Section 436.1(h) of the FTC Franchise Rule defines *franchise* as follows: "*Franchise* means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that: (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark; (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate." 16 C.F.R. § 436.1(h).

106. *Id.* § 436.1(n).

107. FTC v. W. Meat Co., 272 U.S. 545, 559, 47 S. Ct. 175 (1926); FTC v. Saint Claire Refining Co., 261 U.S. 463, 475, 43 S. Ct. 450 (1922).

108. Perhaps the staff was reluctant to point out that the FTC had overstated its jurisdictional reach under the FTC Rule by including the overinclusive definition of *person*.

109. *See, e.g.*, Informal Staff Advisory Op. 00-4, Bus. Franchise Guide (CCH) ¶ 6508 (Apr. 7, 2000) (emphasis in original).

110. *Id.*

111. Informal Staff Advisory Op. 99-4, Bus. Franchise Guide (CCH) ¶ 6501 (May 13, 1999).

112. U.C.C. § 1-201(27) (2001).

113. As discussed, the FTC staff does not use the FTC Act's definition of *corporation* for the purpose of determining jurisdiction per se but, rather, as the test for determining the presence of a "continuing commercial relationship." Thus, under the Challenger Center scenario (Informal Staff Advisory Op. 99-4), even in the face of income earned on wholesale sales to the putative franchisees, the FTC staff concluded thus: ". . . A nonprofit organization such as the Challenger Center that earns income from its activities will not be deemed to engage in commercial, for-profit activities unless the evidence demonstrates that the income is used for non-charitable purposes or inures directly to those associated with the organization, such as directors, officers, or shareholders. Under the circumstances, the facts presented do not rebut the presumption created by the Challenger Center's tax exempt status that the Challenger Center is organized primarily for non-profit purposes. Accordingly, it would appear that the establishment of Learning Centers does not constitute the offer of a franchise under the Commission's Franchise Rule." Bus. Franchise Guide (CCH) ¶ 6501. Again, the FTC staff confuses the nonprofit status of the party (and the statutory prohibition against distributing profits) with the profit-making commercial transactions in which the party is engaged.

114. Unlike the states' franchise laws, the FTC Act and, by extension, the FTC Franchise Rule do not provide for a private cause of action. Holloway v. Bristol-Meyers Corp., 485 F.2d 986 (D.C. Cir. 1973); Mon-Shore Mgmt., Inc. v. Family Media, Inc., 584 F. Supp. 186 (S.D.N.Y. 1984). Accordingly, private litigants are not in a position to press the courts for their interpretation of the FTC Rule,

including their interpretation of *corporation* or *profit* found in § 4 of the act. The issue comes to the courts only after the commission seeks to enforce a particular interpretation of its choosing and then only if that interpretation is challenged by the target of the commission's enforcement action. If the FTC does not want to push the boundaries of its jurisdiction under § 4 to the outer limits, that is its decision to make.

115. Cmty. Blood Banks of Kan. City Area Inc. v. FTC, 405 F.2d 1011, 1016 (8th Cir. 1969).

116. The difficulty of the FTC staff's approach to nonprofits is further revealed in its Advisory Opinion 00-4. Informal Staff Advisory Op. 00-4, Bus. Franchise Guide (CCH) ¶ 6508 (Apr. 7, 2000). In the fact scenario presented there, the putative franchisor, AKOM, a nonprofit associated with the University of North Carolina, entered into licensing agreements with putative franchisees that would use AKOM's trademarked educational program for elementary and middle school children. Those licensees would be both for-profit and nonprofit entities. Licensees would collect tuition from their students, and AKOM would be paid a royalty from those charges. AKOM would provide support and supervision, marketing services, and facilitator training to the licensees. AKOM would sell, at cost, course materials to the licensees. As in the Challenger Center scenario, the FTC staff focused on the "commercial relationship" language in the FTC Rule but actually looked solely at the corporate status of the parties to the relationship. As between AKOM and the nonprofit licensees, therefore, the FTC staff concluded that the relationship was not commercial; however, between AKOM and the for-profit licensees, the exact same relationship was commercial. The FTC Rule would apply, therefore, to the latter but not the former set of licensees. These transactions were identical; they were commercial regardless of the corporate status of the parties, and the FTC staff should have so concluded. The next question that should have been addressed, however, was whether the FTC had jurisdiction over AKOM, a nonprofit, even in connection with its concededly commercial relationships. The resolution of that question requires the FTC to take a stance on how broadly it intends to enforce its jurisdiction under § 4 of the FTC Act over nonprofits that are in fact selling franchises.

117. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 549 F.3d 1079, 1094 (7th Cir. 2008) (*Girl Scouts I*).

118. The same sentiment was expressed by the for-profit sector of franchisors when the FTC Franchise Rule was under consideration. Statement of Basis and Purpose [to the original FTC Rule], 43 Fed. Reg. 59,621 (Dec. 21, 1978) (Original SBP).

119. Angela M. Eikenberry, *The Marketization of the Nonprofit Sector: Civil Society at Risk?*, 64:2 Pub. Admin. Rev. 132, 133 (Mar./Apr. 2004) (citing 1997 data). The percentage of total funds derived from donations can differ dramatically between subsectors. In the health services sector, donations account for only 5.5 percent. In education and research, donations are at 14.6 percent. Donations are 33.9 percent of total funds for social and legal services, 30.9 percent for civic social and fraternal organizations, and 62.5 percent for nonprofits engaged in the arts and culture. Brody, *supra* note 38, at n.50 (citing 1992 data). Nearly all financial support for religious organizations comes from contributions. *Id.*

120. Eikenberry, *supra* note 119, at 134.

121. Brody, *supra* note 38, at 490–91 (citing Howard P. Tuckman & Cyril F. Chang, *Nonprofit Equity: A Behavioral Model and Its Policy Implications*, 11 J. Pol'y Analysis & Mgmt. 76, 77–78 (1992) ("The vast majority of charitable nonprofit organizations accumulate equity and . . . the real value of their equity grows over time." (citations omitted)).

122. Brody, *supra* note 38, at 471.

123. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 646 F.3d 983, 987 (7th Cir. 2011) (*Girl Scouts II*).

124. Oster, *Nonprofit Organizations and Their Local Affiliates*, *supra* note 3, at 84–86; Oster, *Nonprofit Organizations as Franchise Operations*, *supra* note 3, at 226.

125. *See, e.g.*, Oster, *Nonprofit Organizations and Their Local Affiliates, supra* note 3; Oster, *Nonprofit Organizations as Franchise Operations*, *supra* note 3.

126. *Cf.* Wendy N. Davis, *With Charity to All—Except Scammers: Tougher Laws Seek to Nail Bogus Nonprofits*, 97 A.B.A. J. 14 (Dec. 2011) (discussing, generally, proposed legislation to address nonprofit fraud, including Model Protection of Charitable Assets Act, which, among other provisions, requires charities with more than $50,000 in assets in a state to register with state authorities); Jonathan L. Pompan & Kristalyn J. Loson, *N.Y. Attorney General Examining Cause-Related Marketing*, NonProfit Times, Dec. 5, 2011 (NPT weekly e-newsletter), http://link.marketing-thenonprofittimes.com/marketingthenonprofittimes/4/9asvucnHmotug5HtixHk5j3geHpniHx41zn2 (discussing the increasing focus of the New York attorney general, and state regulators generally, on charitable solicitation in general and on cause-related marketing campaigns in particular).

127. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., 549 F.3d 1079, 1092 (7th Cir. 2008) (*Girl Scouts I*).

128. GSUSA's mission statement, to "build[] girls of courage, confidence, and character who make the world a better place" (Constitution of GSUSA, Preamble), differs little from those of for-profit companies also serving girls and young women. *See, e.g.*, mission statements for the following for-profit corporations: American Girl, www.americangirl.com/corp/corporate.php?section=about&id=1 (last visited Nov. 15, 2011) ("At American Girl, we celebrate girls and all that they can be. That's why we develop products and experiences that help girls grow up in a wholesome way, while encouraging them to enjoy girlhood through fun and enchanting play."); Highlights for Children, www.highlights.com/custserv/customerservice-subgateway2main.jsp?iCategoryID=3&CCNavIDs=3 (last visited Nov. 15, 2011) ("[C]hildren are the world's most important people and we are dedicated to serving you, as you help kids become their best selves—creative, curious, caring and confident."); Maybelline New York, www.maybelline.com/about (last visited Nov. 15, 2011) ("[E]mpowering women to make a statement, explore new looks, and flaunt their own creativity and individuality.")