Elements of Offenses - 18 U.S.C. § 666A et seq.

6.18.666A1A	Theft Concerning a Program Receiving Federal Funds (18 U.S.C. § 666(a)(1)(A)) (revised 2/2022)
6.18.666A1A-1	Theft Concerning a Program Receiving Federal Funds - Agent of Organization or Government Defined (revised 2/2022)
6.18.666A1A-2	Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined (revised 2017)
6.18.666A1A-3	Theft Concerning a Program Receiving Federal Funds - Stole, Embezzled, Converted, and Misapplied Defined (revised 2/2022)
6.18.666A1A-4	Theft Concerning a Program Receiving Federal Funds - Belonging to and In the Care, Custody, or Control of Defined (revised 2/2021)
6.18.666A1A-5	Theft Concerning a Program Receiving Federal Funds - Determining Value of Property (revised 2022)
6.18.666A1B	Solicitation of a Bribe by an Agent of a Program Receiving Federal Funds (18 U.S.C. § 666(a)(1)(B)) (revised 2022)
6.18.666A1B-1	Solicitation of a Bribe - Thing of Value Defined
6.18.666A1B-2	Solicitation of a Bribe - Corruptly with Intent to be Influenced Defined (revised 11/2013)
6.18.666A1B-3	Solicitation of a Bribe - Determining Value of Transaction (revised 11/2013)
6.18.666A2	Bribery of an Agent of a Program Receiving Federal Funds (18 U.S.C. § 666(a)(2)) (revised 2022)
6.18.666A2-1	Bribery of an Agent - Thing of Value Defined
6.18.666A2-2	Bribery of an Agent - Corruptly with Intent to Influence Defined (revised 11/2013)
6.18.666A2-3	Bribery of an Agent - Determining Value of Transaction (revised 11/2013)

6.18.666A1A Theft Concerning a Program Receiving Federal Funds (18 U.S.C. § 666(a)(1)(A))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with** *(describe offense; e.g., embezzling from a federally funded program)***, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:

First: That at the time alleged in the indictment, *(name)* **was an agent of** *(specify organization, government, or agency)***;**

Second: That in a one-year period *(specify organization, government, or agency)* **received federal benefits in excess of $10,000;**

Third: That *(name) [(stole) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **property;**

Fourth: That the property *[(stolen) (embezzled) (knowingly converted) (intentionally misapplied)] [(was owned by) (was in the care, custody or control of)] (specify organization, government or agency)***; and**

Fifth: That the value of the property *(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)* **was at least $5,000.**

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 27A-2 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

18 U.S.C. § 666(a) provides:

Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that

(i) is valued at $5,000 or more, and
(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency

commits a federal offense.

18 U.S.C. § 666(b) provides:

The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(d) provides the following definitions of government agency, local, and State:

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

In *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016), the court concluded that the Legislature of the Virgin Islands fell within this definition.

In addition to the elements instruction, the court should give the following instructions as appropriate: Instructions 6.18.666A1A-1 (Theft Concerning a Program Receiving Federal Funds - Agent of Organization or Government Defined), 6.18.666A1A-2 (Theft Concerning a Program

Receiving Federal Funds - Received Federal Funds Defined), 6.18.666A1A-3 (Theft Concerning a Program Receiving Federal Funds - Stole, Embezzled, Converted, and Misapplied Defined), 6.18.666A1A-4 (Theft Concerning a Program Receiving Federal Funds - Belonging to and In the Care, Custody, or Control of Defined), and 6.18.666A1A-5 (Theft Concerning a Program Receiving Federal Funds - Determining Value of Property).

The embezzled or stolen funds need not be traceable to the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *see also Salinas v. United States*, 522 U.S. 52 (1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

The agent need not be someone in a position of trust, and a breach of trust is not a requirement for violation of the statute. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

The failure of the victim to discover or object to the fraud is not a defense and does not preclude conviction. *United States v. Shulick*, 18 F.4th 91 (3d Cir. 2021).

18 U.S.C. § 666 (c) contains a safe harbor provision:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

In *United States v. Shulick*, 18 F.4th 91 (3d Cir. 2021), the defendant failed to demonstrate that he was entitled to a safe harbor instruction.

(Revised 2/2022)

6.18.666A1A-1 Theft Concerning a Program Receiving Federal Funds - Agent of Organization or Government Defined

The first element the government must prove beyond a reasonable doubt is that at the time alleged in the indictment, *(name)* **was an agent of** *(specify organization, government or agency)***.**

An ''agent'' is a person authorized to act on behalf of another person, organization or government. Employees, partners, directors, officers, managers, and representatives are all agents of the organization or government with which they are associated.

[An agent does not necessarily have any control over the federal funds received by the (organization) (government) (agency).]

[A person may be an agent of more than one government agency. An employee of one agency within a larger government department is an agent of that larger department as well.]

[Elected officials are agents of the government which they were elected to serve.]

[A person may be an agent of an organization without being an employee of that organization. An outside consultant who exercises significant managerial responsibility within the organization is an agent of that organization if the consultant is authorized to act on behalf of the organization.]

Comment

Sand et al., supra, 27A-3.

18 U.S.C. § 666(d)(1) provides that as used in this section

> the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.

The court should include any portions of the bracketed language that are appropriate.

In *United States v. Vitillo*, 490 F.3d 314 (3d Cir. 2007), the Third Circuit considered the definition of agent as used in 18 U.S.C. § 666. The defendants were charged with submitting fraudulent invoices for work they never performed while serving as engineers and engineering consultants for a regional airport that received federal funds. The court concluded that the defendants could qualify as agents under the statute even though they had no control over the federal funds and had to bill for the federal funds they received on an hourly basis. The court pointed out that "'agent' is merely a person with authority to act on behalf of the organization receiving federal funds, and can include, inter alia, an 'employee,' 'officer,' 'manager' or 'representative' of that entity." The court also held that an independent contractor could qualify as an agent. *See also United States v. Shulick*, 18 F.4th 91 (3d Cir. 2021); *United States v. Andrews*, 681 F.3d 509, 530 (3d Cir. 2012) (recognizing that agent need not have authority); *United States v. Beldini*, 443 F. App'x. 709 (3d Cir. 2011) (rejecting narrow construction of term "agent").

In *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016), the Third Circuit held that the Executive Director of the Legislature of the Virgin Islands was an agent of the government "given his substantial power to enter into contracts on behalf of the Legislature." *Willis*, 844 F.3d at 167.

The agent need not be someone in a position of trust. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

A contract term specifying that a person is not an agent does not resolve the issue for purposes of the statute; only the statute defines who is an agent. *See United States v. Shulick*, 18 F.4th 91, 104 (3d Cir. 2021).

In *United States v. Shulick*, 18 F.4th 91 (3d Cir. 2021), the trial court's instruction defining agent for the jury included one sentence of the two sentences in the last bracketed portion of the model instruction but omitted the other. The model provides:

> A person may be an agent of an organization without being an employee of that organization. An outside consultant who exercises significant managerial responsibility within the organization is an agent of that organization if the consultant is authorized to

act on behalf of the organization.

The trial court read the first sentence of this paragraph but not the second. The Third Circuit held that the omission did not constitute plain error because the trial court "adopted the crux of the model instruction—someone outside an organization can also be an agent—and that statement of the law accords with our interpretation of [the statute]." *Shulick*, 18 F.4th at 105

(Revised 2/2022)

6.18.666A1A-2 Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined

The second element the government must prove beyond a reasonable doubt is that in a one-year period, *(specify organization, government, or agency)* **received federal benefits in excess of $10,000.**

To prove this element, the government must establish that the *(organization) (government) (agency)* **received, during a one-year period** *(beginning on (specify start date))***, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or some other form of federal assistance.**

[The government is not required to prove that the benefits were paid directly to (specify organization, government, or agency) by the federal government, but it must prove that the funds paid to the (organization) (government) (agency) through an intermediary government did in fact originate as federal benefits under (specify federal program). If some of the funds paid to (specify organization, government or agency) originated with the federal government and some from the state government, it is for you to determine which were federal benefits and that those federal benefits were in excess of $10,000.]

[The one-year period must begin no more than 12 months before the defendant began committing the offense and must end no more than 12 months after the defendant stopped committing the offense. The one-year period may include time both before and

after the commission of the offense.]

Comment

Sand et al., supra, 27A-4.

18 U.S.C. § 666(d)(5) provides that as used in this section

> the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

The court should include any portions of the bracketed language that are appropriate.

In *Fischer v. United States*, 529 U.S. 667 (2000), the Court held that the receipt of Medicare funds by a hospital was sufficient to satisfy this requirement of the statute even though the patients were also beneficiaries of the federal funds. Federal funds may have more than one beneficiary. In *Fischer*, the Court noted that "[t]he payments are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community." 529 U.S. at 680. The Court further explained:

> Our discussion should not be taken to suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b). Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance. To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. Health care organizations participating in the Medicare program satisfy this standard.

529 U.S. at 681 *See also United States v. Willis*, 844 F.3d 155 (3d Cir. 2016) (holding that the evidence was sufficient to establish that the Government of the Virgin Islands received the required benefit under the statute).

In *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016), the Third Circuit rejected the argument that the Legislature of the Virgin Islands was a separate entity from the Government of the Virgin Islands and, further, that the Executive Director of the Legislature could not be convicted of violating § 666 because the Legislature did not receive federal funds in its own

right. The court emphasized that the statute is broad in scope.

The government does not need to establish a nexus between the criminal activity and the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *Salinas v. United States*, 522 U.S. 52 (1997); *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

(Revised 2017)

6.18.666A1A-3 Theft Concerning a Program Receiving Federal Funds Stole, Embezzled, Converted, and Misapplied Defined

The third element the government must prove beyond a reasonable doubt is that *(name) [(stole) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **property.**

[To steal money or property means to take someone else's money or property without the owner's consent with the intent to deprive the owner of the value of that money or property.]

[To embezzle money or property means to intentionally take or convert to one's own use money or property of another after that money or property lawfully came into the possession of the person taking it by virtue of some office, employment, or position of trust.]

[To obtain by fraud means to intentionally take money or property by false representations, suppression of the truth, or deliberate disregard for the truth.]

[To knowingly convert money or property means to knowingly appropriate or use such money or property without proper authority for the benefit of oneself or any other person who was not the rightful owner with the intent to deprive the rightful owner of the money or property.]

[To intentionally misapply money or property means to intentionally use money or property of (specify organization, government, or agency) knowing that such use is unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even if such use benefitted the (organization) (government) (agency).]

[Property includes other things of value besides money and tangible objects. It also includes intangible things like the value of an employee's time and services.]

Comment

Sand et al., supra, 27A-5.

The court should include any portions of the bracketed language that are appropriate.

In *Kelly v United States*, 140 S. Ct. 1565 (2020), the Court considered convictions of employees of the Port Authority of New York and New Jersey. The convictions were based on an alleged scheme to impose gridlock on the Borough of Fort Lee, New Jersey, in order to punish the Mayor of Fort Lee for failing to endorse the Governor of New Jersey as he sought reelection. To accomplish that end, the defendants had used their authority as Port Authority employees to reduce from three to one the lanes onto the George Washington Bridge available to drivers from Fort Lee during the morning commute on four days in September 2013. The result was total gridlock in Fort Lee on those mornings. The government charged the defendants under 18 U.S.C. §§ 666(a)(1)(A) and 1343. The defendants were convicted at trial and appealed. The Third Circuit affirmed the convictions in *United States v. Baroni*, 909 F.3d 550 (3d Cir. 2018), but, in *Kelly*, the Supreme Court reversed. *Kelly*, 140 S. Ct. at 1574.

In *Kelly*, the Court emphasized that both § 666 and § 1343 reach only fraudulent schemes for obtaining money or property. The Court rejected the government argument that the evidence demonstrated that the defendants had schemed to obtain the Port Authority's property and held instead that the scheme did not have property as its object.

First, citing *Cleveland v. United States*, 531 U.S. 12 (2000), the Court held that the use of the defendants' positions at the Port Authority to realign the lanes of traffic was "a quintessential exercise of regulatory power" and therefore was not a scheme to take the Port Authority's

property. *Kelly*, 140 S. Ct. at 1572.

Second, the Court rejected the government argument that the convictions could rest on the defendants' misappropriation of the paid time of Port Authority employees. The Court acknowledged that "a scheme to usurp a public employee's paid time is one to take the government's property." *Kelly*, 140 S. Ct. at 1573. However, the Court held that taking the time of Port Authority employees was not an object of the defendants' scheme but was merely incidental to it. *Kelly*, 140 S. Ct. at 1574.

The Supreme Court did not address every aspect of the Third Circuit opinion that related to the jury instructions in the trial. In the Court of Appeals, the defendants had successfully challenged the following language, which is not included in the Model Criminal Jury Instruction:

> The Government does not have to prove that the Defendants knew of the specific property obtained by fraud, knowingly converted, or intentionally misapplied, or that the value of the property met or exceeded $5,000.

Baroni, 909 F.3d at 581. The Third Circuit explained:

> While the jury need not have found that Defendants knew the value of the property, it was error for the trial judge to instruct the jury "[t]he Government d[id] not have to prove that the Defendants knew of the specific property obtained by fraud, knowingly converted, or intentionally misapplied." Such an instruction runs the risk of negating the statute's mens rea requirement and thus relieving the Government of its burden of proof on an essential element of the crime. We do not believe, for example, one could intend to misapply something one does not know exists; to instruct the jury otherwise would seemingly dispense with the intent requirement.

Baroni, 909 F.3d at 582. *Kelly v United States*, —— U.S. ——, 140 S. Ct. 1565, 206 L.Ed.2d 882 (2020), did not address this aspect of *Baroni.*

Intentionally misapply: The Third Circuit has considered the definition of intentional misapplication under the statute in two recent decisions.

In *United States v. Baroni,* 909 F.3d 550 (3d Cir. 2018), the defendants unsuccessfully challenged the following language in the trial court's charge to the jury, which is included in the model instruction:

> To intentionally misapply money or property means to intentionally use money or property of the Port Authority knowing that the use is unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even if the use actually benefitted the Port Authority.

Baroni, 909 F.3d at 582. The Third Circuit rejected the defendants' argument "that 'unjustifiable or wrongful' is overbroad and ambiguous." The court pointed out that other instructions in the

case "foreclose the possibility the jury convicted defendants for lawful but imprudent conduct, e.g., because the jury thought the lane reductions were 'a bad idea.'" The court further explained:

> These include the requirement that $5,000 worth of property be stolen or misapplied and that the misapplication be "for an unauthorized purpose." The judge also told the jury that it had to be convinced beyond a reasonable doubt that the purpose of the lane reductions was not a legitimate traffic study and that Defendants' good faith would be a complete defense to the charges. Because the jury was instructed that Defendants could not be convicted if they believed in good faith that the reductions were part of a legitimate traffic study, a jury following its instructions could not have convicted Defendants based on its personal judgments about the wisdom and execution of the traffic study.

Baroni, 909 F.3d at 582-83. The Third Circuit also noted that identical language is found in the model instructions promulgated by other circuits. *Baroni*, 909 F.3d at 583. *Kelly v United States*, —— U.S. ——, 140 S. Ct. 1565, 206 L.Ed.2d 882 (2020), did not address this aspect of *Baroni.*

In *United States v. Shulick*, 18 F.4th 91 (3d Cir. 2021), the defendant argued that Model Instruction 6.18.666A1A-3 does not correctly define intentional misapplication under the statute. Consistent with the Model Instruction, the trial court instructed the jury:

> To intentionally misapply money or property means to intentionally use money or property of the School District of Philadelphia, knowing that such use is unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized person, even if such use benefitted the School District of Philadelphia.

The defendant argued that the last clause of the instruction is erroneous because it permits the jury to find intentional misapplication of funds in violation of § 666(a)(1)(A) even if the misuse of funds benefitted the victim.

The Third Circuit addressed the defendant's argument but ultimately did not resolve the question. The court's discussion of the defendant's challenge to the Model Instruction is nevertheless informative. The court examined the statute closely and concluded that both the language of the statute and its legislative history support the language of the Model Instruction. The court emphasized that the limiting language in the statute - "to the use of any person other than the rightful owner" - does not apply to intentional misapplication. *Shulick*, 18 F.4th at 107-108.

The court also examined judicial precedent. The court cited *United States v. Baroni*, 909 F.3d 550, 582 (3d Cir. 2018). In *Baroni*, the trial court instructed the jury in accord with the Model Instruction, and the Third Circuit stated that § 666(a)(1)(A) reaches an unauthorized use of property which nevertheless benefits the victim. However, because *Baroni*, was reversed by *Kelly v. United States*, —— U.S. ——, 140 S. Ct. 1565, 206 L.Ed.2d 882 (2020), the court went on to consider whether this particular aspect of *Baroni* was called into question by *Kelly*. The court concluded that *Kelly* did not address the issue of intentional misapplication, deciding only

that, under the statute, property must be the object of the criminality. *Shulick*, 18 F.4th at 109-110. The court in *Shulick* also noted that the First, Second, and Tenth Circuit Courts of Appeals have refused to adopt the limitation suggested by the defendant. *Shulick,* 18 F.4th at 108.

Considering the facts of the case, the court concluded that the object of Shulick's crime was "unquestionably property." *Shulick*, 18 F.4th at 110. The court also concluded that the error, if any, was harmless. *Shulick*, 18 F.4th at 110-111.

Motive v. intent: In *Baroni,* the defendants unsuccessfully challenged the trial court's refusal to instruct the jury that the defendants could be convicted only if the jury concluded that they acted with the intent to punish the Mayor of Fort Lee. The court rejected this argument. The requested instruction went to motive, not intent, and the requested instruction was therefore erroneous. Even though the indictment included language about the intent to punish the mayor, motive is not an element of the offense. *Baroni*, 909 F.3d at 583-84. The trial court explained this distinction to the jury, giving Model Criminal Jury Instruction § 5.04 on the difference between motive and intent. *Baroni,* 909 F.3d at 583-84. *Kelly v United States*, —– U.S. ——, 140 S. Ct. 1565, 206 L.Ed.2d 882 (2020), did not address this aspect of *Baroni.*

(Revised 2/2022)

6.18.666A1A-4 Theft Concerning a Program Receiving Federal Funds - Belonging to and In the Care, Custody, or Control of Defined

The fourth element the government must prove beyond a reasonable doubt is that the property *[(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)][(was owned by) (was in the care, custody, or control of) (specify organization, government or agency)].*

[Although the words "care," "custody," and "control" have slightly different meanings, for the purposes of this element they express a similar idea. That is that the (organization) (government) (agency) had control over and responsibility for the property [even though it was not the actual owner of the property at the time of (name)'s actions.]]

Comment

Sand et al., supra, 27A-6.

In *Kelly v United States*, 140 S. Ct. 1565 (2020), the Court considered what constitutes government property under that statute. The Court acknowledged that "a scheme to usurp a public employee's paid time is one to take the government's property." *Kelly*, 140 S. Ct. at 1573. However, the Court held that in *Kelly* taking the time of the government employees was not an object of the defendants' scheme but was merely incidental to it and therefore could not support the defendants' convictions. *Kelly*, 140 S. Ct. at 1574.

In *Kelly*, the Court also considered whether the defendants' use of their authority to realign traffic lanes constituted taking government property. The Court held that "a scheme to alter such a regulatory choice is not one to appropriate the government's property." *Kelly*, 140 S. Ct. at 1572.

(Revised 2/2021)

6.18.666A1A-5 Theft Concerning a Program Receiving Federal Funds - Determining Value of Property

The fifth and final element the government must prove beyond a reasonable doubt is that the value of the property *[(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **was at least $5,000. The government is not required to prove the exact amount of money or the value of the property at issue, but the government must prove beyond a reasonable doubt that the value of the money or property was $5,000 or more.**

The word ''value'' means face, par or market value, or cost price, either wholesale or retail, whichever is greater. ''Market value'' means the price a willing buyer would pay a willing seller at the time the property was stolen.

[Property does not include legitimate salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business.]

[If you find that (name) devised a scheme or plan to take sums of money or property from (specify organization, government, or agency), on a recurring basis through a series of acts, you may aggregate or add up the value of property obtained from this series of acts by (name) to meet this $5,000 requirement so long as those acts occur within the same one-year time period.]

The government does not have to prove that the property *[(stolen) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **by** *(name)* **was received by the** *(organization) (government) (agency)* **as federal benefits or derived from the federal benefits received by the** *(organization) (government) (agency)***. What**

the government must prove beyond a reasonable doubt is that the defendant *[(stole) (embezzled) (obtained by fraud) (knowingly converted) (intentionally misapplied)]* **from** *(specify organization, government, or agency)* **at the same time that the** *(specify organization, government, or agency)* **received federal benefits in excess of $10,000 during a one-year period. In other words, the government does not need to establish a connection between the criminal activity and the federal funds.**

Comment

Sand et al., supra, 27A-7.

18 U.S.C. § 666 does not define the term "value." 18 U.S.C. § 641, which deals with theft or conversion of public money, property, or records, provides that "[t]he word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

18 U.S.C. § 666(c) provides:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

In *United States v. Allinson*, 7 F.4th 913 (3d Cir. 2022), the Third Circuit concluded that the evidence was sufficient to establish that the value of the benefit exceeded $5000. The court in *Allinson* rejected the argument that the amount of the bribe could not serve as evidence of the value of the tangible property. *United States v. Allinson*, 7 F.4th 913 (3d Cir. 2022).

If the defendant's scheme involves a number of smaller thefts or conversions, the value may be aggregated to reach the required minimum value of $5,000. *See United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992); *United States v. Webb*, 691 F. Supp. 1164 (N.D. Ill. 1988).

The Supreme Court has held that the funds in question need not be traceable to the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *see also Salinas v. United States*, 522 U.S. 52 (1997).

(Revised 2022)

6.18.666A1B Solicitation of a Bribe by an Agent of a Program Receiving Federal Funds (18 U.S.C. § 666(a)(1)(B))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with** *(describe offense; e.g., soliciting a bribe while acting as an agent for a federally funded program)***, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:

First: That at the time alleged in the indictment, *(name)* **was an agent of** *(specify organization, government, or agency)***;**

Second: That *(specify organization, government, or agency)* **received federal benefits in excess of $10,000 in a one-year period;**

Third: That *(name) [(accepted) (agreed to accept) (solicited) (demanded)]* **something of value from** *(specify person)***;**

Fourth: That *(name)* **acted corruptly with the intent to be influenced** *(or rewarded)* **in connection with** *(the business) (a transaction) (series of transactions)* **of** *(specify organization, government, or agency)***; and**

Fifth: That the value of the *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

Comment

Sand et al., supra, 27A-9.

18 U.S.C. § 666(a) provides:

> Whoever, if the circumstance described in subsection (b) of this section exists--
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--
>
> * * *
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more
>
> commits a federal offense.

18 U.S.C. § 666(b) provides:

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The court should also give Instruction 6.18.666A1B-1 (Solicitation of a Bribe - Corruptly with Intent to be Influenced Defined) and the following instructions as appropriate: Instructions 6.18.666A1A-1 (Theft Concerning a Program Receiving Federal Funds - Agent Defined), 6.18.666A1A-2 (Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined), and 6.18.666A1A1B-2 (Solicitation of a Bribe - Determining Value of Transaction).

In *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991), the Third Circuit stated the elements of this offense:

> The district court observed, and the government agrees, that the following elements comprise a violation of § 666(a)(1)(B): 1) corrupt solicitation; 2) of anything of value; 3) with the intention of being influenced in connection with any transaction of a local government or organization receiving at least $10,000 in federal funds annually; 4) where the transaction involves anything of value of $5,000 or more.

In *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016), the Third Circuit explained:

> Put another way, § 666 criminalizes the acceptance of a bribe of $5,000 or more by a government agent of a local government that receives more than $10,000 a year in federal funds if the agent intends to be influenced by the bribe when making a decision to enter

into business on behalf of the government.

Willis, 844 F.3d at 163.

The model instruction treats the federal funding requirement as a separate element, resulting in a requirement that the government prove five elements. The agent need not be someone in a position of trust, and a breach of trust is not a requirement for violation of the statute. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

The government does not need to establish a nexus between the criminal activity and the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *Salinas v. United States*, 522 U.S. 52 (1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

The instruction has been modified to reflect that the jury should not routinely be instructed that it can convict if the defendant intended to be "rewarded" in connection with actions taken. In *United States v. Munchak*, 2013 WL 2382618 (3d Cir. 2013), a non-precedential decision, the court noted that the trial court should not have included the "rewarded" language in the instruction because the defendant was charged with bribery and that language permitted conviction on a gratuity theory. Nevertheless, the court in *Munchak* declined to reverse, holding the error was not plain error because the evidence would not have led the jury to convict on grounds of gratuity rather than bribe. In *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2006), the Third Circuit distinguished bribery (giving or receiving something in exchange for an official act) from a mere gratuity (a reward for an act the official has already taken or already determined to take), concluding that "bribery requires a quid pro quo, which includes an 'intent 'to influence' an official act or 'to be influenced' in an official act.'" (citing *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (construing 18 U.S.C. § 201(b)).

Questions remain concerning whether a conviction under the statute must rest on proof of a quid pro quo and whether including the term "rewarded" in the instructions improperly allows the jury to convict without finding a quid pro quo. There is a circuit split on the issue, and neither the Supreme Court nor the Third Circuit has squarely addressed the question. *See United States v. Beldini*, 443 F. App'x. 709 (3d Cir. 2011) (non-precedential) (holding it was not plain error to fail to instruct the jury that conviction for violation of § 666 requires proof of quid pro quo and noting circuit split on the question). In *United States v. Willis*, 844 F.3d 155 (3d Cir. 2016), the Third Circuit again declined to reach this question because the indictment adequately alleged quid pro quo.

In construing other statutes, the courts have required a quid pro quo. *See Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (discussing honest-services fraud under 18 U.S.C. § 1346); *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (construing 18 U.S.C. § 201(b)). In *United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011), the Third Circuit declined to decide whether § 666 requires proof of a quid pro quo. *Bryant*, 655 F.3d at 246 n. 16. The court in *Bryant* held that the instruction to the jury adequately addressed the issue of an

exchange because it "effectively link[ed] the *quid* and the *quo*."[1] *See also United States v. Pawlowski*,27 F.4th 897 (3d Cir. 2022) (assuming without deciding that bribery requires proof of quid pro quo where parties agreed prosecution must prove quid pro quo); *United States v. Van Pelt*, 448 F. App'x. (3d Cir. 2011) (non-precedential) (considering instruction that tracked model instruction and concluding that it "adequately conveys the necessity of a link between the thing accepted by [the defendant] and the government business sought to be influenced" and was accurate even if a quid pro quo is required). *See also United States v. Allinson*, 7 F.4th 913 (3d Cir. 2022) (evidence sufficient to establish quid pro quo).

Unlike §§ 1951 (Hobbs Act) and 201 (bribery of a public official), § 666 does not use the term "official act." Instead, section 666 requires the government to prove that the official solicited the bribe "corruptly . . . , intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency." In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), discussed in the Comment to Instruction 6.18.201B1-2, the Supreme Court clarified the meaning of "official act" under § 201 and held that the trial court committed reversible error when it failed properly to instruct the jury on the meaning of the term, allowing the government to rely on an overly-broad definition. To avoid any similar issues under § 666, the court may want to specify the "business, transaction, or series of transactions" to be considered by the jury. *Cf. United States v. Repak,* 852 F.3d 230 (3d Cir. 2017) (rejecting defendant's argument that the jury instructions did not sufficiently narrow the conduct on which he could be convicted under § 666 where the instructions specified the conduct and the government's theory did not support conviction on any other ground). *See also United States v. Allinson,* 7 F.4th 913 (3d Cir. 2022) (evidence sufficient to establish official act).

(Revised 2022)

[1] The court had instructed the jury:

> [W]ith respect to Wayne Bryant, that Wayne Bryant corruptly accepted, agreed to accept, solicited, or demanded salary payments and other financial benefits from UMDNJ/SOM, the quid; while intending to be influenced in taking favorable actions toward SOM in his capacity as a state legislator, the quo.
>
> With respect to R. Michael Gallagher, that R. Michael Gallagher corruptly gave, agreed to give, or offered salary payments and other financial benefits from UMDNJ/SOM, the quid; while intending to influence Wayne Bryant in taking favorable actions toward SOM in his capacity as a state legislator, the quo.

The court noted that the trial court also told the jury to read the bribery instructions in conjunction all the other instructions, including the honest services fraud instruction, which addressed the quid pro quo requirement for bribery. *Bryant*, 655 F.3d at 246-47.

6.18.666A1B-1 Solicitation of a Bribe - Thing of Value Defined

The third element the government must prove beyond a reasonable doubt is that *(name) [(accepted) (agreed to accept) (solicited) (demanded)]* **something of value from** *(specify person).* **The thing of value may be tangible property, intangible property, or services, of any dollar value, so long as it has value.**

The government is not required to prove that the thing of value that the defendant allegedly illegally *(solicited) (demanded) (accepted) (agreed to accept)* **was "federal benefits," or that the illegal acts directly affected the federal benefits that the entity received. Rather, the government is required to prove only that the defendant illegally** *(solicited) (demanded) (accepted) (agreed to accept)* **a thing of value while** *(he) (she)* **was an agent of an entity that received in excess of $10,000 in federal benefits. Finally, the government is not required to prove that the defendant knew that the entity received in excess of $10,000 in federal benefits.**

Comment

18 U.S.C. § 666 does not define “anything of value” or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("an interest-free loan of $30,000 without contemporaneously documented terms is 'something of value'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

6.18.666A1B-2 Solicitation of a Bribe - Corruptly with Intent to be Influenced Defined

The fourth element the government must prove beyond a reasonable doubt is that *(name)* **accepted** *(agreed to accept) (solicited) (demanded)* **something of value corruptly and with the intent to be influenced** *(or rewarded)* **in connection with some business or transaction of** *(specify organization, government, or agency)***.**

To act corruptly means simply to act knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result influenced by the receipt of the thing of value.

Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.

[In considering this element, remember that the government must prove that (name) intended at least in part to be influenced (or rewarded), but the government is not required to prove that (name) or (specify organization, government, or agency) took any particular action. The government does not have to prove that the defendant received the bribe or that the bribe actually influenced (specify organization, government, or agency). It is not even necessary that the defendant had the authority to perform the act sought.]

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] §27.09; Sand et al., supra, 27A-13.

The court should include any portions of the bracketed language that are appropriate.

A good faith instruction is not necessary if the trial court instructs the jury concerning the

intent requirement. *See United States v. Plaskett*, 355 F. App'x. 639, 643 (3d Cir. 2009) (non-precedential). In *Plaskett*, the trial court gave instructions that were described as "virtually identical" to the model instructions on the offense and instructed thoroughly on the meaning of acting corruptly. 355 F. App'x. at 643-44 (setting out instruction).

(Revised 11/2013)

6.18.666A1B-3 Solicitation of a Bribe - Determining Value of Transaction

The fifth element the government must prove beyond a reasonable doubt is that the value of the *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

To establish this element, the government must prove that *(name)* **intended to be influenced** *(or rewarded))* **in connection with any business or transaction or series of transactions of** *(specify organization, government, or agency*) **involving anything of value of $5,000 or more. If you find that the** *(business) (transaction) (series of transactions)* **in question had a value of at least $5,000, this element is satisfied.**

The government is not required to prove that *(name)* **received at least $5,000. It is the value of the** *(business) (transaction) (series of transactions)* **that the bribe was intended to influence** *(or reward)* **that is important for the purposes of this element.**

Comment

Sand et al., supra, 27A-14.

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("an interest-free loan of $30,000 without contemporaneously documented terms is 'something of value'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

18 U.S.C. § 666(c) provides:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

In some cases, there may be a question of whether the court should instruct the jury:

> In determining whether the business or transaction was valued at $5,000, do not include legitimate salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business.

(Revised 11/2013)

6.18.666A2 Bribery of an Agent of a Program Receiving Federal Funds (18 U.S.C. § 666(a)(2))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with** *(describe offense; e.g., bribing an agent of a federally funded program)***, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following five elements beyond a reasonable doubt:

First: That at the time alleged in the indictment, *(name of agent)* **was an agent of** *(specify organization, government, or agency)***;**

Second: That *(specify organization, government or agency)* **received federal benefits in excess of $10,000 in a one-year period;**

Third: That *(name) [(gave) (agreed to give) (offered)]* **something of value to** *(name of agent)***;**

Fourth: That *(name)* **acted corruptly with the intent to influence** *(or reward) (name of agent)* **with respect to** *(the business) (a transaction) (a series of transactions)* **of** *(specify organization, government or agency)***;**

Fifth: That the value of the *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

Comment

Eighth Circuit § 6.18.666C.

18 U.S.C. § 666(a) provides:

Whoever, if the circumstance described in subsection (b) of this section exists--

* * *

> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more

commits a federal offense.

18 U.S.C. § 666(b) provides:

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The court should also give Instruction 6.18.666A2-1 (Bribery of an Agent - Corruptly with Intent to Influence Defined) and the following instructions as appropriate: Instructions 6.18.666A1A-1 (Theft Concerning a Program Receiving Federal Funds - Agent Defined), 6.18.666A1A-2 (Theft Concerning a Program Receiving Federal Funds - Received Federal Funds Defined), and 6.18.666A2-2 (Bribery of an Agent - Determining Value of Transaction).

In *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991), the Third Circuit stated the elements of solicitation of a bribe by an agent:

> The district court observed, and the government agrees, that the following elements comprise a violation of § 666(a)(1)(B): 1) corrupt solicitation; 2) of anything of value; 3) with the intention of being influenced in connection with any transaction of a local government or organization receiving at least $10,000 in federal funds annually; 4) where the transaction involves anything of value of $5,000 or more.

See also United States v. Andrews, 681 F.3d 509, 530 (3d Cir. 2012) (stating elements). The model instruction adapts these elements for the crime of bribing an agent. In addition, the instruction treats the federal funding requirement as a separate element, resulting in a requirement that the government prove five elements.

The agent need not be someone in a position of trust, and a breach of trust is not a requirement for violation of the statute. *See United States v. Brann*, 990 F.2d 98 (3d Cir. 1993).

The government does not need to establish a nexus between the criminal activity and the federal funds. *Sabri v. United States*, 541 U.S. 600 (2004); *see also Salinas v. United States*, 522

U.S. 52 (1997). It is sufficient federal involvement if the organization receives over $10,000 of federal funds in the year.

The instruction has been modified to reflect that the jury should not routinely be instructed that it can convict if the defendant intended to be "rewarded" in connection with actions taken. In *United States v. Munchak*, 2013 WL 2382618 (3d Cir. 2013), a non-precedential decision, the court noted that the trial court should not have included the "rewarded" language in the instruction because the defendant was charged with bribery and that language permitted conviction on a gratuity theory. Nevertheless, the court in *Munchak* declined to reverse, holding the error was not plain error because the evidence would not have led the jury to convict on grounds of gratuity rather than bribe. In *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2006), the Third Circuit distinguished bribery (giving or receiving something in exchange for an official act) from a mere gratuity (a reward for an act the official has already taken or already determined to take), concluding that "bribery requires a quid pro quo, which includes an 'intent 'to influence' an official act or 'to be influenced' in an official act.'" (citing *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (construing 18 U.S.C. § 201(b)).

Questions remain concerning whether a conviction under the statute must rest on proof of a quid pro quo and whether including the term "rewarded" in the instructions improperly allows the jury to convict without finding a quid pro quo. There is a circuit split on the issue, and neither the Supreme Court nor the Third Circuit has squarely addressed the question. *See United States v. Beldini*, 443 F. App'x. 709 (3d Cir. 2011) (non-precedential) (holding it was not plain error to fail to instruct the jury that conviction for violation of § 666 requires proof of quid pro quo and noting circuit split on the question). In construing other statutes, the courts have required a quid pro quo. *See Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (discussing honest-services fraud under 18 US.C. § 1346); *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (construing 18 U.S.C. § 201(b)). In *United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011), the Third Circuit declined to decide whether § 666 requires proof of a quid pro quo. *Bryant*, 655 F.3d at 246 n. 16. The court in *Bryant* held that the instruction to the jury adequately addressed the issue of an exchange because it "effectively link[ed] the *quid* and the *quo*."[2] *See also United States v. Van Pelt*, 448 F. App'x. (3d Cir. 2011) (non-precedential) (considering instruction that tracked model instruction and concluding that it "adequately conveys the

[2] The court had instructed the jury:

> [W]ith respect to Wayne Bryant, that Wayne Bryant corruptly accepted, agreed to accept, solicited, or demanded salary payments and other financial benefits from UMDNJ/SOM, the quid; while intending to be influenced in taking favorable actions toward SOM in his capacity as a state legislator, the quo.
>
> With respect to R. Michael Gallagher, that R. Michael Gallagher corruptly gave, agreed to give, or offered salary payments and other financial benefits from UMDNJ/SOM, the quid; while intending to influence Wayne Bryant in taking favorable actions toward SOM in his capacity as a state legislator, the quo.

The court noted that the trial court also told the jury to read the bribery instructions in conjunction all the other instructions, including the honest services fraud instruction, which addressed the quid pro quo requirement for bribery. *Bryant*, 655 F.3d at 246-47.

necessity of a link between the thing accepted by [the defendant] and the government business sought to be influenced" and was accurate even if a quid pro quo is required). *See also United States v. Pawlowski*, 27 F.4th 897 (3d Cir. 2022) (assuming without deciding that bribery requires proof of quid pro quo where parties agreed prosecution must prove quid pro quo); *United States v. Allinson*, 7 F.4th 913 (3d Cir. 2022) (holding evidence sufficient to establish quid pro quo).

(Revised 2022)

6.18.666A2-1 Bribery of an Agent - Thing of Value Defined

The third element the government must prove beyond a reasonable doubt is that *(name) [(gave) (offered) (agreed to give)]* **something of value to** *(specify person).*

The thing of value may be tangible property, intangible property, or services, of any dollar value, so long as it has value.

The government is not required to prove that the thing of value that the defendant allegedly illegally *(gave) (offered) (agreed to give)* **directly affected the federal benefits that the entity received. Rather, the government is required to prove only that the defendant illegally** *(gave) (offered) (agreed to give)* **a thing of value to an agent of an entity that received in excess of $10,000 in federal benefits. Finally, the government is not required to show that** *(name)* **knew that the entity received in excess of $10,000 in federal benefits.**

Comment

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("[A]n interest-free loan of $30,000 without contemporaneously documented terms is 'something of value.'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

6.18.666A2-2 Bribery of an Agent - Corruptly with Intent to Influence Defined

The fourth element the government must prove beyond a reasonable doubt is that *(name)* **gave** *(agreed to give) (offered)* **something of value to** *(name of agent)* **knowingly and corruptly and with the intent to influence** *(or reward) (name of agent)***'s actions in connection with some** *(business) (transaction) (series of transactions)* **of** *(specify organization, government, or agency)***.**

To act corruptly means simply to act knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result by influencing *(or rewarding) (name of agent)***'s actions.**

Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.

[In considering this element, remember that the government must prove that (name) intended at least in part to influence (name of agent)'s actions, but the government is not required to prove that (name of agent) or (specify organization, government, or agency) took any particular action. The government does not have to prove that (name of agent) accepted the bribe offer or that the bribe actually influenced the final decision of (specify organization, government, or agency). It is not even necessary that (name of agent) had the authority to perform the act which the defendant sought.]

Comment

O’Malley et al., supra, § 27.09; Sand et al., supra, 27A-20.

The court should include any portions of the bracketed language that are appropriate.

In *United States v. Friedman*, 658 F.3d 342 (3d Cir. 2011), the Third Circuit rejected the defendant's argument that he was entitled to an instruction on coercion or extortion to support his theory that he lacked the necessary intent to establish bribery under this statute. The court noted that the question was one of first impression in the Third Circuit. The court held that the trial court properly denied the instruction and adequately addressed the issue of intent in its instructions. The court further concluded that the facts did not support the defense claim of coercion or extortion.

(Revised 11/2013)

6.18.666A2-3 Bribery of an Agent - Determining Value of Transaction

The fifth element the government must prove beyond a reasonable doubt is that the value of the *(business) (transaction) (series of transactions)* **to which the payment related was at least $5,000.**

To establish this element, the government must prove that *(name)* **intended to influence** *(or reward) (name of agent)* **in connection with any business or transaction or series of transactions of** *(specify organization, government, or agency)* **involving anything of value of $5,000 or more. If you find that the** *(business) (transaction) (series of transactions)* **in question had a value of at lea st $5,000, this element is satisfied.**

The government is not required to prove that *(name)* **paid or offered at least $5,000. It is the value of the business or transaction that the bribe was intended to influence** *(or reward)* **that is important for the purposes of this element.**

Comment

Sand et al., supra, 27A-21.

18 U.S.C. § 666 does not define "anything of value" or prescribe an approach to attaching value to the transaction. The term includes intangibles that may be difficult to value. *See United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (discussing meaning of term and holding that conjugal visits for which prisoner paid defendant $6,000 a month and $1,000 per visit satisfied this element of offense); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) ("[A]n interest-free loan of $30,000 without contemporaneously documented terms is 'something of value.'"). The transaction influenced need not involve federal funds. *See United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

18 U.S.C. § 666(c) provides:

> This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of

business.

In some cases, there may be a question of whether the court should instruct the jury:

> In determining whether the (business) (transaction) (series of transactions) was valued at $5,000, do not include legitimate salary, wages, fees, or other compensation paid or expenses paid or reimbursed in the ordinary course of business.

(Revised 11/2013)