

Supreme Court Passes on Esquenazi, Makes Instrumentality Test Settled Law

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The Supreme Court [today declined to issue a writ of certiorari](#) for the appellants in the case of *United States v. Esquenazi*. The Esquenazi decision was noteworthy for adopting the Department of Justice's relatively expansive definition of who qualifies as a "foreign official" under Foreign Corrupt Practices Act. Now it appears that this definition is settled law.

While FCPA practitioners had hoped that the Supreme Court might step in to decide this issue, it appears that there was no room on the docket under the circumstances. The decision not to grant review of the Esquenazi decision is likely the result of a lack of any disagreement among the circuit courts on the issue. This is, in turn, the result of a dearth of judicial scrutiny of the Department of Justice's expansive views of the scope of the FCPA, due to the fact that the majority of FCPA investigations are resolved prior to judicial intervention. Professor Michael Kohler (the self-titled FCPA Professor), who submitted an amicus brief in favor of the Defendants' petition, [noted today](#) that the lack of judicial inquiry in the area of the FCPA means that "Supreme Court review of the key elements of a top-priority federal criminal statute of significant importance to all businesses and individuals engaged in international commerce is unlikely."

Practitioners and compliance officers alike should view the Eleventh Circuit's adopted "instrumentality" rule as settled law and continue to operate their compliance programs accordingly. In its simplest form, this means that where there is any question of whether an individual qualifies as a "foreign official" because he or she may be a representative of a state-owned or state-operated entity, company representatives should err on the side of caution.

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