



VETERANS EDUCATION SUCCESS

Memorandum

To: Interested Parties

From: Sean Marvin, Legal Director

Re: Precedent for FTC's Piercing of Nonprofit Corporate Veils

Date: June 22, 2018

Recent efforts by certain predatory for-profit colleges to convert to nonprofit status¹ raises the question of whether the U.S. Federal Trade Commission (FTC) can continue to exercise jurisdiction over those entities' misleading and deceptive recruiting practices.

The Federal Trade Commission Act, 15 U.S.C. §§ 41-58, grants the FTC enumerated powers over certain persons, partnerships, and corporations. 15 U.S.C. § 45. It defines a "corporation" to include "any company . . . organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. Although this language generally is accepted to mean that the FTC lacks jurisdiction over nonprofit organizations, there have been certain exceptions where the FTC has taken action against nonprofit actors, and where federal courts have recognized its power to do so.

For example, in *In re Ohio Christian College*, 80 F.T.C. 815, 1972 FTC LEXIS 223 (F.T.C. July 29, 1970), the FTC asserted authority over two nonprofit corporations and the individuals who controlled those corporations. Specifically, the FTC ordered Ohio Christian College, a correspondence school, to refrain from various activities, including using the word "college," conferring academic degrees, misrepresenting itself as having resident classes and accredited curricula, and implying that the state of Ohio or any other governmental body recognized its programs. *Id.* at *56-60.

Although Ohio Christian College was technically a nonprofit entity, FTC asserted jurisdiction. In its decision, the FTC focused on the structure and financial dealings of the college and the other nonprofit involved, and noted that the two entities were "mere shells without substance." *Id.* at *67. Among other things, the FTC stated that the two corporate entities were, in reality, the individual respondent "using the guise of the nonprofit corporation to further his own finance and comfort." *Id.* at *67. As such, it determined that "piercing the non-profit corporate veil and recognizing the [school] for what it [was]—a device by which individuals for private gain, seek to deceive the public—does no violence" to the FTC Act. *Id.* at *71.

¹ See generally, The Century Foundation, "Covert For-Profit: How College Owners Escape Oversight through a Regulatory Blind Spot" (2015), available at <https://tcf.org/content/report/covert-for-profit/>

In a more recent case, *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451 (D. Md. 2004), a federal district court rejected a non-profit organization's argument that the FTC lacked jurisdiction over the organization due to its non-profit status. Instead, the court recognized the FTC's authority over the non-profit because it acted in concert, in profit-making activities, with a for-profit company. *Id.*

Similarly, as recently as 2017, the FTC Chairperson, in writing a foreign government authority to affirm the FTC's commitment to an international privacy framework, explained that FTC's jurisdiction extended to "sham charities or other non-profits that in actuality operate for profit" and to "non-profit organizations that operate for the profit of their for-profit members, including by providing substantial economic benefits to those members."

Additionally, although somewhat less on point than the cases listed above, even the Supreme Court has recognized the FTC's ability to assert jurisdiction over a nonprofit entity in certain instances. In *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Court upheld the FTC's authority over a nonprofit organization because the FTC Act expressly grants the FTC jurisdiction over an entity that carries on business for the profit of its members. *Id.* at 766. There, the Court noted that "[n]onprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts under the Federal Trade Commission Act." *Id.* at 768.

In total, the caselaw discussed above demonstrates that the FTC can and will exercise its authority to pierce the veil of a nonprofit organization if it actually operates for the profit of its members. This suggests the FTC has an important role in ensuring that for-profit schools that convert to nonprofit entities are not simply establishing sham structures that allow them to disguise profits and continue deceiving students and the public.