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Kirschner Case Update: The SEC Declines to Weigh In

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We have been following the litigation over the question of whether certain syndicated loans are securities. *Kirschner v. JPMorgan Chase Bank, N.A.*, which has been before New York federal courts for years, is now before the United States Court of Appeals for the Second Circuit.

In this case, the Court is considering an appeal of a 2020 decision by the U.S. District Court for the Southern District of New York which held that the syndicated term loan in question was not a security and therefore not subject to state and federal securities laws and regulations.

Earlier this year, following a hearing, the Second Circuit entered an order asking the U.S. Securities and Exchange Commission ("SEC") to submit "any views it wishes to share" on whether the loans in the Kirschner case are securities.

It's worth noting that the SEC has previously weighed in on the subject and has indicated that, in certain situations and under certain factual scenarios, loans could be securities. The Court set a deadline for the submission by the regulator in April of this year and the SEC requested three separate extensions of time to respond to the Court's request.

After all these extensions, those of us watching the case were a bit surprised when the SEC's response this week was a letter filed with the Court and signed by SEC General Counsel Megan Barbero in which the SEC declined to give its view as to whether certain syndicated loans are securities. The letter said: "Despite diligent efforts to respond to the Court's order and provide the Commission's views, the staff is unfortunately not in a position to file a brief on behalf of the Commission in this matter. We greatly appreciate the Court's indulgence and regret any inconvenience this may have caused the Court or the parties."

Many experts believed that any view expressed by the SEC would be important to the Court's ruling in the case. Without this view, the Court will now move forward in making a determination in this case based on the briefings it has received and the hearings that have taken place. We continue to watch for developments in this case, which could have serious implications for the $1.4 trillion loan market.