**23.3 Theft, Embezzlement, or Misapplication**

**of Bank Funds (18 U.S.C. § 656)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [theft] [embezzlement] [misapplication] of bank funds in violation of Section 656 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a [*specify position held*] of the [*specify* *financial institution*];

Second, the defendant knowingly and willfully [stole] [embezzled] [misapplied] funds or credits belonging to the bank or entrusted to its care in excess of $1,000;

Third, the defendant acted with the intent to injure or defraud the [*specify financial institution*];

Fourth, the [*specify financial institution*] was [*specify Section 656 status*]; and

Fifth, the amount of money taken was more than $1,000.

The fact that the defendant may have intended to repay the funds at the time they were taken is not a defense.

**Comment**

Although not found in the statute, “intent to injure or defraud” has been held to be an essential element of the crime.  *United States v. Stozek*,783 F.2d 891, 893 (9th Cir. 1986). “Intent to defraud may be inferred from a defendant’s reckless disregard of the bank’s interests.” *United States v. Castro*, 887 F.2d 988, 994 (9th Cir. 1989) (citing *Stozek*, 783 F.2d at 893).

If the crime charged is a misdemeanor, the fifth element of this instruction should be omitted.

If Instruction 4.8 (Knowingly) is modified and “limit[ed] only to ‘acts’ committed knowingly,” such an instruction will not “undermine[] the specific mens rea requirements applicable to misapplication of bank funds” offenses. *United States v. Lonich*, 23 F.4th 881, 901 (9th Cir. 2022).

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