Donor Names Remain Secret as Rules Shift

By MICHAEL LUO and STEPHANIE STROM

Crossroads Grassroots Policy Strategies would certainly seem to the casual observer to be a political organization: Karl Rove, a political adviser to President George W. Bush, helped raise money for it; the group is run by a cadre of experienced political hands; it has spent millions of dollars on television commercials attacking Democrats in key Senate races across the country.

Yet the Republican operatives who created the group earlier this year set it up as a 501(c)(4) nonprofit corporation, so its primary purpose, by law, is not supposed to be political.

The rule of thumb, in fact, is that more than 50 percent of a 501(c)(4)’s activities cannot be political. But that has not stopped Crossroads and a raft of other nonprofit advocacy groups like it — mostly on the Republican side, so far — from becoming some of the biggest players in this year’s midterm elections, in part because of the anonymity they afford donors, prompting outcries from campaign finance watchdogs.

The chances, however, that the flotilla of groups will draw much legal scrutiny for their campaign activities seem slim, because the organizations, which have been growing in popularity as conduits for large, unrestricted donations among both Republicans and Democrats since the 2006 election, fall into something of a regulatory netherworld.

Neither the Internal Revenue Service, which has jurisdiction over nonprofits, nor the Federal Election Commission, which regulates the financing of federal races, appears likely to examine them closely, according to campaign finance watchdogs, lawyers who specialize in the field and current and former federal officials.

A revamped regulatory landscape this year has elevated the attractiveness to political operatives of groups like Crossroads and others, organized under the auspices of Section 501(c) of the tax code. Unlike so-called 527 political organizations, which can also accept
donations of unlimited size, 501(c) groups have the advantage of usually not having to
disclose their donors’ identity.

This is arguably more important than ever after the Supreme Court decision in the Citizens
United case earlier this year that eased restrictions on corporate spending on campaigns.

Interviews with a half-dozen campaign finance lawyers yielded an anecdotal portrait of
corporate political spending since the Citizens United decision. They agreed that most
prominent, publicly traded companies are staying on the sidelines.

But other companies, mostly privately held, and often small to medium size, are jumping in,
mainly on the Republican side. Almost all of them are doing so through 501(c) organizations,
as opposed to directly sponsoring advertisements themselves, the lawyers said.

“I can tell you from personal experience, the money’s flowing,” said Michael E. Toner, a
former Republican F.E.C. commissioner, now in private practice at the firm Bryan Cave.

The growing popularity of the groups is making the gaps in oversight of them increasingly
worrisome among those mindful of the influence of money on politics.

“The Supreme Court has completely lifted restrictions on corporate spending on elections,”
said Taylor Lincoln, research director of Public Citizen’s Congress Watch, a watchdog group.
“And 501(c) serves as a haven for these front groups to run electioneering ads and keep their
donors completely secret.”

Almost all of the biggest players among third-party groups, in terms of buying television
time in House and Senate races since August, have been 501(c) organizations, and their
purchases have heavily favored Republicans, according to data from Campaign Media
Analysis Group, which tracks political advertising.

They include 501(c)(4) “social welfare” organizations, like Crossroads, which has been the
top spender on Senate races, and Americans for Prosperity, another pro-Republican group
that has been the leader on the House side; 501(c)(5) labor unions, which have been
supporting Democrats; and 501(c)(6) trade associations, like the United States Chamber of
Commerce, which has been spending heavily in support of Republicans.

Charities organized under Section 501(c)(3) are largely prohibited from political activity
because they offer their donors tax deductibility.

Campaign finance watchdogs have raised the most questions about the political activities of
the “social welfare” organizations. The burden of monitoring such groups falls in large part
on the I.R.S. But lawyers, campaign finance watchdogs and former I.R.S. officials say the agency has had little incentive to police the groups because the revenue-collecting potential is small, and because its main function is not to oversee the integrity of elections.

The I.R.S. division with oversight of tax-exempt organizations “is understaffed, underfunded and operating under a tax system designed to collect taxes, not as a regulatory mechanism,” said Marcus S. Owens, a lawyer who once led that unit and now works for Caplin & Drysdale, a law firm popular with liberals seeking to set up nonprofit groups.

In fact, the I.R.S. is unlikely to know that some of these groups exist until well after the election because they are not required to seek the agency’s approval until they file their first tax forms — more than a year after they begin activity.

“These groups are popping up like mushrooms after a rain right now, and many of them will be out of business by late November,” Mr. Owens said. “Technically, they would have until January 2012 at the earliest to file anything with the I.R.S. It’s a farce.”

A report by the Treasury Department’s inspector general for tax administration this year revealed that the I.R.S. was not even reviewing the required filings of 527 groups, which have increasingly been supplanted by 501(c)(4) organizations.

Social welfare nonprofits are permitted to do an unlimited amount of lobbying on issues related to their primary purpose, but there are limits on campaigning for or against specific candidates.

I.R.S. officials cautioned that what may seem like political activity to the average lay person might not be considered as such under the agency’s legal criteria.

“Federal tax law specifically distinguishes among activities to influence legislation through lobbying, to support or oppose a specific candidate for election and to do general advocacy to influence public opinion on issues,” said Sarah Hall Ingram, commissioner of the I.R.S. division that oversees nonprofits. As a result, rarely do advertisements by 501(c)(4) groups explicitly call for the election or defeat of candidates. Instead, they typically attack their positions on issues.

Steven Law, president of Crossroads GPS, said what distinguished the group from its sister organization, American Crossroads, which is registered with the F.E.C. as a political committee, was that Crossroads GPS was focused over the longer term on advocating on “a suite of issues that are likely to see some sort of legislative response.” American Crossroads’ efforts are geared toward results in this year’s elections, Mr. Law said.
Since August, however, Crossroads GPS has spent far more on television advertising on Senate races than American Crossroads, which must disclose its donors.

The elections commission could, theoretically, step in and rule that groups like Crossroads GPS should register as political committees, which would force them to disclose their donors. But that is unlikely because of the current make-up of the commission and the regulatory environment, campaign finance lawyers and watchdog groups said. Four out of six commissioners are needed to order an investigation of a group. But the three Republican commissioners are inclined to give these groups leeway.

Donald F. McGahn, a Republican commissioner, said the current commission and the way the Republican members, in particular, read the case law, gave such groups “quite a bit of latitude.”