

For-Profit Philanthropy

by Dana Brakman Reiser¹

ABSTRACT

This essay examines Google's adoption of the novel and unorthodox for-profit philanthropy model. Google created a division of its for-profit company that is tasked with pursuing philanthropic activities. Specifically, this division is responsible for addressing the global issues of climate change, poverty, and emerging diseases. Of course, companies have long blended philanthropic and business objectives. They make contributions, commit to corporate social responsibility, or even form as social enterprises. For-profit philanthropy, though, differs from these familiar techniques in both structure and scale. Likewise, for-profit philanthropy stands in stark contrast to the nonprofit, tax-exempt form of organization typically used by those pursuing exclusively philanthropic endeavors. This essay investigates the for-profit philanthropy model, drawing out these distinctions as well as the reasons why Google chose to adopt it. These reasons reveal a fascinating mismatch between Google's philanthropic vision and that of nonprofit law. Exploring this divergence exposes the fundamental policy choices underlying the law's structures for philanthropic activity, as well as the undertheorized boundary between nonprofits and for-profits.

Google is known for its innovative search methodology, pricing structure, even employee benefits. When this for-profit corporation created a philanthropic division inside the company, it grasped the mantle of philanthropic innovator as well. This division stands alongside divisions for engineering, sales and finance, but is tasked with addressing climate change, poverty and emerging diseases. It is known as Google.org. This organizational structure has been termed “for-profit philanthropy.” The for-profit philanthropy structure distinguishes Google.org from the customary range of corporate philanthropic practice. It also differentiates this model from philanthropy pursued in the traditional organizational form: a tax-exempt, nonprofit corporation. This Essay will explore Google.org and its for-profit philanthropy model, drawing out their implications for nonprofit law, for-profit law, and the boundary between them.

The first Part introduces the Google.org phenomenon, describing its roots and initiatives. It also identifies the major themes defining this experiment in for-profit/nonprofit hybridization. The next Part considers several other ways in which for-profits engage in philanthropic activities: corporate charitable contributions, corporate social responsibility, and social enterprise. Comparing these examples with Google.org highlights the distinct innovations of for-profit philanthropy. Part III

¹ Professor of Law, Brooklyn Law School. I am indebted to the formative comments I received from participants in the Stanford/Yale Junior Faculty Forum. I also appreciate the support of Brooklyn Law School's Summer Research Program, the able research assistance of Kate Fitzpatrick, Victoria Siesta and Julia Sobol, and the suggestions of Garry Jenkins, Claire Kelly, Jeff Reiser, and Linda Sugin. Any remaining errors are, of course, my own.

FOR-PROFIT PHILANTHROPY

explores the reasons that Google undertook the for-profit philanthropy experiment, rather than using a traditional philanthropic vehicle. While Google treasures any chance to innovate, its reasons for adopting the for-profit philanthropy model are linked to practical legal concerns. If structured using traditional organizational forms, Google.org would be hamstrung in pursuing its intended philanthropic strategies. Legal restrictions would frustrate its desire to make for-profit investments, directly access Google, Inc. resources, and engage in political action, all in service of philanthropic goals. This Part details these restrictions. In doing so, it identifies a fascinating mismatch between Google's philanthropic vision and that of nonprofit law.

The final Part examines the implications of for-profit philanthropy and the questions it raises, offering insights drawn from both nonprofit and for-profit legal traditions. The nonprofit law perspective prompts difficult questions about enforcement and about the limits, if any, on changing a for-profit philanthropy's mission. A for-profit law perspective reminds us to consider how adopting the for-profit philanthropy model might undermine shareholder primacy, breach fiduciary obligations, or both. Ultimately, these perspectives combine to reveal the more fundamental questions that for-profit philanthropy presents. In important ways, the law defining nonprofit and for-profit forms also defines the boundaries of philanthropy and business. For-profit philanthropy defies these limits. It challenges the entire boundary-setting exercise, and contests the utility and propriety of its categories.

I. GOOGLE.ORG'S FOR-PROFIT PHILANTHROPY MODEL

Google, Inc. is a widely known and fantastically successful public company. It offers an ever-expanding array of products and services, first and most notably its eponymous search engine.² Google, Inc. positions itself as a different kind of company, and its actions support this claim. It ran its initial public offering as a Dutch auction to give greater access to small investors.³ It offers unusual and extravagant employee benefits to recruit top creative talent.⁴ It refuses to run

² Google, Inc. operates in myriad technological fields and has been growing exponentially virtually from its inception. DAVID A. VISE & MARK MALSEED, *THE GOOGLE STORY* 1-9 (2005). Its core product remains its web search technology and it "generate[s] revenue primarily by delivering relevant, cost-effective online advertising." Google, Inc., Annual Report (Form 10-K), at 1 (Mar. 16, 2006), *available at* <http://www.sec.gov/Archives/edgar/data/1288776/000119312506056598/d10k.htm>.

³ See Les Christie, *The ABCs of a Unique IPO*, Apr. 29, 2004, <http://money.cnn.com/2004/04/29/technology/googleauction>.

⁴ See Google Jobs Benefits, <http://www.google.com/support/jobs/bin/static.py?page=benefits.html> (last visited Aug. 22, 2008) (describing a range of benefits from health insurance, retirement savings, and employee stock

FOR-PROFIT PHILANTHROPY

lucrative pop-up ads, or indeed any ads on its homepage.⁵ It even took on “Don’t be evil” as a kind of corporate motto.⁶

Google, Inc.’s goals also extend beyond the company. Its leaders “aspire to make Google an institution that makes the world a better place,” and have pledged to commit one percent of the company’s equity and profits to philanthropic pursuits.⁷ Here, too, Google, Inc. has innovated. From its inception as a public company, Google, Inc. has sponsored a traditional corporate foundation.⁸ Yet, Google, Inc.’s experiment with the for-profit philanthropy concept has come to dominate its philanthropic program. Google.org is now the primary home and driver of Google, Inc.’s philanthropic activities, and today it “manage[s]” the Google Foundation.⁹

Google.org is a division of Google, Inc. tasked with pursuing the company’s philanthropic goals. These goals aim broadly to address “climate change, poverty and emerging disease,” now focusing on five main initiatives.¹⁰ Its initiatives employ a mix of methods. Like traditional foundations, Google.org makes grants to nonprofit entities. In addition, it makes equity investments in for-profit companies. Wherever possible, Google.org also uses Google, Inc.’s human resources, technology, and products to pursue its philanthropic goals. Though its purposes resonate with typical philanthropic pursuits and many companies engage in philanthropic activities, Google.org’s use of an integrated for-profit division inaugurates a new model: “for-profit philanthropy.”

The current Google.org initiatives demonstrate many of the distinctive elements of the for-profit philanthropy model. The first two of its initiatives focus on projects to curb climate change: developing cost-effective renewable energy sources (“Renewable Energy Cheaper than Coal” or “RE<C”) and plug-in vehicles

ownership plans to free food, employee shuttle, and a laundromat); Adam Lashinsky, *Search and Enjoy*, FORTUNE, Jan. 22, 2007, at 70; Robert Levering, Milton Moskowitz & Anne Fisher, *The 100 Best Companies to Work For 2008: The Rankings*, FORTUNE, Feb. 4, 2008, at 75 (ranking Google, Inc. number one); Robert Levering & Milton Moskowitz, *The 100 Best Companies to Work For 2007: In Good Company*, FORTUNE, Jan. 22, 2007, at 94 (same).

⁵ See Corporate Information—Are Pop-Up Ads Allowed on Google?, <http://www.google.com/corporate/nopopupads.html> (last visited Aug. 22, 2008); VISE & MALSEED, *supra* note ____, at 6 (describing Google, Inc.’s decision not to include advertising on this “most valuable piece of real estate on the Internet”).

⁶ Google, Inc., Letter from the Founders (Amendment No. 9 to Form S-1), at 32 (Aug. 18, 2004), *available at* <http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm>.

⁷ Google, Inc., Letter from the Founders, *supra* note ____, at 32.

⁸ Google, Inc., Letter from the Founders, *supra* note ____, at 32 (noting the establishment of the Google Foundation).

⁹ Google.org—About Us, <http://www.google.org/about.html> (last visited Aug. 22, 2008).

¹⁰ Google.org—About Us, *supra* note ____.

FOR-PROFIT PHILANTHROPY

for mass consumer use (“RechargeIT”).¹¹ As part of RE<C, Google.org has become a key investor in companies researching renewable energy technology.¹² It also formed its own internal group to engage in renewable energy research at the company’s headquarters.¹³ In addition to a series of grants to nonprofit research institutes and advocacy projects, RechargeIT collaborates with a series of large and small for-profit companies engaged in the energy, automotive and plug-in industries.¹⁴

The Small and Medium-Sized Enterprises (SME) Initiative seeks to encourage the establishment and growth of these businesses in developing countries.¹⁵ Again, the initiative includes traditional grants to nonprofit organizations supporting entrepreneurship.¹⁶ Breaking from these traditional means, however, Google.org and two partners invested \$17 million to create the Small to Medium Enterprise Investment Company for India, a for-profit investment fund.¹⁷ The SME initiative is also working to involve other investors. Current projects work to link investors with information about developing country SMEs, in order to increase liquidity in their capital markets.¹⁸

At present, the two other Google.org initiatives employ mainly traditional methods. Predict and Prevent (“PnP”), which focuses on tracking emerging diseases, funds nonprofit organizations and academic research groups engaging in data collection, monitoring, and other efforts to track disease outbreaks, primarily in southeast Asia and sub-Saharan Africa.¹⁹ The Inform and Empower (“I&E”) initiative has even broader ambitions. It focuses on India and east Africa, working to supply information regarding education, health, water and sanitation to underserved

¹¹ Plug Into a Greener Grid, <http://www.google.org/rec.html> (last visited Aug. 22, 2008).

¹² Plug Into a Greener Grid, *supra* note ____.

¹³ Plug Into a Greener Grid, *supra* note ____; Google is Committed to Helping Build a Clean Energy Future, and We Need Your Help, <http://www.google.com/jobs/energy/> (last visited Aug. 22, 2008).

¹⁴ RechargeIT.org: A Google Project, <http://www.google.org/recharge/index.html> (last visited Aug. 22, 2008).

¹⁵ Fuel the Growth of Small and Medium-Sized Enterprises, <http://www.google.org/smes.html> (last visited Aug. 22, 2008); *see also* Initiative Brief, Google.org, Fuel Growth of Small and Medium-Sized Enterprises (Jan. 2008), <http://www.google.org/smes.html> (follow “initiative brief” hyperlink) [hereinafter SME Brief].

¹⁶ Grants and Investments, <http://www.google.org/projects.html> (last visited Aug. 22, 2008).

¹⁷ Press Release, Google, Soros Economic Development Fund, Omidyar Network and Google.org Launch Small to Medium Enterprise Investment Company for India (Feb. 19, 2008) available at http://www.google.com/intl/en/press/pressrel/20080219_omidyar_googleorg.html.

¹⁸ Fuel the Growth of Small and Medium-Sized Enterprises, *supra* note ____; *see also* SME Brief, *supra* note ____.

¹⁹ Grants and Investments, *supra* note ____; Predict and Prevent, <http://www.google.org/predict.html> (last visited Aug. 22, 2008). *See also* Initiative Brief, Google.org, Predict and Prevent (Jan. 2008), <http://www.google.org/predict.html> (follow “initiative brief” hyperlink) [hereinafter PnP Brief].

FOR-PROFIT PHILANTHROPY

communities.²⁰ Google.org expects that making this information available will empower individuals and communities to demand change from their governments.²¹ To pursue these goals, I&E has thus far made many grants to nonprofit research and advocacy groups, and contracted with a few individuals and for-profit companies, primarily in-country in the target areas.²² While these two initiatives have so far used only traditional mechanisms, their lofty objectives and reliance on the power of information suggest that a range of techniques will be employed over time.

Together the five initiatives make up an ambitious and diverse philanthropic program. Still, commonalities of Google.org's approach emerge. Google.org intends to leverage Google, Inc.'s financial, human, and technological resources, utilizing its business competencies and products. Further, it relies on skills, methodologies, and ideas gleaned from Google, Inc.'s for-profit success. Moreover, Google.org's initiatives are highly reliant on the power of information²³ – Google, Inc.'s stock in trade. These tenets of the Google.org approach differentiate it from a traditional charity, although its conservation, public health, and anti-poverty mission would also be appropriate for a nonprofit, tax-exempt entity. Further, these common threads shed some light on the philosophy behind Google, Inc.'s pursuit of a for-profit philanthropy model.

As a division of Google, Inc., Google.org is poised to exploit the company's wealth, human resources, technology, and business products in service of its philanthropic goals. The Google.org initiatives already comprise sizeable financial outlays. It has made grants to a wide range of nonprofit partners.²⁴ Google.org also is heavily seeding several for-profit ventures linked to its philanthropic initiatives. The \$17 million in initial start-up funds for the Small to Medium Enterprise Investment Company for India is just the most recent of these. RE<C has invested over \$30 million in cutting-edge companies working on solar, wind and geothermal energy capabilities.²⁵ Late last year, Google.org requested proposals for up to \$10

²⁰ Inform and Empower to Improve Public Services, <http://www.google.org/inform.html> (last visited Aug. 22, 2008); *see also* Initiative Brief, Google.org, Inform and Empower to Improve Public Services (Jan. 2008), <http://www.google.org/inform.html> (follow "initiative brief" hyperlink) [hereinafter I&E Brief].

²¹ Inform and Empower to Improve Public Services, *supra* note ____; *see also* I&E Brief, *supra* note _____. In addition, I&E will provide public sector and civil society groups with data and analytical tools to respond to the calls for change it anticipates.

²² Grants and Investments, *supra* note ____.

²³ Searching for Solutions, <http://www.google.org/index.html> (last visited Aug. 22, 2008) ("Google.org aspires to use the power of information and technology to address the global challenges of our age: climate change, poverty and emerging disease.").

²⁴ Grants and Investments, *supra* note ____.

²⁵ Grants and Investments, *supra* note ____; Powering a Clean Energy Revolution, <http://www.google.com/corporate/green/energy/> (last visited Aug. 22, 2008) (describing Google.org's investments in several solar, wind and other alternative energy companies).

FOR-PROFIT PHILANTHROPY

million of investment capital as part of RechargeIT.²⁶ The request clarified that it would consider only for-profit partners, though investments made under it would be bolstered by prior and continuing grants to nonprofit research and policy organizations.²⁷ To date, Google.org's grants and investments have exceeded \$95 million.²⁸ Its financial commitments are large and diverse, and appear to be growing.²⁹

Google.org also taps Google, Inc.'s valuable human resources, and its ability to attract and recruit top talent. This idea has been taken furthest in Google.org's RE<C initiative. As mentioned above, RE<C includes an internal research and development group to study renewable energy. This group is part of Google, Inc.'s engineering organization, and is currently advertising new positions.³⁰ Google.org relies on or plans to utilize Google, Inc.'s human resources in its other initiatives too. As part of the SME initiative, Google, Inc. software engineers will develop informational and investment tools necessary to establish and mature a global SME capital market.³¹ RechargeIT's demonstration plug-in fleet is available as part of an employee car-sharing fleet program.³² Employee use of the cars generates data used for future research to improve the plug-in technology. Google, Inc. personnel are a key resource for Google.org's programs, one it will continue to mine.

Finally, Google.org can leverage Google, Inc.'s technological resources, business projects and products. Data on the RechargeIT fleet's performance is already being collected via software Google, Inc. developed, and this data is disseminated through the company's websites.³³ Predict and Prevent plans to provide disease warnings through real time data-sharing, "building on existing

²⁶ RechargeIT Request for Investment Proposals, <http://www.google.org/recharge/rfp/> (last visited Aug. 22, 2008); *see also* Google.org Launches \$10 Million Request for Investment Proposals to Advance Sustainable Transportation Solutions, Sept. 12, 2007, <http://www.google.com/intl/en/press/annc/rechargeifp.html>.

²⁷ RechargeIT Request for Investment Proposals, *supra* note ____.

²⁸ Grants and Investments, *supra* note ____.

²⁹ *Face Value: Google's Guru of Giving*, ECONOMIST, Jan. 19, 2008, at 90 ("If the pilots go well, Google.org plans to scale up fast").

³⁰ Google is Committed to Helping Build a Clean Energy Future, and We Need Your Help, *supra* note ____.

³¹ These Google, Inc. employees will be working alongside for-profit partners. SME Brief, *supra* note ____.

³² RechargeIT.org: What We are Doing, <http://www.google.org/recharge/overview.html> (last visited Aug. 22, 2008); RechargeIT.org: A Google Project, *supra* note ____; *see also* Felicity Barringer & Matthew L. Wald, *Google and Utility to Test Hybrids That Sell Back Power*, N.Y. TIMES, Jan. 19, 2007, at C3 ("The six vehicles are used by Google employees near the company's Mountain View headquarters, and sit under a carport with a roof of solar cells.").

³³ *See* Our Fleet, <http://www.google.org/recharge/dashboard> (last visited Aug. 22, 2008) (providing links for each of the six cars and maintaining a calendar for each date that data is available, along with event summaries).

FOR-PROFIT PHILANTHROPY

Google tools and resources.”³⁴ The SME initiative contemplates “partner[ing] on Google.com projects.”³⁵ Inform and Empower plans to assist governments and policy makers in “expand[ing] service delivery with innovative information-based tools.”³⁶ Google, Inc. will no doubt be a potential source for procuring them. Google.org will continue to partner with Google, Inc. to collect, manage and deploy the information its initiatives count on, and will rely on its human and technological resources to do so.

Although operating outside of the Google.org flagship initiatives, the Google Grants program also uses Google, Inc.’s business products in service of its philanthropic goals. This program awards advertising to selected non-profit organizations. The ads appear next to Google’s search results when users search on targeted terms related to the nonprofit’s mission and programs. The free advertising can be used to “to raise awareness and increase traffic.”³⁷ Each grant includes at least three months of free advertising, which may be valued at up to \$10,000 per month.³⁸ The ads operate as an in-kind contribution program, providing for free to chosen nonprofits the valuable services Google, Inc. sells to other advertisers. Through this program Google.org leverages Google, Inc.’s most profitable product – advertising³⁹ – to support philanthropic ends.

Beyond these concrete relationships with Google, Inc., Google.org’s methodology is infused with the vision that made the company a for-profit success. In its policy documents, Google.org speaks of the importance of moving from top-down to bottom-up visions of change,⁴⁰ of the importance of speed,⁴¹ and of lowering transaction costs.⁴² These tenets of Google.org’s vision are traceable to the corporate philosophy of Google, Inc. “Democracy on the web works” – describing Google, Inc.’s innovative bottom-up approach to ranking search results – is one of Google, Inc.’s ten truths.⁴³ So is “Fast is better than slow.”⁴⁴ Likewise, Google,

³⁴ PnP Brief, *supra* note ____, at 3.

³⁵ SME Brief, *supra* note ____.

³⁶ Inform and Empower to Improve Public Services, *supra* note ____.

³⁷ Google Grants, <http://www.google.com/grants> (last visited Aug. 22, 2008).

³⁸ What is Google Grants?, <http://services.google.com/grants/edu/what/> (last visited Aug. 22, 2008).

³⁹ Google Investor Relations Frequently Asked Questions, <http://investor.google.com/faq.html#money> (last visited Aug. 22, 2008).

⁴⁰ I&E Brief, *supra* note ____.

⁴¹ *See, e.g.*, Plug Into a Greener Grid, *supra* note ____ (describing Google.org’s efforts to produce renewable energy “in years, not decades” and to “accelerate mass production” of plug-in vehicles).

⁴² SME Brief, *supra* note ____.

⁴³ Google Corporate Information—Our Philosophy, <http://www.google.com/corporate/tenthings.html> (last visited Aug. 22, 2008).

⁴⁴ Google Corporate Information—Our Philosophy, *supra* note ____.

FOR-PROFIT PHILANTHROPY

Inc.'s principles of design stress that "every millisecond counts."⁴⁵ Google, Inc. underscores the importance of lowering the costs of search transactions when it advocates simplicity and eschews distraction.⁴⁶ Finally, and most prominently, both Google.org documents and the broader range of Google, Inc. materials are riddled with references to the power of information.⁴⁷

Google.org partner organizations also demonstrate a commitment to business skills, methodologies and vision. Even nonprofit partners often tout their market orientation. The core principles of the Rocky Mountain Institute, a nonprofit grantee in the RechargeIT initiative, include embracing "market-oriented solutions" and a commitment to "natural capitalism."⁴⁸ CalCars, another RechargeIT grantee, describes itself as a "startup" organization, echoing Google's roots as a small business.⁴⁹ The website of Technoserve, an SME initiative grantee, proclaims "Social change has a business plan."⁵⁰ At times, funding recipients even adopt a hybrid approach of their own. Pratham, an Indian NGO and grantee in the I&E initiative, relies on a "triangular partnership" between corporate leaders, government, and community members.⁵¹ Google.org has funded a wide variety of grantees and for-profit partners who both promote their programmatic goals and share their philanthropic vision. This shared vision often includes the notion that business ideas, skills, and methodologies are essential links in achieving social change.

The for-profit philanthropy model itself, of course, is a testament to Google, Inc.'s faith in the power of its for-profit vision. Google.org's creators and managers could have continued their philanthropic activities using the Google Foundation, a traditional corporate foundation already in existence and making grants. Instead, they struck out to create Google.org and have essentially halted funding to the

⁴⁵ Google Corporate Information—Google User Experience, <http://www.google.com/corporate/ux.html> (last visited Aug. 22, 2008).

⁴⁶ Google Corporate Information—Google User Experience, *supra* note ____.

⁴⁷ *See, e.g.*, Searching for Solutions, *supra* note ____ ("Google.org aspires to use the power of information and technology to address the global challenges of our age"); Corporate Information—Company Overview, <http://www.google.com/corporate/index.html> (last visited Aug. 22, 2008) ("Google's mission is to organize the world's information and make it universally accessible and useful.").

⁴⁸ Rocky Mountain Institute: Core Principles, <http://www.rmi.org/sitepages/pid69.php> (last visited Aug. 22, 2008).

⁴⁹ California Cars Initiative for Plug-In Hybrids, <http://www.calcars.org/> (last visited Aug. 22, 2008).

⁵⁰ TechnoServe: Business Solutions to Rural Poverty, <http://www.technoserve.org/> (last visited Aug. 22, 2008). Other SME grantees, the Acumen and Grameen Foundations have similar missions to battle poverty through supporting entrepreneurship. Grameen Foundation—Fighting Poverty with Microfinance, <http://www.grameenfoundation.org/> (last visited Aug. 22, 2008); Acumen Fund, <http://www.acumenfund.org/> (last visited Aug. 22, 2008).

⁵¹ Pratham, <http://www.pratham.org/aboutus/aboutus.php> (last visited Aug. 22, 2008).

FOR-PROFIT PHILANTHROPY

foundation.⁵² Their belief that achieving ambitious social goals requires them to draw on Google, Inc.'s business methods and assets stirred them to develop their for-profit philanthropy model.

II. THE FORBEARS OF FOR-PROFIT PHILANTHROPY

Another key to Google.org's for-profit philanthropy model is Google's desire to be an innovator in all respects. The Google brand is founded on the idea that it is a unique company, with a distinct business model. Google, Inc. and its leaders rightfully view innovation in philanthropy as a way to further this public image.⁵³ The idea of blending philanthropic impulses with business activities, though, is not unknown. The notion that companies should use their business skills and resources to pursue needs beyond those of their shareholders, and indeed have the responsibility to do so, has a long historical pedigree. This Part canvasses three familiar methods for blending business and philanthropy and illustrates how Google.org is different.

Perhaps the most mundane example of philanthropy by for-profit entities is the corporate charitable contribution. Corporations make these contributions for various reasons: to gain media exposure with consumers and future employees, build goodwill with their communities, and prop their brands as companies that care. Of course, some economists criticize corporate contributions as careless or inefficient expenditures.⁵⁴ Legal commentators have challenged them for these reasons, and also argued they are made more to improve the reputations of CEOs, directors, and managers than the companies and shareholders these fiduciaries serve.⁵⁵ Despite these complaints and some early attempts by courts to curtail the

⁵² Posting of Sheryl Sandberg to The Official Google Blog, <http://googleblog.blogspot.com/2005/10/about-googleorg.html> (Oct. 11, 2005, 21:02 PST) (stating that Google does not "expect to make further donations to the Foundation for the foreseeable future.").

⁵³ Jim Hopkins, *Google Foundation May Invest in For-Profit Firms*, USA TODAY, Apr. 27, 2005, at 1B (noting that innovation in philanthropy meshes with Google, Inc.'s overall branding).

⁵⁴ See, e.g. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 135 (1962).

⁵⁵ See, e.g., R. Frank Balotti & James J. Hanks, Jr., *Giving at the Office*, 54 BUS. LAW. 965, 968, 982-83 (1999); see also Victor Brudney, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1198 (2002) (suggesting shareholders rather than managers should be permitted to select corporate donees for this and other reasons).

FOR-PROFIT PHILANTHROPY

practice, corporate contributions have gained widespread legal acceptance⁵⁶ and are an expected norm of business practice.⁵⁷

Corporate contributions have flourished, totaling \$15.69 billion in 2007.⁵⁸ Of this sum, 28% was donated through corporate foundations and the balance directly to operating charities or needy individuals.⁵⁹ Nor has corporate generosity been limited to cash donations; an estimated one-third to one half of corporate giving takes the form of in-kind contributions.⁶⁰ Some firms combine a range of contribution styles, with a few even making broad company-wide commitments to giving.⁶¹ Cause-related marketing, where consumers are offered a charitable contribution packaged with their purchase, also continues to grow.⁶² Likewise, corporate sponsorships of charity events and programs are legion. For-profit leaders clearly believe that making corporate contributions is good for their businesses, and are increasingly integrating philanthropy into their broader corporate strategies.⁶³

Google.org might be viewed simply as a significant corporate contribution; Google, Inc. has committed to dedicate 1% of its equity and profits to philanthropy. The arguments justifying corporate contributions certainly hold true in this case. Press accounts chronicled the initial announcement of Google.org's establishment

⁵⁶ Every state has enacted statutes specifically permitting them. *See* Balotti & Hanks, Jr., *supra* note ____, at 970–3 (1999); *see also* AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §2.01 (1994) (asserting that corporations may devote reasonable amounts to philanthropic activities “even if corporate profit and shareholder gain are not enhanced”); JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O’NEAL, CORPORATIONS § 4.4 (1997).

⁵⁷ BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 34 (2005) (asserting that corporations have the responsibility to be good citizens, including by making charitable contributions), *available at* <http://www.businessroundtable.org/pdf/CorporateGovPrinciples.pdf>.

⁵⁸ GIVING USA FOUND., GIVING USA 2008: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2007 10 (2008).

⁵⁹ GIVING USA FOUND., *supra* note ____, at 10.

⁶⁰ GIVING USA FOUND., *supra* note ____, at 81.

⁶¹ Salesforce.com, a purveyor of customer relationship management software, follows a 1% time, 1% equity, and 1% product philanthropy program. Salesforce.com Foundation, <http://www.salesforce.com/foundation/> (last visited Aug. 22, 2008). It “encourages its employees to donate one percent of their working time to the community,” the company donated one percent of its equity to its corporate foundation at its founding, and it seeks to give away one percent of its product by donating or discounting its software licenses for nonprofits.

⁶² The entire business model of Working Assets, a credit card company, and its affiliated mobile company, Credo, are founded on this practice. These companies promise consumers that they will donate a portion of each purchase consumers make with them to a range of progressive organizations. Working Assets: About Us, <http://www.workingassets.com/About.aspx> (last visited Aug. 22, 2008). Customers may even nominate and vote on the year’s roster of donees on the company’s website. *See id.*

⁶³ GIVING USA FOUND., *supra* note ____, at 80 (“Aligning philanthropy with business goals has been a major trend in the corporate world for a number of years.”).

FOR-PROFIT PHILANTHROPY

and the media has traced its every step, generating significant positive publicity.⁶⁴ As a company operating on the Internet, Google.org's projects around the globe resonate with Google, Inc.'s potential customers and partners, building on its already behemoth presence in the virtual community. Additionally, several of Google.org's initiatives have a particular nexus with its home community in Mountain View, California.⁶⁵ More generally, the idea that Google, Inc. is contributing to philanthropic endeavors on a substantial scale meshes with and bolsters its image as a company gaining success "without doing evil."

Yet, the organizational aspect of Google.org differs from the corporate contribution model in significant respects. Corporate contributions take corporate largesse out of the company's coffers and place it with external charities, or at least a separately incorporated and managed nonprofit foundation. Google.org's status as a division of Google, Inc. keeps control over philanthropic funds, and the funds themselves, firmly within the confines of the business organization. Further, Google, Inc. has integrated its philanthropic goals more fully into its business model than do corporate contributors.

The extent and reach of Google, Inc.'s philanthropic commitments resonate with the idea of corporate social responsibility (CSR). This concept suggests corporations should go further than mere donations in pursuit of community and societal aims. Rather, the various CSR movements have proposed that corporations and their leaders be permitted or required to consider interests beyond those of shareholders in their everyday business decisions.⁶⁶ Like corporate contributors, the CSR concept has drawn consistent, and often withering, criticism.⁶⁷ Yet, the idea is tenacious. Today it has strong, though not unqualified, legal support.⁶⁸

⁶⁴ See, e.g., Chris Gaither, *Google Sets Aside \$1 Billion for Causes*, L.A. TIMES, Oct. 12, 2005, at 2 (describing the initial funding of Google.org and its unusual for-profit structure); Katie Hafner, *Philanthropy Google's Way: Not the Usual*, N.Y. TIMES, Sept. 14, 2006, at A1 (reporting on Google.org's early initiatives and the appointment its first Executive Director); David Haskell, *For-Profit Philanthropy*, N.Y. TIMES MAG., Dec. 10, 2006, at 50 (including Google.org's for-profit philanthropy model in its sixth annual ideas issue); Harriet Rubin, *Google's Searches Now Include Ways to Make a Better World*, N.Y. TIMES, Jan. 18, 2008, at C1 (detailing the Google.org initiatives).

⁶⁵ RechargeIT.org: What We are Doing, *supra* note ____ (describing the demonstration plug-in fleet located at the company's headquarters); Powering a Clean Energy Revolution, *supra* note ____ (reporting that Google's offices and data centers became carbon neutral in 2007, and the largest corporate solar panel was installed at the company headquarters); Brad Stone, *Google's Next Frontier: Renewable Energy*, N.Y. TIMES, Nov. 28, 2007, at C3 (similar).

⁶⁶ C.A. Harnwell Wells, *The Cycles of Corporate Social Responsibility*, 51 U. KAN. L. REV. 77 (2002); Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605 (2001).

⁶⁷ Milton Friedman, *Social Responsibility of Business*, N.Y. TIMES MAG. Sept. 3, 1970; see also Wells, *supra* note ____, at 109–10, 123–25 (noting Friedman's opposition and that of earlier commentators Manning and Rostow).

⁶⁸ Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738–39 (2005) (describing the view that corporate leaders must act to maximize profits as canonical, but

FOR-PROFIT PHILANTHROPY

More importantly, CSR has become a fundamental trope in the rhetoric and culture of large corporations.⁶⁹ Both as advocated and adopted, CSR means companies view a responsibility to community and society as more than an occasional philanthropic impulse. They bring consideration of social impact into the mainstream of their business operations. In addition to sponsoring corporate foundations and making both cash and in-kind donations, corporations speak of leveraging employee time and partnering with organizations and enterprises in underserved communities. They trumpet themselves not purely as engines of profit, but as responsible corporate citizens and agents of change. Some companies seek to distinguish their brands as leaders in CSR.⁷⁰ Many others simply recognize that a respectable level of CSR commitment is an indispensable part of any modern company's public image.⁷¹ The CSR theme can now be found across corporate America and beyond.

Google.org aligns with this CSR paradigm. Google, Inc. does not purport to view “the business of business as business” with philanthropy as a public relations move or a sideline. The Google.org division considers social impact when it makes business decisions. Its very existence integrates Google's philanthropic vision within its corporate operations. But, Google.org differs from CSR in both scope and structure. CSR asks companies to be mindful of the impact their decisions will have

overstated considering statutory and other legal support for corporate actions motivated by social responsibility).

⁶⁹ Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771 (2007) (“Virtually every corporation not only professes a desire to engage in charitable endeavors but also generates a report regarding those endeavors.”); DAVID VOGEL, *THE MARKET FOR VIRTUE* 6 (2005) (describing the pervasiveness of CSR); see also e.g., Corporate Citizenship at ExxonMobil, http://www.exxonmobil.com/Corporate/community_ccr_overview.aspx (last visited Aug. 22, 2008) (“At ExxonMobil, corporate citizenship is embedded in our business model and effectively integrates good corporate governance, safety, and environmental and social responsibility into all aspects of our global business.”); General Motors—Corporate Responsibility, <http://www.gm.com/corporate/responsibility/> (last visited Aug. 22, 2008) (asserting a “commit[ment] to sound corporate citizenship in all aspects of our business”); Microsoft Corporate Citizenship, <http://www.microsoft.com/About/CorporateCitizenship/us/CommunityInvestment/default.aspx> (last visited Aug. 22, 2008) (accepting Microsoft's “responsibility to apply its expertise in software to helping people, particularly people in underserved communities” and noting projects including partnerships and devotion of employee time).

⁷⁰ The Timberland Company prominently promotes its CSR strategy on its website, providing reports on key CSR performance indicators on a quarterly basis and publishing a comprehensive biannual report. About Timberland: Corporate Social Responsibility, Timberland—About Us, http://www.timberland.com/corp/index.jsp?clickid=topnav_corp_txt (follow “Corporate Social Responsibility Overview” hyperlink, and also “CSR Strategy” and “Transparency & Accountability” hyperlinks) (last visited Aug. 22, 2008).

⁷¹ *Social Responsibility: Just Good Business*, ECONOMIST, Jan. 19, 2008; *The Good Company: Capitalism and Ethics*, ECONOMIST, Jan. 22, 2005.

FOR-PROFIT PHILANTHROPY

on constituencies other than shareholders. At times, this rubric will motivate for-profits to take actions to minimize harm to those constituencies, perhaps even actively to help them. Google.org goes well beyond CSR's aims of awareness and consideration. Funding a division to engage solely in philanthropic activities is a much more ambitious and specific approach than merely adding social impact to the mix of factors considered when business leaders make decisions. The for-profit philanthropy model is thus distinct from what is typically contemplated by CSR's proponents. There are, however, companies that use philanthropic vision to guide areas of their business, or even build an entire business model around philanthropic ideals.

Some for-profit companies have joined business and social goals as the foundation of their corporations. Although this phenomenon has been called by a host of names, the term "social enterprise" will be used here.⁷² Social enterprises integrate philanthropy into their business models at a more basic level than companies that make corporate contributions or practice CSR. Social entrepreneurs pursue social and business goals together, viewing them as synergistic and mutually-reinforcing, as equal partners in their business vision. This deep and particular commitment to philanthropic endeavor is the thrust of the social enterprise ideal.

The precise point where a social enterprise brings social concerns into its business processes varies widely.⁷³ Social enterprise firms may marry their business and social missions when obtaining the supplies they need to make their products.⁷⁴ While other, more cost-effective and therefore profit-maximizing sources might be available, these companies choose their partners to achieve social aims. Social enterprises may steer the employment opportunities they provide to the impoverished, individuals with disabilities, or those reentering society following incarceration.⁷⁵ They may produce their wares with environmental impact and profit

⁷² James J. Fishman, *Wrong Way Corrigan and Recent Developments in the Nonprofit Landscape*, 76 FORDHAM L. REV. 567 (2007) [hereinafter Fishman, *Wrong Way Corrigan*] (using "social enterprise" as an umbrella term); cf. James Austin, Howard Stevenson & Jane Wei-Skillern, *Social and Commercial Entrepreneurship: Same, Different or Both?*, 30 ENTREPRENEURSHIP: THEORY & PRAC. 1 (2006) (using "social entrepreneurship"); J. Gregory Dees & Beth Battle Anderson, *For-Profit Social Ventures*, in SOCIAL ENTREPRENEURSHIP (2003) (using "for-profit social venture").

⁷³ Dees & Anderson, *supra* note ____, at 3–5.

⁷⁴ Ben & Jerry's Homemade, Inc. sources milk and cream from a local cooperative, brownies from another social enterprise (a bakery providing job-training), and much of its vanilla, coffee, and cocoa from cooperatives of poor farmers. Values-Led Sourcing Initiative, http://www.benjerry.com/our_company/about_us/social_mission/social_audits/2006_sear/sear06_4.0.cfm?mid=menu4 (last visited Aug. 22, 2008). The fair-trade sourcing policies now in effect at many companies proceed on a similar footing.

⁷⁵ See, e.g., Christopher St. John, *The Humanitarian Divide*, STAN. SOCIAL INNOVATION REV. 52 (Spring 2004) (describing Digital Divide Data, a company founded on the idea of providing jobs for poor Cambodians).

FOR-PROFIT PHILANTHROPY

as equal criteria for judging success.⁷⁶ Much of the microfinance movement is based on a vision that there is both social good and profit to be made from lending to poor individuals formerly unable to access credit.⁷⁷ Even investment policies can be founded on philanthropic vision.⁷⁸ Rather than merely committing to be mindful of social concerns as they proceed with their business ventures, these organizations place philanthropic and profit-making goals on a par from the outset and at the very core of their business models. Profit remains a central goal, but not the exclusive one.

Google.org's for-profit philanthropy is certainly related to social enterprise, but again several aspects differentiate it. First are the related features of size and scope. Social enterprise companies are often small and controlled by owners who have a personal commitment to their social goals.⁷⁹ A few have begun that way, but grew quite large as a result of their success. By comparison, Google.org is massive. Moreover, Google.org is dwarfed by the rest of Google, Inc. Google, Inc. has social commitments, perhaps more than most companies of its age and size. Yet, in the general range of its business, these do not have an equal place with building a financially successful company.⁸⁰ Profit and business imperatives figure too strongly in Google, Inc.'s overall decision-making to view the entire company as a social enterprise.

If considered standing alone, Google.org comes closer to fitting the social enterprise category. In the Google.org division, social mission is wholly mixed with business ethos. Its initiatives target areas of operation to maximize philanthropic impact. Simultaneously, it brings business acumen and a desire for efficiency, speed,

⁷⁶ See, e.g., Rob Walker, *The Worm Turns*, N.Y. TIMES MAG. (May 20, 2007) (describing the social enterprise, TerraCycle, which uses environmentally friendly processes to produce plant fertilizer from worm waste); Leslie Berger, *Garden-Variety Revolution*, STAN. SOCIAL INNOVATION REV. 73 (Spring 2008) (similar).

⁷⁷ See, e.g., General Questions on Grameen Bank, http://www.grameen-info.org/index.php?option=com_easyfaq&task=cat&catid=80&Itemid=524#faq7 (last visited Aug. 22, 2008) (describing Grameen's business plan to lend to poor borrowers and its intention and achievement of profits).

⁷⁸ See, e.g., Acumen Fund: About Us, <http://www.acumenfund.org/about-us.html> (last visited Aug. 22, 2008) ("Acumen Fund is a non-profit global venture fund that uses entrepreneurial approaches to solve the problems of global poverty."); Omidyar Network—Portfolio, <http://www.omidyar.net/portfolio.php> (last visited Aug. 22, 2008) (describing its investments in for-profit companies "where social impact is integral to the business model").

⁷⁹ Dees & Anderson, *supra* note ____, at 17–19 (describing the need for social enterprises to remain controlled by owners sympathetic to their dual mission); Michael Chertok, Jeff Hamaoui & Eliot Jamison, *The Funding Gap*, STAN. SOCIAL INNOVATION REV. 44 (Spring 2008) (describing the difficulties in financing faced by social enterprises desiring to expand).

⁸⁰ Andy Serwer, *Larry Page on How to Change the World*, FORTUNE, May 12, 2008, at 82 (quoting the Google founder, who states "70% of our resources are spent in our core business and 10% end up in unrelated projects, like energy or whatever. [The other 20% goes to projects adjacent to the core business.] Actually, it's a struggle to get it to even be 10%.").

FOR-PROFIT PHILANTHROPY

and knowledge management to transform social conditions. Google.org also takes its social values very seriously when determining its means and mode of production. Social goals are deeply embedded in the Google.org business model. This is the very crux of the for-profit philanthropy ideal.

Still, Google.org is also not a perfect fit with social enterprise. It is artificial to consider it in isolation from its Google, Inc. whole. Furthermore, Google.org is actually too focused on social mission to match the social enterprise category precisely. Google.org views profit as a distant and unlikely possible consequence of its activities. Its leaders have emphasized, “[w]e’re not doing it for the profit. And if we didn’t get our capital back, so what? The emphasis is on social returns, not economic returns.”⁸¹ This nonchalance lacks the passion for the coexistence of social mission and profit that drives social enterprise.

Blending philanthropy and business has long been in fashion and entities have pursued it in a variety of ways. In fact, calls for capitalism to spearhead solutions to society’s greatest problems are mounting all the time.⁸² The three variants assessed in this Part are exemplary, but do not offer an exhaustive catalogue. By comparison, though, the for-profit philanthropy model offers genuine innovation in structure and scale. It envisions a division within a for-profit company tasked solely with pursuing philanthropy. This division engages in major initiatives, but the core business remains primarily devoted to profit maximization. Google.org has pushed the for-profit philanthropy model forward and provided it with significant prominence. The next Part considers Google.org’s reasons for embarking on this innovation, many of which are grounded on legal limitations it desired to avoid.

III. THE REASONS FOR FOR-PROFIT PHILANTHROPY

Just as it differs from its for-profit forbears, Google.org is significantly and intentionally distinct from traditional nonprofit forms. As compared with a nonprofit entity, the for-profit Google.org division has greater freedom to invest, direct access to Google, Inc.’s resources, and more ability to engage in political activities.⁸³ State and federal law applicable to traditional nonprofit entities would curtail all of these, in differing ways and to varying extents. This Part will explain how these legal limits would frustrate Google.org’s strategy.

⁸¹ Hafner, *supra* note __ (quoting Google.org Executive Director, Dr. Larry Brilliant).

⁸² MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH ARE TRYING TO SAVE THE WORLD (2008); MICHAEL EDWARDS, JUST ANOTHER EMPEROR: THE MYTHS AND REALITIES OF PHILANTHROCAPITALISM (2008); Matthew Bishop, *The Birth of Philanthrocapitalism*, ECONOMIST (Feb. 25, 2006).

⁸³ Google.org—About Us, *supra* note __ (explaining that its structure permits it to “invest in for-profit endeavors,” “lobby for policies that support our philanthropic goals,” and “tap Google’s innovative technology and, most importantly, its inspired workforce”).

FOR-PROFIT PHILANTHROPY

Prior to that, however, it is important to specify the benefits attendant to traditional legal forms for philanthropic activity. This will clarify what Google.org gives up in exchange for the freedom of investment, direct access, and political flexibility it gains by using a for-profit structure. A nonprofit incorporated under state law obtains status as a separate entity with the ability to transact in its own name and limited liability for its members, if any.⁸⁴ Of course, incorporated for-profit firms are also characterized by corporate personhood and limited liability. In addition, however, state law often offers property tax exemption, exemption from sales and use taxes, and even limitations on tort liability to nonprofit charities.⁸⁵ These benefits would not likely be extended to Google.org.

Philanthropic groups organized along traditional lines also can qualify for tax benefits under federal law. As the tax-exempt label suggests, principal among these is exemption from corporate taxation on net income.⁸⁶ Of course, for philanthropic groups running at a loss, this exemption is not necessarily a great boon. Moreover, a for-profit division like Google.org might well set off its losses against gains in other portions of Google, Inc.'s business.⁸⁷ Thus, for Google.org, exemption could be a less desirable alternative than taxability. Another important federal tax benefit is the ability to offer donors tax-deductible contributions. Donors to certain exempt entities may deduct the contributions they make to these entities against their income in determining their tax due, up to a percentage limit of their adjusted gross income.⁸⁸ For Google, Inc., the sole planned donor to Google.org, this limit would be ten percent. Finally, organizations known as nonprofit, charitable, or tax-exempt can experience a halo effect; they benefit from the general positive association the public has with charities. However, Google.org's self-styling as a philanthropy, its use of the ".org" suffix, and the content of its programs may provide it with a significant glow of its own.

⁸⁴ See, e.g., REVISED MODEL NONPROFIT CORP. ACT §3.02 (granting nonprofit corporations powers to act and transact in the corporate name), § 6.12 (limiting members' liability). Nonprofits may also be organized as charitable trusts or unincorporated associations. MARILYN E. PHELAN, NONPROFIT ENTERPRISES: CORPORATIONS, TRUSTS, AND ASSOCIATIONS § 1:03 (2000). In addition, Vermont recently passed legislation permitting organizations founded with a mix of business and charitable purposes to form as a low-profit limited liability company (L3C), a new type of hybrid form. Debra E. Blum, *Vermont Poised to Recognize Businesses That Are Created to Offer Social Benefits*, CHRON. PHILANTHROPY (May 1, 2008). This Essay compares the for-profit philanthropy model with the nonprofit corporate form, as the latter is by far the most common form used by U.S. charities. PHELAN, *supra*, § 1:03.

⁸⁵ HOWARD OLECK & MARTHA STEWART, NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS §7 (6th ed. 1994).

⁸⁶ I.R.C. § 501(c)(3) (2000).

⁸⁷ Christopher Lim, *Google.org, For-Profit Charitable Entity: Another Smart Decision by Google*, 17 KAN. J.L. & PUB. POL'Y 28, 52-54 (2007) (describing this possibility as well as Google.org's potential utility in avoiding accumulated earnings tax).

⁸⁸ I.R.C. § 170(c).

FOR-PROFIT PHILANTHROPY

These various benefits often propel philanthropists to use tax-exempt, nonprofit corporations to pursue their goals. Even standing alone, in Google's circumstances, they might not have provided sufficient inducement. Whether or not they are compelling, they are not the reasons Google.org has cited. The remainder of this Part explores the ways Google.org explains its choice to take the for-profit philanthropy route instead.

A. Freedom of Investment

One of the major reasons Google.org cites for adopting a for-profit philanthropy model is the freedom to invest in for-profit businesses in pursuit of its philanthropic goals.⁸⁹ If structured as a traditional nonprofit, state nonprofit corporate law and federal tax regulation would significantly limit Google.org's ability to invest in for-profits. Further, these regimes would restrict the use of any gains Google.org realized on its investments.

Several aspects of state nonprofit corporate law could hinder Google.org's investment plans. The nondistribution constraint prohibits nonprofit corporations from distributing net earnings to those with control over the corporation's decisions.⁹⁰ Thus, if Google.org were a nonprofit corporation, any profits it realized from investments in for-profit companies would have to be reinvested in the nonprofit's mission, rather than shared with Google, Inc. or its shareholders. Neither Google, Inc. nor its investors could be granted a true equity stake in Google.org. Of course, Google.org has dismissed any intention to use profits for anything other than future philanthropy.⁹¹ For it, and for other for-profit philanthropists willing to make such a commitment, the nondistribution constraint should not be a reason to avoid the nonprofit form.

State law imperatives regarding permissible nonprofit purposes and activities, though, could restrain a nonprofit Google.org's freedom of investment. State law may demand that nonprofit corporations organized under its auspices have charitable purposes.⁹² Furthermore, pecuniary or commercial purposes or activities

⁸⁹ Google.org—About Us, *supra* note ____ (“we can also invest in for-profit endeavors, such as efforts by companies to develop breakthrough renewable energy technologies”).

⁹⁰ See *e.g.*, REVISED MODEL NONPROFIT CORP. ACT §§ 1.40, 13.01 (prohibiting payments from nonprofit corporations to their “members, directors, or officers”); see also Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (coining the term “nondistribution constraint” to describe this prohibition and identifying its role in an economic rationale for the nonprofit sector).

⁹¹ See Hafner, *supra* note ____ (“All of Google.org's spending, [Google.org Executive Director] Dr. Brilliant said, will be in keeping with its mission, and there is to be no ‘blowback.’ That is, should Google.org make a profit with one of its ventures, those funds will not go to the search engine business, but will stay within Google.org.”); Rubin, *supra* note ____.

⁹² See, *e.g.*, N.Y. NOT-FOR-PROFIT CORP. ACT § 201(b) (McKinney 2008) (requiring Type A and B nonprofit corporations to be formed for a range of civic, associational or charitable purposes).

FOR-PROFIT PHILANTHROPY

may be limited.⁹³ A nonprofit Google.org substantially devoted to investing in for-profit companies, or developing products or services for eventual sale by a for-profit entity, could well breach these restrictions. However, engaging in some commercial activities or investing in certain for-profit entities as part of a wider program pursuing conservation, public health and poverty reduction would not necessarily breach the requirements. Rather, it seems to be a question of emphasis. Still, there is certainly greater risk in pursuing these investments as a nonprofit than as a for-profit.

Finally, state law regulating nonprofit investment activity could limit a nonprofit Google.org's freedom of investment. Nonprofit fiduciaries are bound by the duty of care to manage and invest corporate assets prudently.⁹⁴ These investments should make up a portfolio with a risk and return profile appropriate to the size, goals and other attributes of the organization.⁹⁵ It is uncertain whether investments in for-profit companies made for programmatic purposes – to further the mission of the organization directly, rather than to maintain or increase its assets – would even be subject to these restrictions. A strong case can be made that these are program decisions, on which the law defers to nonprofit corporate fiduciaries so long there is no self-dealing and leaders and managers utilize careful and appropriate process in reaching them. Yet, if judged by a yardstick of prudent investment, investing charitable assets in risky ventures (even those seeking societally-useful goods) may not comply with fiduciaries' obligations. Taken together, these three state law concepts would create some hazards for Google.org's investment plans, were it to organize as a nonprofit corporation.

If Google.org were to seek federal tax benefits, further and more serious restrictions would apply. Organizing as a nonprofit corporation does not automatically trigger the tax advantages available to some nonprofits under federal law, principally income tax-exemption and qualification to receive tax-deductible contributions. To obtain these benefits, Google.org would have to request, obtain, and maintain tax-exempt status under IRC § 501(c)(3). The federal law constraints on tax-benefitted nonprofits would hinder Google.org's freedom of investment considerably more than would those under state law.

Federal tax law imposes various limits on the organizational purposes for which tax benefits will be granted. Statutes and regulations provide a list of purposes for which an exempt organization must be primarily organized and operated:

⁹³ See, e.g., N.Y. NOT-FOR-PROFIT CORP. ACT § 204 (limiting “activities for pecuniary profit or financial gain” by nonprofits).

⁹⁴ AM. LAW INST., PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS §§ 351, 320(b)(6), 335.

⁹⁵ AM. LAW INST., PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 335 cmt. (b)(2).

FOR-PROFIT PHILANTHROPY

“religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals.”⁹⁶ Google.org’s goals of pursuing environmental conservation, public health and poverty reduction should fit within the permitted range. However, restrictions apply to exempt organizations’ activities as well. An entity exempt under §501(c)(3) cannot engage or even be empowered “to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.”⁹⁷ Such non-exempt activities include engaging in “a manufacturing business,”⁹⁸ and other commercial activities will attract regulators’ attention.

An organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization’s exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business.⁹⁹

Furthermore, income from an exempt organization’s unrelated business activity is subject to tax.¹⁰⁰ There is no outright prohibition, but federal law clearly looks skeptically upon commercial activity by tax-exempt entities.

Google.org desires the flexibility to invest in for-profit businesses to further its philanthropic goals. If necessary, Google.org wants the flexibility to develop this technology itself. Ensuring these activities do not amount to more than an “insubstantial part” of its program or become categorized as an “unrelated trade or business” that is its “primary purpose” might limit this flexibility. The murky commerciality limitations will be costly to comply with and monitor.¹⁰¹ In addition, if business activities are deemed *unrelated* to exempt purposes, income from them is taxable, limiting the tax-exemption benefit. It is entirely understandable that Google.org would want to avoid these federal law limits by opting out of the federal tax benefit apparatus.

The purpose and commerciality limits hardly stand alone, however; the private benefit doctrine would further frustrate Google.org’s vision. This doctrine

⁹⁶ I.R.C. § 501(c)(3) (2000); Treas. Reg. § 1.501(c)(3)-1. Federal law also includes a prohibition on distributing profits to equity investors. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008).

⁹⁷ Treas. Reg. § 1.501(c)(3)-1(b)(1)(i).

⁹⁸ Treas. Reg. § 1.501(c)(3)-1(b)(1)(iii).

⁹⁹ Treas. Reg. § 1.501(c)(3)-1(e)(1).

¹⁰⁰ I.R.C. § 511; *see also* Lim, *supra* note ____, at 35-38 (describing how the commerciality doctrine and unrelated business income tax would limit Google.org’s plans).

¹⁰¹ JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 596 (2006) (calling the area “untidy”).

FOR-PROFIT PHILANTHROPY

forbids tax-exempt entities from conferring substantial benefits on unrelated individuals and entities.¹⁰² Conferring such a benefit is punishable by loss of exemption, cancellation of donors' deductions, and fines. If any Google.org investment were deemed to confer a substantial benefit on its for-profit recipient, this would be an improper private benefit with serious consequences. Thus, Google.org's for-profit investment strategy is perilous on this ground as well.

If these various limits were not enough, the internal classification system within tax-exempt status would subject Google.org to even more onerous restrictions. Each tax-exempt organization qualifying under § 501(c)(3) is further classified as either a public charity or a private foundation.¹⁰³ Because of its single funding source, Google.org would be deemed a private foundation and made subject to a series of additional restrictions on its activities. Breach of these restrictions triggers initial penalty taxes assessed against the private foundation and its managers. Confiscatory additional taxes apply if the relevant transactions are not unraveled.

Google.org's investment plans would likely run afoul of several of the private foundation restrictions, exposing it to costly penalty tax liability. Private foundations cannot hold more than twenty percent of the voting control of any corporation or partnership.¹⁰⁴ This rule would limit the size of the investments Google.org could make when funding for-profit ventures. In addition, private foundations cannot invest any amount in a manner that would jeopardize the carrying out of their exempt purposes.¹⁰⁵ Whether an investment is one that creates such jeopardy is a fact-sensitive question and the regulations prize diversification.¹⁰⁶ Google.org's exclusively high-risk, high-return investment strategy could thus threaten jeopardy investment liability. Even if these threats could be avoided, any expenditure the IRS deemed outside of a private foundation's exempt purposes would create liability as well.¹⁰⁷ Finally, a Google.org organized as a private foundation would be required to engage in pre-grant review and post-grant evaluation of any payments to its for-

¹⁰² I.R.C. § 501(c)(3) (stating that “no part of the net earnings [of a tax-exempt entity may] inure[] to the benefit of any private shareholder or individual”); *see generally* John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 282–83 (2d ed. 2006) (describing the private benefit doctrine and distinguishing its cousins, inurement and excess benefit).

¹⁰³ I.R.C. § 509.

¹⁰⁴ I.R.C. § 4943.

¹⁰⁵ I.R.C. § 4944.

¹⁰⁶ Treas. Reg. § 53.4944-1(a)(2). So-called “program related investments” are exempt from designation as jeopardizing exempt purposes, but only if their primary purpose “is to accomplish one or more of the [organization’s exempt] purposes *and* no significant purpose of [them] is the production of income or the appreciation of property.” I.R.C. § 4944 (emphasis added).

¹⁰⁷ I.R.C. § 4945.

FOR-PROFIT PHILANTHROPY

profit partners, and to report on these findings to the IRS.¹⁰⁸ Together, these restrictions would create a minefield for a Google.org organized as a tax-exempt private foundation.

In sum, if organized using traditional philanthropic forms, legal limitations would create serious barriers for Google.org's freedom to invest. Various state law restrictions could interfere with Google.org's for-profit investment strategy. These restrictions would make Google.org's plans more costly and risky, possibly quashing them altogether. Federal tax law would even more seriously inhibit Google.org's plans to utilize and potentially profit from investments in for-profit entities. Its planned activities would expose it to loss of exemption, as well as significant penalty tax liability. These restrictions, along with those addressed in the next two sections, make nonprofit incorporation and tax-exempt status quite unattractive for Google.org.

B. Direct Access to Google, Inc.

Incorporation as a nonprofit, and particularly status as a tax-exempt private foundation, would also hinder Google.org's desired direct access to Google, Inc.'s resources. On the state law side, again, the potential impact of the nondistribution constraint, charitable purpose requirements, and the commerciality restrictions all stem from the same concern. A nonprofit Google.org could be perceived by state regulators as overly concerned with the affairs of Google, Inc. or to be acting at its behest. If so, regulators could challenge the bona fides of Google.org's charitable purposes or claim it had crossed the line into being a commercial entity. If Google, Inc. or its key personnel had control over the affairs of a nonprofit Google.org, it would be important to ensure that neither Google, Inc. nor those key players received inappropriate distributions. In the same vein, fiduciary obligations on a nonprofit Google.org's directors and officers would attach liability to unfair self-dealing.¹⁰⁹ Resource-sharing arrangements would thus need to be scrutinized to ensure that Google.org received any benefits of such bargains.

Analogous federal tax law concepts would pose similar obstacles for direct access. The exempt purpose requirement would be breached by a substantial purpose to benefit a for-profit business. Although proprietary activities are permitted, too much intermingling of Google, Inc.'s personnel, technology, and other resources with Google.org would raise alarms regarding the commerciality

¹⁰⁸ I.R.C. § 4945(h); Garry W. Jenkins, *Soft Power, Strategic Security, And International Philanthropy*, 85 N.C. L. REV. 773 (2007) (describing the required "expenditure responsibility" that private foundations must exercise for grants made to entities other than tax-exempt public charities).

¹⁰⁹ MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 219–25 (2004); Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers*, 23 J. CORP. L. 631, 646 (1998).

FOR-PROFIT PHILANTHROPY

limits on tax-exempt entities. Additionally, the mutually-beneficial relationship envisioned by direct access could raise concerns under the inurement doctrine and the excess benefit statute. The inurement doctrine bars exempt organizations from distributing net earnings to insiders with organizational control.¹¹⁰ The inurement ban applies to any distributions, whether substantial or not, and is punishable by loss of exemption. But its vagueness and draconian penalty limit its application.¹¹¹ The excess benefit statute, IRC § 4958, is more easily applied to curb similar behavior. It imposes penalty taxes on transactions that provide excessive benefits to fiduciaries or major donors.¹¹² Together, these restrictions would place intermingling of Google, Inc. and Google.org resources under even greater scrutiny than state fiduciary law.

Federal tax law would again, however, have the most dramatic effect on Google.org if it was classified as a private foundation (as it almost certainly would be). As a private foundation, especially strict rules would penalize or prevent sharing of resources between Google, Inc. and Google.org. These rules would characterize as self-dealing any “sale or exchange, or leasing, of property” between Google.org and Google, Inc., whether direct or indirect and even if the transfer were at fair-market price or better for Google.org.¹¹³ Likewise, unless provided entirely free of charge, “furnishing of goods, services, or facilities between” the two organizations would be deemed self-dealing.¹¹⁴ As under the private foundation restrictions discussed above, self-dealing transactions subject foundations and their managers to penalty taxes and must be unwound. Thus, Google.org’s direct access plan would be fraught with risk if the entity were set up as a traditional nonprofit, and particularly dangerous were it deemed a private foundation.¹¹⁵

C. Political Activities

Finally, Google.org emphasizes that its choice of a for-profit model avoids restrictions on its political activities.¹¹⁶ Federal tax law creates the more severe limitations on political activities by traditionally-organized philanthropic entities. The extent and dimensions of these limitations are, again, determined by an organization’s precise classification within tax-exempt status. If Google.org were

¹¹⁰ Fishman, *Wrong Way Corrigan*, *supra* note ____, at 584–85.

¹¹¹ Fishman, *Wrong Way Corrigan*, *supra* note ____, at 585.

¹¹² I.R.C. § 4858; Treas. Reg. § 53.4958.

¹¹³ I.R.C. § 4941(d)(1)(A).

¹¹⁴ I.R.C. § 4941(d)(1)(C).

¹¹⁵ The Google Foundation experienced some of these difficulties firsthand early in its life, an experience which in part motivated the formation of Google.org. Kevin J. Delaney, *Google: From Don't Be Evil to How to Do Good*, WALL ST. J., Jan. 18, 2008, at B1. (noting Google’s dismay when it encountered problems donating to One Laptop Per Child, a “project aimed at increasing Internet access [that] arguably could boost Google’s online advertising revenue”).

¹¹⁶ Google.org—About Us, *supra* note ____.

FOR-PROFIT PHILANTHROPY

able to achieve status as a tax-exempt public charity, an aspiration unlikely to be realized if Google, Inc. remained its singular funder, federal law would allow “no substantial part” of its earnings to be spent on lobbying.¹¹⁷ No regulation defines substantial,¹¹⁸ and few cases or rulings address it directly.¹¹⁹ The chilling effect of this uncertainty leads some charities to elect a series of optional and complex, but more quantifiable restrictions.¹²⁰ These restrictions require lobbying expenditures to be maintained below a certain percentage of the entity’s operating budget.¹²¹ An entity that exceeds these limits faces penalty excise taxes;¹²² repeated infractions are punishable by revocation of exemption.¹²³ In contrast, if a tax-exempt Google.org were deemed a private foundation, as is most likely, it would not be permitted to lobby at all.¹²⁴

Regardless of classification, political campaign activities are subject to a more straightforward ban.¹²⁵ Engaging in such activities subjects an exempt entity to revocation of exempt status,¹²⁶ as well as additional penalty taxes that vary somewhat based on classification.¹²⁷ To complicate matters further, the line between lobbying and campaign activities under tax-exempt law does not always align with a lay idea of this border, or even that set by other legal regimes. One might assume messages about issues of policy, rather than encouraging support of a particular candidate, would qualify as lobbying efforts that are curtailed but permitted. Yet, if Google.org reached out to voters with its views on a policy issue, and it was one about which candidates differed, these efforts might well be characterized as campaign activities subject to an outright ban.¹²⁸

¹¹⁷ I.R.C. § 501(c)(3).

¹¹⁸ *Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1662 (1992).

¹¹⁹ *Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955) (holding less than 5% of political activity not substantial); *Haswell v. United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974) (eschewing a percentage rule).

¹²⁰ Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 62–67 & n.379 (2003) (noting groups’ claims that the “no substantial part” test chilled lobbying made in the hearings on the new regime).

¹²¹ I.R.C. § 4911.

¹²² Treas. Reg. § 1.501(h)-3.

¹²³ Treas. Reg. § 1.501(h)-3(b), (c)(7).

¹²⁴ I.R.C. § 4945(d)(1) (subjecting any lobbying expenditure by a private foundation to prohibitive penalty taxes).

¹²⁵ I.R.C. § 501(c)(3) (“no part of the earnings of [a tax-exempt public charity] may be used to participate or intervene in a political campaign on behalf of (or in opposition to) any candidate for public office”).

¹²⁶ *See, e.g., Branch Ministries v. Rosotti*, 211 F.3d 137 (D.C. Cir. 2000) (affirming IRS revocation of a church’s exempt status due to campaign activities).

¹²⁷ I.R.C. § 4955 (taxing campaign expenditures by any exempt organization); § 4945(d)(2) (subjecting campaign activity by a private foundation to prohibitive penalty taxes).

¹²⁸ Rev. Rul. 80-282, 1980-2 C.B. 178; Rev. Rul. 86-95, 1986-2 C.B. 73.

FOR-PROFIT PHILANTHROPY

The extent to which state nonprofit law would check Google.org's involvement in politics is less clear than the obvious federal law obstacles. Still, states have restricted political activities of nonprofit corporations. In doing so, they sometimes rely federal tax law to support a conclusion that significant political activities preclude charitable status.¹²⁹ Other times, courts create their own tests for the point at which political activities will disqualify an organization from nonprofit status under state law.¹³⁰ These more independent state courts have allowed nonprofits with political purposes or activities to maintain their status, but the tone of their pronouncements remains skeptical.¹³¹

Although Google.org does not mention a specific desire to participate in political campaigns, it highlights plans “to lobby for policies that support [its] philanthropic goals” as part of its rationale for choosing for-profit charity.¹³² Federal tax law would chafe these plans, even if Google.org were classified as one of the organizations with relatively liberal restrictions on political activities. The most likely classification for a nonprofit, tax-exempt Google.org – a private foundation – would require it to abandon virtually all plans for political activity. State corporate law would create additional suspicion around these political activities. By opting out of traditional philanthropic forms, Google.org is able to pursue political activities as it sees fit to achieve its social goals.

* * *

The legal restraints on nonprofit, tax-exempt entities would interfere with major strands of the Google.org vision. They would limit Google.org's ability to invest in for-profit ventures in pursuit of its philanthropic goals. They would scrutinize and, at times, punish its use of and access to Google, Inc. resources to support its activities. They would constrain, if not entirely prohibit, the use of political action to promote Google.org's philanthropic mission. Google, Inc.'s decision to eschew traditional charitable forms to pursue its philanthropic endeavors is thus easily understood. The mismatch of its philanthropic vision and the legal limitations imposed on traditional charitable forms should encourage thinking about whether these limitations represent good policy choices or unduly restrict

¹²⁹ See, e.g., *Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n of City of N.Y.*, 438 N.Y.S.2d 521, 525 (N.Y. App. Div. 1981) (denying state tax exemption and using federal cases interpreting I.R.C. § 501(c)(3) for support).

¹³⁰ See, e.g., *New England Legal Found. v. City of Boston*, 423 Mass. 601 (1996) (specifically declining to “embark on a path of adopting the detailed federal rules and regulations of political organizations”).

¹³¹ See, e.g., *Michigan United Conservation Clubs v. Twp. of Lansing*, 378 N.W.2d 737 (Mich. 1985); *Register of Wills for Baltimore City v. Cook*, 216 A.2d 542, 549 (Md. 1966); *Jackson v. Phillips*, 14 Allen 539 (Mass. 1867).

¹³² Google.org—About Us, *supra* note ____.

FOR-PROFIT PHILANTHROPY

philanthropic activities. The next Part begins to address these fundamental issues, as well as some more pragmatic concerns raised by the for-profit philanthropy model.

IV. CONCERNS RAISED BY FOR-PROFIT PHILANTHROPY

The for-profit philanthropy model raises an array of concerns for those steeped in the traditions of nonprofit and for-profit law alike. Of course, nonprofit law will not apply to for-profit philanthropy divisions directly, but taking a nonprofit law perspective brings out important pragmatic concerns about this new model. This perspective forces one to ask questions about the availability and suitability of enforcement mechanisms for for-profit philanthropy. Nonprofit law's focus on mission, and its concern for constraining mission evolution, pose further challenges for the for-profit philanthropy model. A for-profit law perspective reveals different, but likewise important pragmatic concerns – concerns for-profit philanthropists will need to address because for-profit law will actually apply to these entities. For-profit law's shareholder primacy norm and its concern over protecting investors are certainly implicated by the for-profit philanthropy model. Further, this model tests the limits of fiduciary discretion. Finally, the for-profit philanthropy model and the Google.org example expose fundamental issues regarding the law's construction of a boundary between nonprofit and for-profit endeavor, and whether its present location is well-charted.

A. Nonprofit Law's Perspective

Drawing on nonprofit legal sources and debates, three major strains of concern arise from the for-profit philanthropy model. Does for-profit philanthropy perilously evade enforcement measures? Will it inappropriately blur or influence philanthropic mission? Can it mislead partners, beneficiaries, or the public? The answers to these questions are neither easy nor crystalline. Contending with them uncovers issues that for-profit philanthropists and nonprofit advocates should monitor, to ensure this new model operates to enhance philanthropy.

Placement of philanthropic activity inside a for-profit entity immediately sparks questions about enforcement, a major preoccupation of nonprofit law and scholarship.¹³³ Its structure puts philanthropic activity conspicuously outside the oversight of both state attorneys general and federal tax regulators traditionally charged with monitoring philanthropic organizations. Of course, as detailed in Part III, this is quite deliberate. Google.org's structure is a response to the scrutiny and penalties these regulators would place on its plans to invest in for-profit entities, directly access Google, Inc.'s resources, and engage in political activities. In order to pursue these strategies, Google.org needs to be outside of their jurisdiction.

¹³³ Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87, 93–96 (2008).

FOR-PROFIT PHILANTHROPY

State and federal regulators, however, have a fairly broad mandate. They are empowered to protect charitable assets, prevent donor fraud, safeguard the reputation of the charitable sector, and police the benefits nonprofits are given.¹³⁴ To do so, these regulators can engage in front-end review of charitable purpose. They can consider changes to purpose when governing documents are amended, major transactions occur, or when an entity dissolves.¹³⁵ They can prosecute fiduciaries when self-dealing transactions do, in fact, disadvantage philanthropic entities.¹³⁶ They can require disclosure of internal policies, spending decisions, and program choices for regulatory, donor, and public review.¹³⁷ In its effort to escape a few particularly troublesome restrictions imposed by nonprofit law and federal tax-exemption requirements, for-profit philanthropy avoids this broad regulatory framework entirely.

Without the constraints of state nonprofit or federal tax law, a for-profit philanthropist might misbehave badly. It could squander or misuse philanthropic assets, confuse partners or the public as to its goals or activities, even deleteriously impact the reputation of the charitable sector, without any sanction. For-profit accountability mechanisms offer some promise for keeping these entities honest. Shareholder suits or offers for control might prevent or punish embezzlement or other direct self-dealing harms that ultimately impact the for-profit's bottom line. In addition, the pure self-interest of a for-profit philanthropist like Google.org – in achieving its own stated and well-publicized goals – should encourage it to pursue accountability. If it is part of a highly visible public company, a for-profit philanthropy division will be subject to some public scrutiny. The charitable sector and the public will challenge problems that come to light. Still, the for-profit form provides only limited and structured transparency, geared to investors rather than the public at large.¹³⁸ Further, none of these mechanisms are likely to challenge Google.org if it strays from or lags on its philanthropic course.¹³⁹ For-profit philanthropy's potential avoidance of enforcement regimes therefore remains concerning.

¹³⁴ Evelyn Brody, *Whose Public? Parochialism And Paternalism In State Charity Law Enforcement*, 79 IND. L.J. 937, 946–50 (2004) (addressing the enforcement prerogatives of state attorneys general).

¹³⁵ See, e.g., REVISED MODEL NONPROFIT CORP. ACT §§ 11.02, 12.02, 14.03 (providing nonprofits must notify the state AG prior to merger, sale of substantially all assets, or dissolution).

¹³⁶ FREMONT-SMITH, *supra* note ___, at 309 (describing the range of court actions available to state AGs).

¹³⁷ James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 239–42 (2003) [hereinafter Fishman, *Charitable Accountability*] (describing state and federal disclosure and filing requirements).

¹³⁸ Rana, *supra* note ___, at 95.

¹³⁹ Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAV. L. REV. 205, 212–15 (2004) (articulating the accountability problem created by mission creep).

FOR-PROFIT PHILANTHROPY

Importantly, though, this concern is tempered by the fact that nonprofit regulators engage in a relatively low level of enforcement. In fact, the dearth of resources state attorneys general bring to their nonprofit enforcement efforts is oft-cited, and the subject of frequent criticism in the nonprofit legal literature.¹⁴⁰ Federal regulators offer somewhat greater enforcement resources than their state counterparts. This relative advantage, however, still leaves them with meager financial, human and technological resources to achieve their tasks.¹⁴¹ Due to standing limitations, members of the public rarely may bring enforcement suits against philanthropic organizations or their leaders.¹⁴² Without more enforcement resources available in the nonprofit enforcement architecture, Google.org's decision to opt out creates lower accountability costs than might be imagined.

The perspectives of nonprofit law and scholarship also draw out several mission-based concerns regarding the for-profit philanthropy model. Combining for-profit attributes with traditionally nonprofit activities is the point of for-profit philanthropy. This might make philanthropic activities more efficient, but it could also blur mission in unintended and undesirable ways. For-profit philanthropy's embrace of business methods may put additional pressure on entities like Google.org to measure their performance.¹⁴³ But, performance metrics for nonprofit production are notoriously slippery and contested.¹⁴⁴ Some of Google.org's initiatives provide obvious opportunities for benchmarking progress. If a plug-in vehicle produced through RechargeIT becomes viable for even small-scale production, this would certainly be an achievement. Likewise, RE<C might chart its progress as greater efficiencies in electricity production are achieved by processes it develops or funds. Often, though, identifying and measuring milestones will be far more complicated. Perhaps a count of emerging disease hot spots identified would track the PnP initiative's success. Or, perhaps a small advance in the understanding of the basic science relating to disease mutation is the proper target. There is always a danger with performance measures that an inapt one will be selected. Even if good choices are made, the risk of overemphasizing metrics remains. Concentrating on achieving

¹⁴⁰ See, e.g., FREMONT-SMITH, *supra* note ___, at 352 (noting state attorneys general have achieved some nonprofit enforcement successes, “[a]ll of them operate with severely limited budgets, which has meant a shortage of legal and accounting support”); Fishman, *Charitable Accountability*, *supra* note ___, at 262–63 (addressing the limitations on nonprofit enforcement presented by governmental resources).

¹⁴¹ FREMONT-SMITH, *supra* note ___, at 459–61 (describing the challenges federal regulators face); Evelyn Brody, *Accountability and Public Trust*, in *THE STATE OF NONPROFIT AMERICA* 479 (2002) (“Funding for charity enforcement has never been high, at either the state or federal level.”).

¹⁴² Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 657 (1998) (noting that standing to challenge fiduciary breaches by anyone other than the attorney general and fellow fiduciaries is extremely limited).

¹⁴³ Rana, *supra* note ___, at 94.

¹⁴⁴ MEASURING THE IMPACT OF THE NONPROFIT SECTOR (Patrice Flynn & Virginia Hodgkinson, eds. 2001).

FOR-PROFIT PHILANTHROPY

the measures can become an organization's whole purpose, eclipsing and blinding it to broader goals or alternative visions of success. These risks exist for nonprofit entities as well, of course. The call to use business methods to re-engineer philanthropy in search of greater efficiency, however, suggests that the dilemma over performance measures will be particularly acute in for-profit philanthropy. Philanthropy advocates would do well to monitor this issue as for-profit philanthropy grows.

The for-profit philanthropy model could also undesirably skew mission in other ways. What begins as a philanthropic mission could, as a result of it being embedded within a business, become biased toward alignment with the goals of the for-profit company. This is not to suggest any nefarious intent. Rather, a for-profit philanthropy division's position within the larger organizational culture, along with its desire to take advantage of its direct access to the for-profit's resources and technology, could well cause slow but steady drift in mission toward service of for-profit goals. One could herald this type of development as welcome synergy. Indeed, some commentators suggest that both business and social goals can be enhanced by integrating philanthropy more fully with overall corporate strategy.¹⁴⁵ In important ways, though, this integration might degrade the idea of corporate philanthropy.¹⁴⁶ If "philanthropic" expenditures are made to improve the lot of the corporation and its shareholders, they are hardly a gift to humankind. More importantly, if this drifting effect indeed skews deployment of philanthropic resources to only those social issues that neatly align with for-profit imperatives, there is real cause for concern. Again, this concern is not limited to the for-profit philanthropy domain. Corporate foundations are subject to similar criticism for shifting mission from original unrelated philanthropic goals toward ones more closely aligned with the branding and ideals of the for-profit company.¹⁴⁷ The for-profit philanthropy model, by bringing traditionally nonprofit activities within business operations, would only enhance this effect. Again, contemplation and monitoring are warranted.

The ultimate mission-based fear raised by the for-profit philanthropy model is that resources contributed with much fanfare to achievement of philanthropic

¹⁴⁵ CENTER FOR CORP. CITIZENSHIP, STRATEGIC PHILANTHROPY: THE BUSINESS VALUE OF CONTRIBUTIONS 1 (describing the value of "align[ing] charitable activities ... with a social issue or cause that supports their business objectives").

¹⁴⁶ See, e.g., Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARVARD BUSINESS REVIEW 57 (Dec. 2002); COMMITTEE ENCOURAGING CORPORATE PHILANTHROPY, CAPTURING THE CORPORATE PHILANTHROPY OPPORTUNITY 23-24 (arguing, based on a McKinsey study, that "[t]he most efficient philanthropists are [] seeking to make their philanthropy congruent with the business footprint").

¹⁴⁷ Cf. Linda Sugin, *Encouraging Corporate Charity*, 26 VA. TAX. REV. 125, 144-51 (2006) (arguing that the alignment of corporate philanthropy with business goals makes these expenditures more appropriately deductible as business expenses than as charitable gifts).

FOR-PROFIT PHILANTHROPY

aims could, one day, be recaptured by the for-profit and used instead for profit-making purposes.¹⁴⁸ Such recapture is not possible if resources are gifted to a separately incorporated nonprofit. It simply could not be done with a tax-exempt private foundation, even a corporate foundation with many overlapping leaders and with significant company-foundation interaction. And, it is important to note, Google.org and its leaders vehemently object to any suggestion it would happen there. Perhaps not, but no legal obstacle would prevent Google.org from doing so. Moreover, future adopters of the for-profit philanthropy model might not be so willing to irreversibly dedicate their resources to their philanthropic stream.

The possibility of recapture, of course, will not necessarily reduce overall corporate expenditures on philanthropy. It may instead be beneficial to allow companies to contribute resources to philanthropic endeavors only for as long as they are so inclined. On the one hand, the ability to recapture these assets for profit-making purposes at a later time might increase corporate willingness to fund philanthropic activities in the current period. It might expand the range of social aims companies are willing to bankroll or encourage greater experimentation. On the other hand, meeting philanthropic goals often requires sustained attention and stability. The risk that funds might be cut off at any time could curtail the scale of for-profit philanthropists' efforts, or undesirably limit their goals' scope and ambition. These are empirical questions that merit further exploration.

Finally, the nonprofit law perspective highlights concerns about misleading customers, partners, and the public. Protecting donors and others from nonprofit frauds or schemes is a major preoccupation of nonprofit law.¹⁴⁹ The recapture possibility elicits real concerns about how for-profit philanthropists describe and publicize their activities. The idea that funds once contributed may be taken back for the donor's private use does not track with the traditional idea of charitable giving. Characterizing as for-profit *philanthropy* an activity marked by this flexibility misuses the term. Without a real commitment to restrain recapture of ostensibly donated funds, the for-profit philanthropy concept risks casting future adoptees of the model as unduly charitable. If for-profit philanthropists free-ride on the positive associations of the philanthropic community, they may mislead customers, partners, or the public generally. They may even dilute or damage these associations, at a point when they are already showing wear.¹⁵⁰ Like all of the mission-related concerns outlined here, for-profit philanthropists and philanthropy advocates should carefully mind these issues.

¹⁴⁸ Fishman, *Wrong Way Corrigan*, *supra* note ____, at 607.

¹⁴⁹ Brody, *supra* note ____, at 947 (noting this was reported as state regulators' "biggest concern").

¹⁵⁰ Suzanne Perry, *Public Confidence in Nonprofit Groups Slides Back, New Survey Finds*, CHRON. PHILANTHROPY (Apr. 3, 2008).

FOR-PROFIT PHILANTHROPY

B. For-Profit Law's Perspective

The perspective of for-profit law exposes a range of other concerns about the for-profit philanthropy model. The model tests the strength of the shareholder primacy norm and the limits of fiduciary discretion. Is philanthropy, when taken this far, still a valid corporate objective? Can the decision to create a philanthropic division be sustained as a proper exercise of fiduciary responsibility? Likely yes on both counts, and for mostly familiar reasons. The Google.org example, however, expands on these rationales and offers some guidance for future for-profit philanthropists.

A for-profit legal perspective quickly seizes upon the shareholder primacy challenge that for-profit philanthropy represents. As a for-profit corporation, the primary objective of Google, Inc. is to make profits for its shareholders.¹⁵¹ These profits may be obtained by shareholders immediately, through dividends or rises in stock price, or over the long-term, when reinvestment in the corporation leads to growth in its value. Google, Inc., of course, is pursuing profits doggedly, but not exclusively. It is also pursuing philanthropic goals through Google.org. The debate over whether and to what extent corporations should expend funds and other resources for purposes other than increasing shareholder value has raged for decades.¹⁵² The creation of a division specifically devoted to pursuit of social rather than shareholder returns raises these issues more pointedly.¹⁵³ Google, Inc.'s especially shareholder-resistant corporate structure makes shareholder primacy concerns even more vivid. Under its dual class structure, one class of its common stock provides a single vote per share and is held by most shareholders; a second class of common stock, with ten votes per share, is held primarily by insiders.¹⁵⁴ The structure thereby entrenches control with a few manager-owners, insulating it from the shareholder pressure and threat of hostile takeovers that enforce the shareholder primacy norm.¹⁵⁵

In the main, though, Google.org could be easily defended using traditional responses to shareholder primacy arguments opposing corporate charitable

¹⁵¹ AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §2.01 (1994) (“a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain”); *see also* Elhauge, *supra* note ___, at 745 (accepting without argument that “managers' primary obligation is and should be to make profits”).

¹⁵² Wells, *supra* note ___; Branson, *supra* note ___, at 605. A particular resurgence in this debate arose after states' adoption of corporate constituency statutes in the 1990s. Wells, *supra*, at 125–29.

¹⁵³ Stone, *supra* note ___, at C3 (reporting that the announcement of Google's entry into the renewable energy field was greeted by some concern on the part of investors and analysts).

¹⁵⁴ VISE & MALSEED, *supra* note ___, at 172.

¹⁵⁵ VISE & MALSEED, *supra* note ___, at 172; Google, Inc., Letter from the Founders, *supra* note ___, at 29–30.

FOR-PROFIT PHILANTHROPY

contributions. Google, Inc.'s corporate do-gooding meshes with its non-“evil” brand positioning. Google.org seems likely to enhance Google, Inc.'s standing with consumers and potential partners. Its design of a new model for corporate philanthropy aligns with its reputation for innovation. This reputation is key to Google, Inc.'s strategy for recruiting and inspiring the highly-prized and sought after technical job force its business requires. Many other businesses could likewise use such claims to support efforts to create for-profit philanthropy divisions in their own corporations.

Google, Inc. can add an additional argument to the mix: notice. Its plans regarding the extent of the company's philanthropic reach have been public and longstanding, dating from its IPO. Its pledge then to commit one percent of equity and profits to philanthropy informed all would-be Google, Inc. shareholders of the company's broad philanthropic orientation. Any shareholders disdaining such use of their capital could have looked elsewhere to invest. Google, Inc.'s capital and control structure were likewise detailed in these early documents, and have continued to be transparent to investors who cared to inquire. Shareholders thus purchased with notice and need not be heard to complain. In fact, some shareholders may have purchased because of Google, Inc.'s philanthropic commitment, and would want to hold the company to its promises. Disclosure is the bedrock of federal securities law; it provides Google, Inc. a strong defense to any claim that Google.org breaches protections for investors. This notice strategy is also relatively easy to copy, though more so for companies just making shares available to the public than for established public corporations.¹⁵⁶

The questions raised by fiduciary obligation, another persistent for-profit law theme, also can be quickly answered. In most cases, the only potentially viable shareholder claim for breach of fiduciary duty is for a lapse in loyalty. A shareholder could claim that a for-profit philanthropy division is merely a veiled perquisite for a company's directors or officers. The claim would argue the company undertook philanthropic activities for the benefit of these fiduciaries, but using corporate assets. Such a case is theoretically possible, but difficulties of proof as well as law would make its success unlikely. It would be quite difficult to demonstrate that philanthropic activity was for the benefit of a fiduciary, not the company.¹⁵⁷ Even if such proof could be made, if the philanthropic expenditure when added to the fiduciary's compensation was still within a reasonable range, there would be little harm.

Claims under the duty of care would be nearly hopeless. Initially, the deferential standards of review in duty of care suits and the complex procedural obstacles to bringing them would stymie shareholder plaintiffs challenging for-profit

¹⁵⁶ Companies frequently disclose their philanthropic activities to shareholders already, for dual purposes of disclosure and public relations.

¹⁵⁷ See Elhauge, *supra* note ____, at 834.

FOR-PROFIT PHILANTHROPY

philanthropy. Even on the merits, the decision to fund Google.org would fall well within the range of rational business decisions. Regardless of Google.org's claims that it is unconcerned with the return on its investments, it is certainly more likely to profit from its initiatives than it would from making a charitable donation in the same amount.

In fact, it would seem easy to defend a for-profit philanthropy division without any resort to the philanthropic high ground. The division could be just one part of a diversified portfolio of corporate investments. This division pursues extremely high risk, but potentially very high return, projects. If Google.org finds a way to produce one gigawatt of electricity cheaper than coal, or to prevent and predict diseases of grave concern to public health worldwide, these achievements could likely be translated into significant profits. Of course, these endeavors are great challenges and may come to nothing. But, that is true of many corporate projects. Provided corporate leaders used appropriate process in considering the matter, they would be acting well within the standard of care to create a for-profit philanthropy division like Google.org. It uses a relatively low overall financial investment to pursue projects unlikely to pan out, but which if successful could expand its business exponentially, not unlike some research and development units. Of course, Google, Inc. has not so positioned Google.org in its public statements. Rather, it brushes off the possibility of profit and promises to reinvest in philanthropy any profits it should happen to make. There is no reason not to take them at their word. Still, future for-profit philanthropists could easily leave open the door to justifying adoption of the model on these terms.

Finally, one could conceivably question whether for-profit philanthropy could undermine the value of the for-profit corporate form more generally. Substantial benefits accrue to for-profit corporations in recognition of the role they play in producing economic vitality.¹⁵⁸ If for-profit philanthropy so seriously distracted the captains of industry that it undermined this tradeoff, it would be cause for distress. Of course, the same fear could be raised with regard to corporate contributions, corporate social responsibility, and social enterprise. And, it would be similarly overstated. None of these examples blending business and philanthropy pose such catastrophic threats. They do not adopt, or even advocate, a wholesale abandonment of the role of business in building economic prosperity. It remains to be seen whether a trend toward more nonprofit and for-profit hybridization is forming. Today, at Google, Inc. and elsewhere, outlays on philanthropy are still tiny compared to those spent developing, producing, and marketing products and services. Moreover, if the U.S. economic downturn persists or deepens, philanthropic expenditures may diminish as companies feel less flush with funds to

¹⁵⁸ Not least of these is limited liability, which can stimulate investment and foster risk-taking, all in service of greater efficiency. COX, HAZEN & O'NEAL, *supra* note ____, § 7.2; CHARLES CLARK, CORPORATIONS §1.1 (1986).

FOR-PROFIT PHILANTHROPY

allocate to social goals. For-profit philanthropy, like its forbears, seems highly unlikely to be the undoing of the business-driven economy.

The pragmatic legal questions a for-profit perspective brings to mind can thus fairly easily be answered. Indeed, other corporate commentators find the for-profit philanthropy model of so little concern that they argue for encouraging these efforts by extending tax benefits to reach them. Professors Posner and Malani argue that none of the rationales supporting tax benefits for philanthropic activities can justify premising these benefits on the adoption of a nonprofit form.¹⁵⁹ Thus, they propose decoupling nonprofit form from tax benefits based on social activities, and opening these benefits to any type of entity engaging in activities that benefit the community.¹⁶⁰ Only time will tell if for-profit philanthropy will figure largely in the corporate mainstream. If Posner and Malani's prescription is not adopted, other for-profits may be unwilling to give up the tax and other benefits attendant to structuring their philanthropy along more traditional legal lines. Assuming refinement and replication of the model does occur, for-profit legal concerns should not create serious obstacles.

C. Fundamental Concerns About the Nonprofit/For-Profit Boundary

The for-profit philanthropy model and the Google.org example do, however, highlight a more fundamental issue: the utility of the legal boundary between nonprofit and for-profit endeavor. There is a real and evident mismatch between Google, Inc.'s philanthropic vision and the legal restrictions on traditional forms for philanthropic activity. This divergence exposes fundamental policy choices around how the law structures, and thereby encourages, philanthropic activity. These policy choices have delineated several key boundaries between what is philanthropy and what is not.

- Philanthropy is qualitatively different than commercial activity. It produces something different from, perhaps larger than, products and services.
- Philanthropy defines a charitable class and provides the benefits of its success to them, not to equity investors, not to leaders or managers, not even to unrelated parties if they are outside the benefitted class. It embodies at least this basic level of altruism.
- Philanthropy is not engaging in the political system. It is working for change in some more direct or at least different way, without becoming embroiled in political processes that might taint or overtake a charitable mission.

¹⁵⁹ See Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007).

¹⁶⁰ See Malani & Posner, *supra* note ____, at 2065.

FOR-PROFIT PHILANTHROPY

Because the law is complex and sometimes muddled and because organizations cannot be expected to fulfill the philanthropic ideal to perfection, the boundaries are muddy. There are exceptions. Limited incursions across them are permitted or overlooked. But, these boundaries are there.

The for-profit philanthropy model does not just push or question the boundaries the law has placed on philanthropy. It ignores the map altogether. Google.org shows that structural innovation can limit the potency of the law's boundaries. It defies the law's attempt to chart human endeavor into easy categories of public or private, self-regarding or other-regarding, noble or base. In doing so, for-profit philanthropy raises serious questions about whether the boundaries the law has placed on traditional charitable forms represent the right policy choices. Exposing these fundamental questions may ultimately be for-profit philanthropy's greatest contribution to nonprofit law and the philanthropic community. Full exploration of the theoretical implications of this revelation will continue beyond this Essay, in my future work and hopefully that of others.

V. CONCLUSION

Google.org's for-profit philanthropy model is the most recent in a long line of phenomena blending nonprofit and for-profit endeavor. The persistence of corporate charitable contributions and corporate social responsibility arguments, as well as the advent of social enterprise and the new advocates of philanthrocapitalism, suggest innovation may well continue in this direction. For-profit philanthropy's innovation is mainly structural, placing philanthropic activity in-house, as a division of a for-profit company. This structure responds to reasonable concerns about the feasibility of pursuing Google, Inc.'s particular philanthropic vision and program through traditional charitable forms. Its novel approach, however, raises real questions about nonprofit and for-profit law and the boundary these regimes establish between their constituents. Through its examination of these questions, this Essay provides signposts for the evaluation of for-profit philanthropy. More work must be done to better understand and guide the legal impact of for-profit philanthropy, especially if it becomes subject to widespread replication. Until then, the Google.org example offers valuable insight on the undertheorized boundary between nonprofits and for-profits.