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Investment Management

July 19, 2023

Are syndicated loans actually securities? The SEC "is not in a position" to say.

By Scott H. Moss and Jennifer Fiorica Delgado

If you have been following the appeal in *Kirschner v. JP Morgan Chase Bank, N.A.*, No. 21-2726, you know that the Second Circuit, following oral argument on the Trustee's appeal of the District Court's decision that the syndicated loans at issue in the case are not securities, issued an order soliciting "any views that the United States Securities and Exchange Commission (SEC) may wish to share" on the subject of whether the loans should be classified as securities under the test in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). *Kirschner*, No. 21-2726207, Dkt. No. 170.

The Order initially asked for a response by April 13th, but the deadline was extended at the request of the SEC three times "in view of the need to carefully review these complex issues; consult with the Office of the Solicitor General, other federal agencies, the parties, as well as Commission staff; and seek authorization to file any response through a vote by a majority of Commissioners." *Kirschner*, No. 21-2726207, Dkt. No. 200.

Industry experts have been reeling for months, working through the list of potential consequences of whatever the SEC said on the subject.

On July 18, after months of conjecture, the SEC filed a letter, not an amicus brief, stating that "the staff is unfortunately not in a position to file a brief on behalf of the Commission in this matter." *Kirschner*, No. 21-2726207, Dkt. No. 207. The Second Circuit has not yet issued its decision in the Appeal but is expected to do so imminently—now that the SEC has spoken (or, more accurately, declined to speak).

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

SCOTT H. MOSS
Partner
Chair, Fund Regulatory & Compliance
T: **646.414.6874**
smoss@lowenstein.com

JENNIFER FIORICA DELGADO
Partner, Litigation
T: **646.414.6962**
jdelgado@lowenstein.com