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Artfully dodging donor scrutiny

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There's no mystery about why a business or industry group might be shy about how it spends money on election campaigns. Just ask department store chain Target.

In 2010, Target, which had been known for its progressive employment policies, faced a customer and shareholder backlash after it donated \$150,000 to a pro-business PAC in Minnesota that was backing a gubernatorial candidate who opposed gay rights.

Target eventually quelled the furor with a policy change prohibiting trade groups from using its contributions to intervene in elections, but it stopped short of disclosing all its political donations. Yet had it made its Minnesota donation through a nonprofit organization known as a 501(c)4, it might have avoided all that hassle. That's because such organizations don't have to disclose who their donors are.

These so-called C4s are becoming the most fashionable dodge allowing businesses, industries and well-heeled figures to involve themselves in politics behind the scenes.

By law, 501(c)4s -- so designated after a section of the tax code governing nonprofits -- are supposed to be devoted exclusively to "social welfare purposes," which the IRS defines broadly as education, fundraising, and even lobbying on issues related to the common good and civic betterment.

But although C4s aren't supposed to get directly involved with election campaigns or electioneer for specific candidates, they're becoming a major conduit of political contributions by business and industry.

That's because the law allows C4s to keep the names of their donors secret. The consequence is that business interests and the wealthy not only get a free pass to pour millions into the electoral process, but have a way to keep their fingerprints off the bucket -- or at least to significantly delay disclosure.

For example, PhRMA, the drug industry's lobbying arm, contributed \$4.5 million in 2010 to American Action Network, a 501(c)4 founded by former GOP Sen. Norm Coleman of Minnesota, devoted to what it says are "center-right policies."

That's half again as much as PhRMA disclosed as its contributions to candidates, party organizations, and political action groups, but it wasn't disclosed by American Action and showed up in PhRMA's public tax return only last November, a year after the 2010 election.

Nothing in the law says a 501(c)4 can't be political in the broadest sense of the word, or even lobby aggressively. What concerns campaign finance experts is a new breed of C4 created with the sole purpose of concealing campaign donations. Some are closely linked to super PACs.

The emblematic C4 of this variety is Crossroads GPS, which is related to American Crossroads, the super PAC founded by GOP operative Karl Rove. The Crossroads group last month announced that it had raised \$51 million in 2011--but only \$18.4 million of the sum was attributed to American Crossroads, which as a super PAC had to name its donors. The other \$32.6 million was ostensibly raised by GPS, whose donors largely remained anonymous.

I don't mean to pick on Rove or the Republicans here; Democratic Party operatives and the Obama campaign are certain to exploit the same dodge as fundraising for the November election kicks into gear. No matter who's doing it, it's this yoking together of the fundraising capabilities of super PACs and the secrecy of C4s

that makes a mockery of campaign finance regulation.

"If you're worried about corruption, think of a case where a big donor contributes to a C4, and the C4 contributes to a super PAC," observes Donald Tobin, a campaign law expert at Ohio State University. "The donor knows his money went to the PAC, and because the PAC is run by a friend of the candidate, the candidate knows where the money came from. But the voter doesn't know. That's a recipe for disaster in the democratic process."

The C4 dodge isn't new, but it's burgeoning. Of the \$300 million in outside spending in the 2006 election cycle tracked by the Washington-based Center for Responsive Politics, only 0.3% came from 501 groups making no contributor disclosure. By the presidential election year of 2008, the total spent was \$585 million and the undisclosed percentage was 13%; in 2010, total outside spending was about \$490 million and more than 27% was undisclosed. You can expect both figures to soar this year, but of course we won't really know until well after the election.

It's this reality that makes the Supreme Court's 2010 Citizens United decision so dangerous. That's the decision that overturned restrictions on campaign expenditures by corporations and unions. The majority opinion by Justice Anthony Kennedy expressed great faith in the effectiveness of public disclosure of donors' identities as a political disinfectant. Disclosure, Kennedy wrote, "enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Kennedy's confidence was touching in its naivete, like a child's vigil for Santa on Christmas Eve, but destined to be just as bootless. Kennedy spoke of how modern marvels like the Internet made disclosure almost instantaneous, but he forgot about the much more ancient lawyerly art of finding loopholes in the rules and driving Sherman tanks through them.

And the rules governing 501(c)4s and political giving are very porous. Although the federal law says the nonprofits must be exclusively devoted to social welfare activities, the IRS has chosen to interpret that as meaning their "primary purpose" must be social welfare. But it hasn't defined "primary purpose," so campaign lawyers have chosen to infer that as long as 51% of a C4's spending is for social welfare, the other 49% is wide open.

Moreover, the line between lobbying, which is permissible, and campaign "intervention," which is not, "can be pretty thin," says Ellen P. Aprill, a campaign and tax law expert at Loyola Law School. Even the IRS warns that "social welfare" is "inherently an abstruse concept that continues to defy precise definition." Even if the agency were to conclude that a C4 had acted illegally, that decision is sure to come months or years after the offending behavior, and the nonprofit may have closed up shop and slunk away by then.

Nothing is stopping regulatory agencies or Congress from closing these loopholes -- nothing but political pressure, that is. Last year, when the IRS tried to crack down on wealthy taxpayers who hadn't paid gift tax on their 501(c)4 contributions, a shriek went up from Republicans on Capitol Hill.

Enforcing the tax on contributions to C4s engaged in public policy, according to a letter to the IRS from six Republican senators, "runs an unacceptable risk of chilling political speech." That sounds like it gave the game away, but the time it took the IRS to back off could be measured in nanoseconds.

Meanwhile, the DISCLOSE Act, an effort by Sen. Charles E. Schumer (D-N.Y.) and others that would require disclosure of all donors behind political ads, failed to escape a filibuster threat in 2010 by a single vote. The sponsors will try again this year, but don't hold your breath. By the way, because C4s are tax-exempt, we're all paying for this dodge. And the biggest bills haven't even arrived yet.

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