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Theft, Fraud, and Undue Influence: Determining the Scope of the Federal Funds Bribery Statute

Derek Tisler†

I. INTRODUCTION

An overarching narrative in American political discourse in 2017 was the prevalent and growing distrust of public institutions. At the heart of this distrust is a view that public officials act too frequently for their own benefit rather than for the benefit of their community. When public officials act in this manner, and law enforcement fails to hold these agents accountable, people lose confidence in their government’s ability to provide essential services and to keep their community safe. This loss of confidence can lead to civic disengagement, allowing further corruption to take place and, in turn, greater harm to the community.

The television show The Wire explored institutional dysfunction in urban communities and showcased the detrimental consequences that follow. When David Simon—the creator of The Wire—was asked whether he would describe the show as cynical, he responded that the show was not cynical about individual people, but rather, about “institutions and their capacity for serving the needs of the individual.”¹ Each season of the show told the story of a different facet of Baltimore and the public institutions that regularly failed to effectively meet their responsibilities to these communities. Season One, for example, focused on the Special Crimes Unit of the Baltimore Police Department and its efforts to stop illegal drug operations of a local gang. This season conveyed an entrenched reality of institutional dysfunction. It showed how the Police Department avoided oversight and negative consequences for excessive tactics, and how this failure to hold these actors accountable

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only led to further corruption. In this season and the seasons that followed, the show emphasized that the revolting and corrupt activity seen by the viewer is a direct result of institutional dysfunction. The stories featured on *The Wire* helped bring attention to the issue of corruption in local institutions and demonstrated the need for effective governmental intervention.

The federal government has taken an increasingly prominent role in providing for this intervention. In 1984, Congress enacted 18 U.S.C. § 666 ("the federal funds bribery statute"), providing the federal government clear authority to prosecute general corruption at the state and local level when federal funds are at issue. The statute was intended to supplement the general bribery statute, 18 U.S.C. § 201, which only applies to federal employees and other individuals that exercise federal authority. The federal funds bribery statute, on the other hand, applies to any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof." But the statute is limited to those governmental or organizational entities that receive at least $10,000 in funding through a federal program in a one-year period. This provision recognizes Congress’s interest in ensuring that federal funds are spent consistently with their intended purposes. The constitutional authority for federal intervention in state and local corruption rests on this interest. The Supreme Court has extended this constitutional justification even when the exact dollars involved in the corrupt activity could not be traced back to a federal source.

Congress enacted the federal funds bribery statute “to protect the integrity . . . of Federal programs from theft, fraud, and undue influence by bribery.” The statute covers three separate crimes concerning covered entities (private entities, or state and local governments that receive federal funds). Section 666(a)(1)(A), covering embezzlement, makes it a crime for an agent of a covered entity to embezzle or convert for his own use property valued at $5,000 or more, and owned by the entity. Section 666(a)(1)(B), covering the taking of bribes, makes it a crime for an agent of a covered entity to solicit or accept “anything of

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5 18 U.S.C. § 666(b).
6 *Sabri*, 541 U.S. at 605.
7 *Id.* at 605–06.
value” with the intention to be influenced, in connection with a transaction “involving anything of value of $5,000 or more.” Finally, § 666(a)(2), covering the offering of bribes, makes it a crime for any person to corruptly offer or give “anything of value” to an agent of a covered entity with the intent to influence a transaction “involving anything of value of $5,000 or more.”

The bribery crimes under the federal funds bribery statute contain three separate valuation requirements. First, the “federal funds element” limits the statute to entities that receive $10,000 or more in federal funding during any one-year period. Second, the “bribery element” requires that the bribe under (a)(1)(B) or (a)(2) be “anything of value.” Finally, the “transactional element” requires that the bribe under (a)(1)(B) or (a)(2) be connected to a transaction “involving anything of value of $5,000 or more.”

Embezzlement crimes under (a)(1)(A) require only that the federal funds element is met and that the property embezzled is valued at $5,000 or more.

An example from The Wire illustrates how these valuation requirements fit together to determine whether a crime has occurred under the statute. In the opening scene of Season Two, Episode One, a city police officer finds a boat that is stranded in the harbor. The officer boards the boat, finds that a party is taking place on the boat, and learns that the boat is stranded due to engine failure. The officer informs the captain that he will have to tow the boat into shore. But the owner of the boat intervenes and offers the officer a cash bribe to tow the boat “somewhere out of the way [while] the band plays on a while longer.” In the next scene, hours have passed, and the officer is shown sitting in the police boat with his partner, watching the other boat floating and connected to the tow line as the party continues.

This scene involved an agent of the city of Baltimore, an entity that receives well over $10,000 per year in federal funding. The federal

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10 Id. § 666(a)(1)(B).
11 Id. § 666(a)(2).
12 Id. § 666(b).
13 Id. §§ 666(a)(1)(B), (2).
14 Id. §§ 666(a)(1)(B), (2).
15 Id. §§ 666(a)(1)(A), (b).
16 The Wire: Ebb Tide (HBO television broadcast June 1, 2003) (Season Two, Episode One).
17 Id.
18 Id.
19 Id.
20 Id.
21 In 2003, the year this episode of The Wire aired, the City of Baltimore received $250 million in federal grants. CITY OF BALTIMORE, MARYLAND, COMPREHENSIVE ANNUAL FINANCIAL REPORT
funds element is thus satisfied. Further, the cash transfer was “anything of value,” satisfying the bribery element. Yet the transaction element was probably not satisfied. The activity that the bribe was in connection with was the police officers towing the party boat and then waiting with the boat until the party finished. For the transactional element to be satisfied, the value of the officer’s time for one night or the value to the boat owner of the party itself would need to exceed $5,000. If this transaction was valued at $5,000 or more, a bribery crime would have been committed under § 666(a)(1)(B) with respect to the police officer, and under § 666(a)(2) with respect to the boat owner.

Circuits have split on the question of how another part of this statute, the § 666(c) exception, interacts with these valuation requirements. Subsection (c)—the “bona fide salary exception”—states that “this section does not apply to bona fide salary, wages, fees, or other compensation paid . . . in the usual course of business.”22 The Sixth and Eleventh Circuits hold that the bona fide salary exception must be read to apply to all of the valuation requirements in the statute.23 The Seventh and Fifth Circuits hold that the bona fide salary exception applies only to the “wrongdoing”—in the case of bribery, the bribe itself.24

The federal funds bribery statute gives federal law enforcement a role in prosecuting state and local corruption, providing an alternative to the state and local law enforcement that may be affected by the corruption or subjected to greater political pressure. The circuit split over the interpretation of the bona fide salary exception has implications for how broad the scope of the federal funds bribery statute will sweep, and in turn, how much authority federal law enforcement will have in prosecuting state and local matters. When the bona fide salary exception applies to a valuation requirement, it effectively works to raise that threshold in particular circumstances. If raising the threshold leads to the exclusion of non-corrupt transactions, this exclusion may be justified so as not to overburden and limit acceptable government transactions. But if the interaction of these subsections leads to the exclusion of corrupt and wrongful transactions, this could lead to an underinclusive application of the statute and frustrate the federal government’s ability to effectively limit corruption in federally-funded government services.

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22 Id. § 666(c).
23 United States v. Mills, 140 F.3d 630, 633 (6th Cir. 1998); United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015).
24 United States v. Robinson, 663 F.3d 265, 272 (7th Cir. 2011); United States v. Marmolejo, 89 F.3d 1185, 1190 n.5 (5th Cir. 1996).
This Comment will argue that “this section,” as used in § 666(c), refers not to the individual valuation requirements of the section, but to the wrongdoings described in the section: bribery and embezzlement. Applying the bona fide salary exception to the bribery and embezzlement elements furthers the federal government’s interest in protecting the integrity of federal funds. And it does so by focusing federal resources on actions of sufficient severity, without creating arbitrary classes of corrupt action that escape federal oversight. The bona fide salary exception therefore separates acceptable transactions from wrongful ones.

Part II of this Comment will discuss the text and legislative history of the federal funds bribery statute, as well as the nature of federal funding programs that give rise to federal intervention. Part III will assess how federal circuit courts have split over the interpretation of the bona fide salary exception and the implications of the differing conclusions. Finally, in Part IV, this Comment will propose an interpretation of the statute that both provides a coherent view of the bona fide salary exception’s relationship with the valuation requirements, and furthers the policy objectives of Congress to protect federal funds from theft, fraud, and undue influence.

II. 18 U.S.C. § 666: THE FEDERAL FUNDS BRIbery STATUTE

A. Text of the Statute

The federal funds bribery statute criminalizes two separate actions involving agents who work for entities that receive federal funding. The embezzlement part of the statute makes it a crime for an agent of a covered entity to “embezzle[], steal[], obtain[] by fraud, or otherwise . . . convert to use” money or property that is owned by the entity.\textsuperscript{25} The bribery part of the statute addresses bribery of entity agents in connection with transactions of the entity.\textsuperscript{26} The agent that solicits or accepts the bribe is covered under (a)(1)(B) and the individual who offers or gives the bribe is covered under (a)(2).

The embezzlement crime contains two valuation requirements. First, the “federal funds element” in subsection (b) limits the statute to entities that receive $10,000 or more in federal funding during any one-year period.\textsuperscript{27} Second, the “embezzlement element” requires that the value of the property that is “embezzle[d], [stolen], obtain[ed] by fraud, or otherwise without authority knowingly convert[ed] to the use of any

\textsuperscript{26} Id. §§ 666(a)(1)(B), (2).
\textsuperscript{27} Id. § 666(b).
person other than the rightful owner” must be “$5,000 or more.” Thus, in order to meet the requirements of an embezzlement crime under the statute, an agent of a government or organization that receives at least $10,000 in a one-year period must embezzle property, owned by that entity, that has a value of $5,000 or more.

The bribery crimes contain three valuation requirements. First, the “federal funds element” in subsection (b) limits the statute to entities that receive $10,000 or more in federal funding in any one-year period. Second, the “bribery element” requires that the bribe under (a)(1)(B) or (a)(2) must be “anything of value.” Finally, the “transactional element” requires that the bribe under (a)(1)(B) or (a)(2) be connected to a transaction “involving anything of value of $5,000 or more.” Thus, in order to meet the requirements of a bribery crime under the statute, (1) the bribe must go to an agent of an organization that receives at least $10,000 in a one-year period, (2) the bribe to the agent must be of value, and (3) the bribe must be intended to influence a transaction that has a value of at least $5,000.

Subsection (c), commonly referred to as the “bona fide salary exception,” provides that “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.” Since the bona fide salary exception refers to transactions of financial value, the most reasonable reading of the statute is that the exception is meant to have an impact on at least some of the valuation requirements. But there is disagreement among courts as to exactly which elements within “this section” (§ 666) the exception applies to, as well as what effect this application has on the elements. This disagreement is the focus of this Comment.

B. Legislative History

Before the federal funds bribery statute was enacted, 18 U.S.C. § 201 operated as the only general bribery statute in the federal criminal code. Section 201 applies to “public officials,” defined as “an officer or employee, or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch.” At the time Congress was

28 Id. § 666(a)(1)(A).
29 Id. § 666(b).
30 Id. §§ 666(a)(1)(B), (2).
31 Id. §§ 666(a)(1)(B), (2).
32 Id. § 666(c).
considering the federal funds bribery statute, there was a case pending before the Supreme Court, which was to resolve the circuit split over whether state and local employees could be “public officials” under § 201(a). Congress specifically noted this ambiguity and, as a response to the pending case, passed the federal funds bribery statute in part to provide clear authority to prosecute bribery for state and local government employees in connection with federal funds.

The stated purpose of the federal funds bribery statute, according to a Senate Judiciary Committee Report, is to “augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program.” The report further stated that the Committee intended the scope of what is considered a “Federal program” under subsection (b) to be “construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery.” However, the report noted that “the concept is not unlimited,” and that “there must exist a specific statutory scheme authorizing the federal assistance” in order to fall within the purview of the statute. The report listed three previous cases—which were part of the circuit split over the meaning of § 201—as examples of circumstances in which the federal funds bribery statute was meant to apply.

The original version of the statute, enacted in 1984, did not contain a bona fide salary exception. That part was added with an amendment in 1986, which also changed the wording and structure of the statute “to conform [the statute] to the drafting style and format used generally in Title 18 of the United States Code.” A House Committee report notes that the statute was amended “to avoid its possible application to

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37 S. REP. NO. 98-225, at 369 (1983); see also Salinas, 522 U.S. at 58; Weitz, supra note 36, at 816.
39 S. REP. NO. 98-225, at 369. This broad interpretation of “federal program” has been supported by the Supreme Court. See Fischer v. United States, 529 U.S. 667, 678 (2000).
40 S. REP. NO. 98-225, at 369.
41 Id.
acceptable commercial and business practices.” A footnote further explains that the statute “prohibits bribery of certain public officials, but does not seek to constrain lawful commercial business transactions.” The footnote also states that the bona fide salary exception “parallels the bank bribery provision (18 U.S.C. 215).”

In *Sabri v. United States*, the Supreme Court unanimously upheld the constitutionality of the federal funds bribery statute. The Court explained that:

> Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.

The Court further noted that, even when the bribe is not directly from or connected to federal payments, “[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.”

### III. Circuit Split over the Bona Fide Salary Exception

Circuits have split over how the bona fide salary exception interacts with the valuation requirements contained in the statute. The exception states that “this section does not apply to bona fide salary, wages, fees, or other compensation paid . . . in the usual course of business.” The Sixth and Eleventh Circuits hold that the bona fide salary exception must be read to apply to all of § 666. The Seventh and Fifth Circuits hold that the bona fide salary exception applies only to the “wrongdoing”—the bribe itself. The circuit split over the interpretation of the bona fide salary exception has implications for how broadly

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45 Id.
46 Id. at 30 n.9.
47 Id.
49 Id. at 602.
50 Id. at 604.
51 Id. at 606.
52 18 U.S.C. § 666(c).
53 United States v. Mills, 140 F.3d 630, 633 (6th Cir. 1998); United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015).
54 United States v. Robinson, 663 F.3d 265, 272 (7th Cir. 2011); United States v. Marmolejo,
the scope of the statute sweeps, and in turn, how much authority federal law enforcement will have in prosecuting state and local matters.

A. The Sixth and Eleventh Circuits: The Bona Fide Salary Exception Applies to Each Valuation Requirement

The Sixth Circuit holds that the bona fide salary exception must be read to apply to all of § 666.\textsuperscript{55} In United States v. Mills,\textsuperscript{56} the government alleged that the Chief Deputy Sheriff and a staff special deputy at a county sheriff’s department violated the statute when they solicited and obtained payments from individuals in exchange for a promise to hire these individuals as deputy sheriffs.\textsuperscript{57} The payments obtained were between $3,500 and $3,930.\textsuperscript{58} The district court ruled “that the conduct charged by the government did not constitute a violation of [the statute] because the minimum transaction valuation required by the statute had not been met under the facts of [the] case.”\textsuperscript{59} The bribes to the officers were “anything of value,” but the bribes did not influence a transaction valued at $5,000 or more because the court read the bona fide salary exception to exclude the value of the deputy sheriff position salaries from the calculation of the transaction.\textsuperscript{60}

The government argued that the bona fide salary exception only applies to the bribery element (“i.e., whether the local government agent solicited or accepted ‘anything of value’”) and not to the transactional element (“i.e., whether the transaction in connection with which a bribe was received involved ‘anything of value of $5,000 or more’”).\textsuperscript{61} The Sixth Circuit court, however, sided with the defendant and concluded that the bona fide salary exception “must be read to apply to all of § 666. . . .”\textsuperscript{62}

The Sixth Circuit reached this conclusion by determining that “this section” in subsection (c), unambiguously meant the whole section (i.e., 18 U.S.C. § 666).\textsuperscript{63} In so doing, the court noted that “broad language referring to the entire body of the law was used” and that Congress

\begin{itemize}
  \item \textsuperscript{55} Mills, 140 F.3d at 633.
  \item \textsuperscript{56} Id. at 630.
  \item \textsuperscript{57} Id. at 631.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 633.
  \item \textsuperscript{61} Id. at 632.
  \item \textsuperscript{62} Id. at 633.
  \item \textsuperscript{63} Id. at 633.
\end{itemize}
could have used more restrictive language if it wished to limit the exception to the bribe only.\textsuperscript{64} The court explained that by adding the exception, Congress demonstrated an intention for only the most serious instances of corruption to fall under the federal act.\textsuperscript{65} Because the bona fide salary exception applies to all of § 666, the salaries to be paid to the individuals as deputy sheriffs could not be included in calculating whether the bribe was connected to a transaction involving anything of value of $5,000 or more. In other words, the value of the bribe itself could be calculated as part of the transactional element ($3,500 to $3,930 in each transaction), but the benefit received by the individuals that paid the bribe (a deputy sheriff salary) could not be included in the sum. Thus, the transactional element for each bribery count was only $3,500 to $3,930, falling below the required threshold of $5,000.\textsuperscript{66}

The Eleventh Circuit agrees with the Sixth Circuit that the bona fide salary exception applies to the whole statute.\textsuperscript{67} In United States v. Chafin,\textsuperscript{68} the government alleged that a county sheriff committed federal-program embezzlement under the statute when he drew, made payable, and cashed 225 checks totaling $65,730 from the jail commissary account over a two-year period.\textsuperscript{69} The county where he worked had received $33,897 in federal funds during each of the two years that this activity was taking place.\textsuperscript{70} The federal funds received were disbursed under the Victims of Crimes Act.\textsuperscript{71} At least $25,000 of these federal funds were used each year to pay the salary of a witness advocate.\textsuperscript{72} Thus, the defendant argued that the federal funds requirement was not met, because these “bona fide” salary payments could not be included in determining the federal funds received under subsection (b).\textsuperscript{73}

The court agreed with the defendant that the bona fide salary exception applies to the whole act, including the federal funds element, but affirmed his conviction on other grounds.\textsuperscript{74} The court followed the reasoning of the Sixth Circuit in determining that the phrase “this section” in § 666(c) is unambiguous and “that the statutory scheme is consistent and coherent.”\textsuperscript{75}

\textsuperscript{64} Id.
\textsuperscript{65} Id. at 632.
\textsuperscript{66} Id. at 633.
\textsuperscript{67} United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015).
\textsuperscript{68} 808 F.3d 1263 (11th Cir. 2015).
\textsuperscript{69} Id. at 1266.
\textsuperscript{70} Id. at 1267.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 1268.
\textsuperscript{74} Id. at 1272–73.
\textsuperscript{75} Id. at 1271.
B. The Seventh and Fifth Circuits: The Bona Fide Salary Exception Applies Only to the Bribery Element

The Seventh Circuit, on the other hand, holds that the bona fide salary exception applies only to the bribery element of the statute.76 In *United States v. Robinson*,77 Anthony Robinson was charged with federal-funds bribery under the statute when he allegedly bribed a police officer.78 Robinson was suspected of running a cocaine-trafficking operation and had attempted to bribe a police officer during a traffic stop.79 The officer initially refused, but later set up a sting operation and solicited a bribe from Robinson.80 Robinson offered to pay the officer $1,000 per week to “get the heat off” of him, but he ended up paying the officer “only about $1,000” in total.81 The officer later agreed with Robinson to sell him seized cocaine and arrested Robinson when the transaction occurred.82

Robinson appealed his conviction in part because he argued that the transactional element had not been met. The government argued that Robinson’s bribe was “intended to influence [the officer] in connection with the [police department]’s ‘business’ of investigating drug trafficking.”83 As such, the transactional element would be met if this business of investigating drug trafficking had a value of $5,000 or more. The government argued that the value of this business did exceed $5,000 by any of three metrics: “(1) the officers’ salaries (well over $5,000); (2) the amount of the bribe (an open-ended offer of $1,000 per week); or (3) the estimated value of an illicit ‘license’ to sell cocaine (well over $5,000 in ill-gotten gains).”84 In a challenge to the first possible metric, the appellant argued that the officer’s salary could not be used to establish the transactional element minimum because of the bona fide salary exception.85

The court rejected the appellant’s argument, holding that the language “[t]his section does not apply,” as used in the bona fide salary exception “suggests only that legitimate salary, wages, and other compensation may not be considered a bribe, not that salary evidence may not be admitted to prove the value of the ‘business’ or ‘transaction’ the

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76 United States v. Robinson, 663 F.3d 265, 272 (7th Cir. 2011).
77 663 F.3d 265 (7th Cir. 2011).
78 Id. at 266.
79 Id. at 267.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id. at 272.
bribe-giver or bribe-taker intended to influence.”86 The court noted that the reasoning in *Mills* was not consistent with the statutory text, “which uses the language of an exception, not the language of a limitation on the proofs.”87 The bona fide salary exception “pertains to the alleged wrongdoing—that is, the bribe itself—and does not limit the modes of proof for the $5,000 minimum-value requirement in the transactional element of the offense.”88

The Fifth Circuit has also noted that the bona fide salary exception applies only to the alleged wrongdoing in the case.89 In *United States v. Marmolejo*,90 the court considered an appeal from a federal-programs bribery conviction “arising from a series of bribes [accepted by a Sheriff], in exchange for permitting conjugal visits for a federal prisoner housed at [the county jail].”91 In a footnote, the court addressed the defendants’ argument that the federal payments used to establish the federal funds requirement constituted a “commercial transaction,” that was excluded from the statute by the bona fide salary exception.92 The court explained, however, that the bona fide salary exception “refers to the alleged wrongdoing . . . not to the nature of the benefit that the agency receives pursuant to the Federal program.”93 Thus, the court argued, all of the federal funds received by the county could be counted toward the federal funds requirement, regardless of whether the funds were part of a commercial transaction.

C. The Supreme Court’s Discussion of the Bona Fide Salary Exception

The Supreme Court discussed the impact of the bona fide salary exception in dicta in *Fischer v. United States*,94 which considered whether hospitals that participate in the Medicare program are covered entities that receive “benefits” under the federal funds requirement of § 666(b). In this case, the appellant argued that the exception “operates to exclude [the Medicare payments] because they are either ‘compensation’ or ‘expenses paid or reimbursed,’ or some combination of the two, and that the payments are made in the ‘usual course of business.’”95 The

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86 Id.
87 Id.
88 Id.
89 United States v. Marmolejo, 89 F.3d 1185, 1190 n.5 (5th Cir. 1996).
90 89 F.3d 1185 (5th Cir. 1996).
91 Id. at 1188.
92 Id. at 1190 n.5.
93 Id.
95 Id. at 678.
Court noted that one inference of the exception “is that the described payments would have been benefits but for the [the exception].”\(^\text{96}\) However, the Court stated that it “need not go so far” because, “[e]ven assuming the examples of [the exception] bear upon the definition of benefits,” the Medicare payments in question “are made for significant and substantial reasons in addition to compensation or reimbursement” and thus beyond the scope of the exception.\(^\text{97}\) The Court further explained that “[t]o determine whether an organization participating in a federal assistance program receives ‘benefits’ [under § 666(b)], an examination must be undertaken of the program’s structure, operation, and purpose.”\(^\text{98}\)

Of the circuit courts that have determined which valuation requirements the bona fide salary exception applies to, only the Seventh Circuit in Robinson and the Eleventh Circuit in Chafin addressed the issue after the Supreme Court’s discussion in Fischer. The Eleventh Circuit confirmed that the Supreme Court’s in arguendo exploration of the bona fide salary exception was mere dicta by treating the issue as a matter of first impression.\(^\text{99}\) Further, the two circuit courts came to different conclusions on the matter and neither court cited Fischer in reaching its decision.\(^\text{100}\)

D. Effect of the Circuit Split on Federal Jurisdiction under the Federal Funds Bribery Statute

The conflict among circuit courts over how to interpret the bona fide salary exception has implications for how broad the scope of the statute will sweep, and in turn, how much authority federal law enforcement will have in prosecuting state and local matters. Given the history and purpose of the statute, it is reasonable to read the minimum thresholds set by the valuation requirements as limiting the statute to corrupt transactions of sufficient enough severity that they merit the attention of limited federal resources.\(^\text{101}\) Under this reading, the embezzlement element provides that more minor embezzlement actions in

\(^{96}\) Id.

\(^{97}\) Id. at 679.

\(^{98}\) Id. at 681.

\(^{99}\) United States v. Chafin, 808 F.3d 1263, 1270 (11th Cir. 2015).

\(^{100}\) Fischer was cited in Chafin only for the idea that the broad purpose of § 666 is ensuring “the integrity of organizations participating in federal assistance programs.” Id. at 1272.

\(^{101}\) Sec, e.g., United States v. Sabri, 326 F.3d 937, 952 (8th Cir. 2003) (The $10,000 [federal funds] threshold requirement and the $5,000 transactional requirement create a sufficient nexus between the offense conduct and federal funds to ensure that federal power will not be extended to the prosecution of merely local matters that may not jeopardize in any significant manner the integrity of federal funds.); United States v. Ferrara, 990 F.Supp. 146, 150 (E.D.N.Y. 1998) (“[A]
covered entities do not merit federal attention and therefore can be handled through state and local law enforcement at the discretion of the state. The bribery element uses the language of “anything of value,” indicating that any bribe can be worthy of federal attention depending on the outcome sought to be influenced by the bribe. This outcome is measured by the transactional element, which states that the outcome, in connection with the bribe, must be valued at $5,000 or more to merit federal attention. Finally, since the federal interest in the matters of these entities is established through federal funding, the federal funds element sets a threshold of $10,000 in any one-year period.

The bona fide salary exception, when applied to a valuation requirement, effectively works to raise that threshold in particular circumstances. For example, if the bona fide salary exception applies to the embezzlement element, the value of property that is converted to the use of a person other than the rightful owner must be worth at least $5,000, excluding all bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business. Similarly, if the exception is applied to the transactional element, the bribe must be in connection with a transaction valued at $5,000 or more without considering any expenses paid in the usual course of business that are part of the particular transaction. As the number of requirements subject to the bona fide salary exception increases, the number of transactions involving government agents or resources that are subject to criminal liability under the statute decreases. If the interaction of these subsections leads only to the exclusion of acceptable, non-corrupt transactions, this exclusion would be strongly justified so as not to overburden and limit acceptable government transactions. However, if the interaction of these subsections leads to the exclusion of wrongful, corrupt transactions, this could hinder the federal government’s ability to protect the integrity of federal funding at the state and local level.

IV. The Bona Fide Salary Exception Clarifies the Wrongdoings Covered by the Federal Funds Bribery Statute

Courts that have examined the question of which valuation requirements the bona fide salary exception applies to have done so with a narrow scope and in the context of case-specific facts. In Chafin, for example, the court looked at an alleged embezzlement crime where only

plain reading of the statute seems to indicate that the purpose of the $5,000 [transactional] requirement is to assure that only corrupt transactions which may be categorized as significant—as measured against that dollar amount—will activate Section 666.”); United States v. Apple, 927 F. Supp. 1119, 1125 (N.D. Ind. 1996) (“Congress wanted to limit the reach of section 666 to circumstances where, in some way, the bribe involves ‘real money’ and thereby a real threat to the ultimate integrity of appreciable federal funds.”).
the federal funds element was challenged. The court held that the bona fide salary exception applied to the whole section in the context of this narrow challenge, but it never considered the implications of this holding with respect to the transactional element. Likewise, the court in Robinson held that the bona fide salary exception applied only to the bribery element without considering whether the same logic used to support this decision would compel a similar application to the embezzlement requirement. This unresolved question is ripe for a broad examination of the entirety of the statute, and a solution that is consistent with the structure, purpose, and history of the statute as a whole.

The valuation requirements fit into two general categories. Two of the requirements—the embezzlement element and the bribery element—determine whether a wrongdoing occurred. These elements represent the actions that the statute seeks to prohibit. The embezzlement element is the defining element of the embezzlement crime, which seeks to stop the flow of corrupt money from government officials to wrongful beneficiaries. The bribery element is the defining element of the bribery crime, which seeks to stop the flow of corrupt money to government officials. The other two requirements—the transactional element and the federal funds element—describe the circumstances surrounding the wrongdoing and the effect of the wrongdoing. The transactional element describes the severity of the wrongdoing by measuring the benefit sought by the briber. The federal funds element describes the federal interest in preventing the wrongdoing by measuring the investment by the federal government in the covered entity.

The bona fide salary exception seeks to distinguish exchanges that are prohibited under the statute from exchanges that are acceptable. The exception can be read as stating that “bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business” is not embezzlement or bribery under the statute. However, the enumerated categories in the exception do not bear any relation to the severity of the wrongdoing or the federal government’s interest in the wrongdoing. This marks a logical line of where the bona fide salary exception applies. The bona fide salary exception is applicable to the embezzlement element and the bribery element, but not to the transactional element or the federal funds element. The exception is meant to ensure that when money goes to or from an official of a covered entity, the transaction is not a crime if this transfer is part of a legitimate commercial transaction. The bona fide salary exception implements and reinforces the line between acceptable and wrongful transactions.

102 Chafin, 808 F.3d at 1270.
103 United States v. Robinson, 663 F.3d 265, 272 (7th Cir. 2011).
A. The Bona Fide Salary Exception

The bona fide salary exception ensures that the statute “does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.”104 The ordinary meaning of “bona fide” is “made in good faith without fraud or deceit,” as exemplified by dictionary definitions at the time that the bona fide salary exception was added to the statute.105 As previously mentioned, the stated purpose of the bona fide salary exception is “to avoid [the section’s] possible application to acceptable commercial and business practices.”106 Acceptable commercial and business practices can be read to mean transactions that are made in good faith and without fraud or deceit, such as salary paid to an employee, fees paid to a governmental entity, and government contracts with private parties. This exception, therefore, excludes the value of ordinary commercial transactions made in good faith when calculating whether an applicable valuation requirement is met.

Courts that have read the bona fide salary exception to apply to each valuation requirement have latched onto the phrase “this section” and have determined that this unambiguously means that this section must be read to apply to every valuation element that is contained within “this section”— all of § 666.107 But determining that “this section” applies to all of § 666 (rather than only a particular subsection) can be consistent with two readings. One interpretation is that the bona fide salary exception applies to each valuation requirement within “this section.” Another interpretation is that the bona fide salary exception applies to the wrongdoings described in “this section.” The courts in Robinson108 and Marmolejo109 advocated for this latter approach.

The legislative history of the statute, and the bona fide salary exception in particular, is consistent with the second way of reading “this section.” The House Judiciary Committee report that accompanied the

104 18 U.S.C. § 666(c).
105 See United States v. Walsh, 156 F. Supp. 3d 374, 386 (E.D.N.Y. 2016) (discussing the definition of “bona fide” in various dictionaries from 1985 to 2014). The other definitions cited in Walsh were all a close variation of “made in good faith without fraud or deceit.” See also United States v. George, 841 F.3d 55, 62 (1st Cir. 2016) (“[C]onsistent with the plain language and evident purpose of the statute . . . ‘bona fide salary’ means salary actually earned in good faith for work done for the employer”); United States v. Williams, 507 F.3d 905, 908 (5th Cir. 2007) (“[S]alary is not bona fide or earned in the usual course of business under § 666(c) if the employee is not entitled to the money.”).
107 United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015); United States v. Mills, 140 F.3d 630, 633 (6th Cir. 1998).
108 Robinson, 663 F.3d at 272.
109 United States v. Marmolejo, 89 F.3d 1185, 1190 n.5 (5th Cir. 1996).
1986 Amendment, which added the bona fide salary exception, stated that the statute was amended “to avoid its possible application to acceptable commercial and business practices.”\textsuperscript{110} A footnote further explained that the statute “prohibits bribery of certain public officials, but does not seek to constrain lawful commercial business transactions.”\textsuperscript{111} The statute thus “prohibits corruptly giving or receiving anything of value for the purpose of influencing or being influenced in connection with any business, transaction, or series of transactions.”\textsuperscript{112} These comments demonstrate an understanding that the bona fide salary exception would apply to the wrongdoing—specifically bribery—though the reasoning would compel application to embezzlement as well. But these comments indicate that Congress did not consider potential application to the transactional or federal funds element.

Moreover, the House Judiciary Committee Report stated that the bona fide salary exception “parallels the bank bribery provision (18 U.S.C. 215).”\textsuperscript{113} Section 215, in relevant part, states that:\textsuperscript{114}

(a) Whoever—

(1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution; or

(2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution;

shall be fined not more than $5,000 . . .

Section 215 also contains a bona fide salary exception\textsuperscript{115}:

\textsuperscript{111} Id. at 30 n.9.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} 18 U.S.C. § 215(a).
\textsuperscript{115} Id. § 215(c).
(c) This section shall not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

However, the bank bribery provision contains no valuation requirements beyond the bribery element: the statute only contemplates a bribery crime; the bribe need only be connected to “any business or transaction of such institution” regardless of value; and there is obviously no federal funds element since the statute applies to private banks. The bona fide salary exception language was added to the bank bribery statute in the same year that the bona fide salary exception language was added to the federal funds bribery statute. ¹¹⁶

The decision by Congress to explicitly use this same language in the federal funds bribery statute is consistent with the idea that Congress did not intend for the bona fide salary exception to narrow the transactional or federal funds elements. Under the in pari materia canon, statutes that “share a common subject matter, employ similar language, or directly refer to one another” are interpreted in a manner that allows for inter-statutory consistency and coherence. ¹¹⁷ The argument for reading the federal funds bribery statute and the bank bribery statute in pari materia is especially strong in this case because: the two provisions address a common subject matter (corrupt transactions); the two provisions employ identical language; and the provisions were enacted by the same Congress. In combination with the legislative history, this inter-statutory reading strongly suggests that the meaning of the bona fide salary exceptions in both § 666(c) and § 215(c) is that “bona fide salary, wages, fees, or other compensation paid . . . in the usual course of business” is not a wrongdoing covered by the statute. ¹¹⁸

B. The Bribery Element

The application of the bona fide salary exception to the bribery element is the most obvious and coherent application. All of the courts that have examined the question at issue here have concluded that the exception applies to the bribery element, such that bona fide compensation paid in the usual course of business cannot be included in determining whether there was “anything of value” involved in the bribe. Applied to the bribery element, the bona fide salary exception carries a clear purpose: to make sure that legitimate wages, compensation, and

business transactions are not considered a bribe. When a government official hires an employee, or a concert venue contracts with the local police to provide security near the event, such payments are made “with an intent to influence or reward” a government official. Yet such transactions are not the target of the statute and are not actions that would ordinarily merit criminal liability. These transactions do not negatively impact the integrity of federal funds or divert federal funds to unintended purposes. As such, the bona fide salary exception removes these expenses “paid in the usual course of business” from the scope of the statute. If, however, the salary was influenced by a bribe—for example if an individual paid a government official a bribe in exchange for being hired as an employee—the bona fide salary exception would not preclude liability. In such a case, the salary would serve as the transactional element and, as argued below, would not be excluded from the calculation of this element.

Application of the bona fide salary exception to the bribery element has a clear meaning and purpose within the organization of the statute. Bona fide compensation in the usual course of business is a subset in the general category of benefits given to, or accepted by, government agents in order to influence government business or transactions; it is important to distinguish this subset from other actions that negatively impact the integrity of federal funds. The bona fide salary exception thus effectively separates acceptable transactions from wrongful transactions. The exception also gives meaning to “corruptly,” as used in the statute, by clarifying the instances in which giving anything of value, with the intent to influence, is not corrupt.

Application of the bona fide salary exception to the bribery element also creates consistency across federal bribery statutes. The federal funds bribery statute can be read as having the same meaning with respect to the surrounding statute as identical language that was added to another federal bribery statute earlier in the year; that is, the bona fide salary exception can be read as a subsection meant to further define what a bribe is.

C. The Embezzlement Element

Of the cases that make up the circuit split, only the Eleventh Circuit examined the question in the context of an embezzlement crime. The court’s holding—that the bona fide salary exception applies to the whole section, including the federal funds element—was made in the context of considering a challenge to the government’s ability to prove that the federal funds threshold was met. The opinion therefore offers no analysis with specific respect to the embezzlement element beyond the overall view that “the plain meaning of the phrase this section [does
not warrant] applying subsection (c)’s exception to only certain parts of § 666.”

The embezzlement element is, in a sense, the mirror of the bribery element. The embezzlement element defines the crime that seeks to stop the flow of corrupt money from government officials to wrongful beneficiaries. The bribery element defines the crime that seeks to stop the flow of corrupt money to government officials, who are attempting to gain a wrongful benefit. Each of the elements determine whether an action has occurred that threatens the integrity of federal funds.

The same reasons that support application of the bona fide salary exception to the bribery element compel application to the embezzlement element. Just like the bribery element, application of the bona fide salary requirement to the embezzlement element has a clear meaning and purpose within the organization of the statute. When a local government hires a contractor to complete a road project, a government official converts property under the control of the government to the use of another. But these transactions do not negatively impact the integrity of federal funds or divert federal funds to unintended purposes. Conversely, if a government employee diverted into his own bank account salary that was supposed to be paid to a coworker, this transaction clearly frustrates the integrity of federal funds. The bona fide salary exception would not exclude such funds even though they are “salary,” because such funds are not paid in the usual course of business; that is, the funds are not paid to the intended employee in exchange for services rendered. Bona fide compensation in the usual course of business is a subset within the general category of property under the control of government that is converted to the use of another; it is important to distinguish this subset from other actions that negatively impact the integrity of federal funds. The bona fide salary exception removes this subset of a general category from the scope of criminal liability.

One could argue that the language surrounding the embezzlement element does not contain a broad word similar to “corruptly” that needs to be clarified through a later exception. Compared to “corruptly,” the meaning of “without authority” is relatively clear. However, both legitimate and illegitimate transactions can be approved with the explicit permission of an authoritative figure within the government; and “without authority” may not alone adequately distinguish acceptable activity from wrongful activity. When applied to the embezzlement element, the bona fide salary exception clarifies that a transaction conducted with authority is one that is a bona fide commercial transaction. Likewise, a

119 United States v. Chafin, 808 F.3d 1263, 1271 (11th Cir. 2015).
“rightful owner” under the statute, is the recipient of a bona fide transaction in the usual course of business.

It could also be contended that the argument for reading the bona fide salary exception in parallel with the bona fide salary exception of the bank bribery statute cautions against application to the embezzlement element. No such element is found in the bank bribery statute, and the legislative history could therefore be read to not apply to the embezzlement element—just like it was not intended to apply to the transactional or federal funds element. But the bribery and embezzlement elements perform the same role within the statute: the elements identify the wrongful act that defines the respective crime. Application of the bona fide salary exception therefore affects the embezzlement element in the same way that it affects the bribery element: the exception narrows the scope of a broad category in order to distinguish acceptable action—where the integrity of federal funds is maintained—from a wrongful action. There is no such comparable effect with respect to the transaction or federal funds elements, which define the implications of a wrongdoing rather than the wrongdoing itself.

D. The Transactional Element

In enacting the federal funds bribery statute, Congress made a decision to not involve federal law enforcement resources in every instance of state and local corruption. Instead, Congress wrote the statute to apply only to instances where the integrity of federal funds is sufficiently threatened and the wrongdoing is severe enough that federal government attention is both warranted and worthwhile.

A bribe is an economic transaction. The person that gives the bribe (the briber) pays some cost to the person that receives the bribe. The cost is considered worthwhile for the briber because achieving the desired outcome in the transaction he or she seeks to influence is more valuable than the cost that he or she pays. The transactional element seeks to establish the value of this desired outcome and set a threshold for outcomes that are large enough to warrant federal intervention and expenditure of limited federal resources. As such, the transactional element creates two categories of benefits to the briber: (1) benefits resulting from transactions that are worth less than $5,000; and (2) benefits resulting from transactions that are worth $5,000 or more. This separation is coherently included in the statute, because it measures the government’s interest in getting involved with conduct severe enough to merit federal attention.

Applying the bona fide salary exception to the transactional element would further divide benefits valued at $5,000 or more into two subcategories: bribes meant to influence compensation of $5,000 or
more paid in the usual course of business, and bribes meant to influence other transactions of $5,000 or more. Unlike the distinction between benefits less than $5,000 and benefits greater than $5,000, this further distinction does not advance the federal government’s interest in involving federal resources only in cases that are sufficiently severe. The application of the bona fide salary exception to the transactional element thus leads to an underinclusive effect that is inconsistent with the purpose of the statute.

Consider two scenarios as an example. In the first scenario, a drug dealer pays a police officer $1,000 in exchange for the police officer leaving his drug business alone—a business that the dealer values at $6,000. In this scenario, the bribe is “anything of value” and in connection with a business “involving anything of value of $5,000 or more”; but, the transactional element is not compensation in the usual course of business. In the second scenario, an owner of a construction company pays a public works department official $1,000 in exchange for the department hiring the owner’s company to build the new city hall—a project valued at $6,000. The bribe is also “anything of value” and in connection with a business “involving anything of value of $5,000 or more,” but the transactional element is compensation in the usual course of business.\(^{120}\) If the bona fide salary exception applied to the transactional element, the second scenario would not fall under the scope of the federal funds bribery statute. The beneficial outcome for the briber is the same regardless of whether the outcome is a $6,000 commercial transaction in the usual course of business. Because of this, a briber would be willing to pay the same cost to achieve either outcome. Both transactions are clearly a bribe, and the severity of wrongdoing in terms of the misuse of federal funds is the same in each instance.\(^{121}\) A distinction between these two transactions would not advance the federal government’s interest in protecting the integrity of federal funds, which is the primary purpose and constitutional justification for the statute.

This arbitrary distinction does not appear when the bona fide salary exception is applied to the bribery and embezzlement elements. The bribery element need only be “anything of value,” and thus, the only

\(^{120}\) One could argue that the payment of a bribe in this scenario renders the transaction outside of the “usual course of business.” But this argument conflates the bribery and transactional elements, which are clearly distinguished as separate elements in the statute. Further, if the bona fide salary exception was read to apply to the transactional element, but every transaction connected to a bribe was not conducted in the usual course of business, the exception would never have any applicability.

\(^{121}\) It is true that the severity of wrongdoing of the underlying activities in the scenarios is not equal under the law, given that one of the scenarios considers illegal activity, while the other considers legal activity. But the severity of the underlying activity is the subject of other criminal statutes. The wrongdoing sought to be remedied by the federal funds bribery statute is the wrongdoing associated with the corrupt transfer of money in order to bring about an outcome.
distinction is between legitimate and illegitimate transactions. The embezzlement element must be $5,000 or more, meaning there is a class of illegitimate transactions that the statute does not cover. But this subdistinction, between illegitimate transactions valued at less than $5,000 and illegitimate transactions valued at $5,000 or more, furthers the federal government’s interest in only pursuing cases that are sufficiently severe.

For these reasons, the bona fide salary exception should not be read to apply to the transactional element.

E. The Federal Funds Element

The statutory text that surrounds the federal funds element initially narrows the scope of possible federal payments. The use of the phrase “or other form of Federal assistance” implies that each of the enumerated examples of benefits—grant, contract, subsidy, loan, guarantee, and insurance—must constitute some form of federal assistance. The ordinary meaning of “federal assistance” does not include transactions such as hiring or commercial purchases, where the federal government receives a direct good or service benefit. The legislative history supports this concept. A Senate report\(^{122}\) noted:

The term “federal program” means that there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier of a federal crime.\(^{123}\)

Because this committee report was written for the original version of the federal funds bribery statute before the bona fide salary exception was added to the statute, it reinforces the idea that this narrowing of “federal assistance” occurs without any consideration of the exception. In *Fischer*, the Supreme Court noted that “[a]ny receipt of federal funds can, at some level of generality, be characterized as a benefit,” but “the statute does not employ this broad, almost limitless use of the

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\(^{122}\) S. REP. NO. 98–225, at 369 (1983). This committee report was written for the original version of the federal funds bribery statute, before the bona fide salary exception was added to the statute.

\(^{123}\) *Id.*
term.” 124 The Court further stated “[t]o 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.” 125 The Court’s commentary indicates that “federal assistance” refers to federal statutory funding programs.

Reading the bona fide salary exception to apply to the federal funds element therefore could be consistent with one of two interpretations, both of which should be rejected.

The first interpretation is that the bona fide salary exception is merely meant to make the same distinction that the use of “federal assistance” does: to ensure that the federal funds element is only met by looking at payments to covered entities through statutory funding schemes, as opposed to commercial transactions between the federal government and covered entities. This reading would apply the bona fide salary exception to the federal funds element, but it would make the exception superfluous.

The second interpretation is that the bona fide salary exception creates a distinction, not in the form of payment from the federal government, but in how the federal funds are spent by a covered entity. According to this reading, it would not count toward the federal funds requirement when a covered entity uses the proceeds of federal funding in the usual course of business (hiring employees, purchasing goods and services, etc.), but it would count toward the requirement when federal funds are used for any other purpose. Given that expenses in the usual course of business make up a large portion of government spending, this reading would dramatically reduce the applicability of the statute. And much like the arbitrary distinction made if the bona fide salary exception was applied to the transactional element, this distinction does not further any governmental interest. The manner in which entities spend federal funds does not have a relation to the severity of wrongdoing. And the integrity of federal funds is equally threatened when these funds are sent to corrupt governmental actors, regardless of what these actors later spend these specific funds on.

Finally, this inquiry into how federal fund recipients spend these funds contradicts how the statute has been interpreted by the Supreme Court. In Salinas v. United States, 126 the Court held that the statute “does not require the Government to prove the bribe in question had any particular influence on federal funds.” 127 Reading the bona fide sal-

125 Id. at 680.
127 Id. at 61.
ary exception to distinguish between how covered entities make expenses that are unrelated to the wrongdoing requires the Government to establish exactly the kind of evidence that was held to be unnecessary in *Salinas*. Covered entity expenditures that are affected by the bribe are already accounted for by the transactional element.

For these reasons, the bona fide salary exception should not be read to apply to the federal funds element.

F. Policy Implications

As noted previously, the number of transactions involving government agents or resources that are subject to criminal liability under the federal funds bribery statute decreases as the number of requirements subject to the bona fide salary exception increases. This decrease only hinders the federal government’s ability to effectively limit corruption if the transactions excluded from the scope of the statute are *corrupt* transactions, which threaten the integrity of federal funds and are of sufficient severity to merit federal attention.

With respect to the bribery and embezzlement elements, the interpretation put forward in this Comment reads the bona fide salary exception as a way to separate legitimate commercial transactions from corrupt bribery and embezzlement. This distinction excludes certain transactions from the scope of the statute, but it does so for the reason that these excluded transactions are ordinary transactions in the course of performing the responsibilities of governmental entities. These transactions further legitimate governmental objectives, act in the public’s interest rather than sowing public distrust, and do not misuse resources and agents that are in part funded by the federal government. The federal government’s ability to effectively limit corruption in federally funded entities is in no way hindered when the bona fide salary exception is applied to the bribery and embezzlement elements.

But the interpretation put forth in this Comment does not apply the bona fide salary exception to the transactional and federal funds elements, because this distinction *would* create a class of corrupt transactions that are outside the scope of statute. This distinction does limit the federal government’s ability to effectively limit corruption in federally funded entities, and does so without contributing to the government’s interest in protecting the integrity of federal funds or the government’s interest in only expending federal resources on instances of corruption that are sufficiently severe. In other words, the application of the bona fide salary exception to the transactional and federal funds elements would limit the federal government’s ability to prosecute state and local corruption, but this limitation would be unrelated to the policy objectives of the statute.
One could argue that because the scope of federal involvement in state and local matters has increased too much under the federal funds bribery statute, this involvement should be curbed through a more aggressive application of the bona fide salary exception than this Comment proposes. But an application of the bona fide salary exception, without respect to the policy goals of the statute, would argue for limitation for the sake of limitation without considering why it is desirable for the federal government to be involved at some level in matters of state and local government. Leaving the responsibility for preventing state corruption to the state itself could severely inhibit the ability to solve the matter in furtherance of public interest, particularly when those tasked with enforcement are the very subject of the corruption. State agents are constantly interacting with one another, and providing corruption enforcement discretion could merely add one more interaction to this system, thus leaving open the possibility that the benefits of strict enforcement will be weighed in context with other internal objectives. It is reasonable to expect that, for example, state law enforcement would be hesitant to prosecute corruption against a state legislator if that legislator also had broad authority over the state law enforcement budget. Giving this corruption prevention authority to state actors could thus be used as a bargaining chip to be utilized in furthering corrupt transactions. The federal funds bribery statute provides a tool to remove this enforcement power from the state and place it in the hands of a higher body of government, that is less dependent on the decisions of state agents. Given these consequences, the bona fide salary exception should only be used to limit federal involvement in matters of state and local corruption when such limitation distinguishes acceptable from wrongful activity, and furthers the policy objectives of the statute.

V. CONCLUSION

The valuation requirements in the federal funds bribery statute fit into two general categories. The bribery and embezzlement elements determine whether a wrongdoing has occurred, while the transactional and federal funds elements describe the circumstances surrounding the wrongdoing and the federal government’s interest in the wrongdoing. This Comment proposes that the bona fide salary exception applies to the embezzlement element and the bribery element, but not to the transactional element or the federal funds element. This is because the categories of expenses enumerated in the exception relate to the type of transaction that has occurred, but they do not bear any relation to the severity of the wrongdoing or the federal government’s interest in the wrongdoing. Application of the bona fide salary exception to the former
elements distinguishes transactions that are consistent with legitimate governmental objectives, from transactions that are contradictory to governmental objectives and the public interest. Application of the bona fide salary exception to the latter elements, however, would create arbitrary classes of corrupt transactions without furthering a federal interest expressed in the statute.

The federal funds bribery statute draws three lines that determine the scope of criminal liability. The statute distinguishes between (1) transactions for legitimate government purposes and transactions for illegitimate purposes, (2) transactions of sufficient severity to merit the attention of the federal government and transactions of insufficient severity to do so, and (3) transactions that threaten the integrity of federal funds and transactions that do not threaten the integrity of federal funds. Applying the bona fide salary exception to the bribery and embezzlement elements, but not to the transactional and federal funds elements, is the best way to respect these statutory lines drawn by Congress and further the policy objectives associated with them.