

Hunter Biden's 'Blind' Art Sales Show Ethics Purity Challenges

By **Robert Rizzi** (August 3, 2021)

New clients always ask two questions: First, why do government ethics rules make no sense? We respond that these are just rules like the tax code, and are not required to make sense to regular citizens.

And second, why can't I use a blind trust? Blind trusts generally don't work for protecting clients from financial conflicts of interest, because the conflicted assets when contributed are still known.

As a result, qualified blind trusts are rare. Instead, clients are required to divest their problematic assets, often incurring significant economic cost.



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Still, the attractiveness of blindness — the concept that those serving in government can be insulated from financial conflicts because of a lack of knowledge or control over conflicting assets — persists. This brings us to the recent story concerning the sales of works of art by Hunter Biden.

According to reports, ethics officials and, perhaps more importantly, ethics critics, determined that such sales of art risk corruption, because buyers might overpay for hard-to-value art in an effort to curry favor with the artist's father, President Joe Biden, who raised over \$1 billion from donors during his campaign.

The ethical links, of course, are open to question, and they challenge the previously bright-line rule that financial dealings of adult children are not attributable to their parents under the Ethics in Government Act, or in most other government ethics situations.

A significant exception is the "appearance of conflict" regulation — Title 5 of the U.S. Code of Federal Regulations, Section 2635.502 — which provides attribution rules for members of the household of a government official. And in this day and age, this could include adult children living indefinitely in their parent's spare rooms.

Once the dealings of adult children become conflated with those of their public servant parents, the ethical doors are wide open to regulatory chaos.

The proposed solution to the Hunter Biden art concern, however, carries a lesson.

According to news reports, ethics officials in the White House determined that works of art produced by Hunter Biden would be sold through a single art dealer, and that the dealer committed not to disclose the identity of the buyer, even to Hunter. Presumably, Hunter would determine the amount paid through receipt of the proceeds of sale.

The proposal thus points both to the attractiveness of blindness, and the flaws of using blindness in this area.

As was pointed out immediately by critics, who advocated for prohibiting Hunter Biden from selling his art altogether, although the art dealer may be committed to the role as a nondisclosure "cut-out," the buyers were not, and indeed could not be.

As such, a lucky purchaser could boast of his new acquisition to friends, that information

could find its way onto Twitter and the rest of the internet, and the feared effect on Hunter's father, and potentially the White House more generally, could ensue (although many of us remain skeptical).

This is one problem with blindness as a solution — we cannot be sure it is really blind.

This concern about pseudo-blindness is one of the bases for the restrictive approach by the U.S. Office of Government Ethics in regulating qualified blind trusts — requiring, for example, that the trustee be an independent, institutional trustee, because of the fear that a personal relationship between the government official and an individual trustee might lead to peeking into the trust.

Similar issues arise in connection with blind excepted investment funds. EIFs can be mutual funds or private equity and other partnership vehicles.

If the manager of the EIF is willing to sign a statement that the government official, as well as other investors, do not have access to information concerning the underlying holdings — as is often the case, for example, with hedge funds that do not disclose their investment strategy — the fund becomes in effect a sort of blind trust, protecting the public official from the taint of knowledge and eliminating conflicts.

But how many investment funds are truly blind?

U.S. Securities and Exchange Commission mandates, for example, require reporting by managers of overall equity holdings through 13F filings.

Of course, these reports are always out of date and crisscross funds with common managers. Information concerning the underlying holdings is therefore randomized.

Generally, these filings do not prevent an EIF from being suitably blind.

The search for blindness as a solution to ethical problems highlights a fundamental dilemma with avoiding financial conflicts of interest — the system must be, and be perceived as, virtually perfect, but perfection is impossible.

Some information may inevitably leak despite best efforts, and whether or not the information is material or gives rise to actual corruption is beside the point. However, the recent application of blindness in the case of the Biden art helps to focus on this dilemma, and for that reason alone, is welcome.

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