Barnes

Securities Issues in Private Credit

The fastest-growing corner of private capital

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THE FRAME

Three securities analyses stacked on one loan.

The vehicle, the instrument and the distribution are independent questions. Clearing one does not clear the others. Run all three or you have not run the analysis.

01 Three levels, three different questions

1 The vehicle

Whoever raises the capital is almost certainly selling a security: fund interest, note program or JV unit. The 1933 Act, the Investment Company Act and the Advisers Act engage here.

2 The instrument

The loan is usually not a security. That is a conclusion, not an assumption. *Reves* governs, and the answer moves with the plan of distribution.

3 The distribution

Anyone paid for locating capital, borrowers or investors may be a broker under Exchange Act §15(a)(1), whatever the arrangement is called.

02 Is the loan a security? The *Reves* family resemblance test

Every note is presumed to be a security. The presumption is rebutted only if the note strongly resembles a judicially recognized exception, tested against four factors.

FACTOR	POINTS TOWARD A SECURITY	POINTS AWAY
Motivations of buyer and seller	Investment motive; raising capital	Commercial or corporate purpose
Plan of distribution	Broad offering; free transferability	Consent-based assignment; minimum assignment amounts; no assignment to natural persons
Reasonable expectations of the public	Marketing that leans on "investor," "investment" and "yield"	Documents and marketing that describe a loan
Another regulatory scheme reducing risk	No other oversight; unsecured	Bank regulatory guidance; perfected collateral; first-priority lien

> ***Kirschner v. JPMorgan Chase Bank*, 79 F.4th 290 (2d Cir. 2023), cert. denied (2024)**
>
> Notes under a $1.775 billion term loan syndicated to some 400 institutional investors were held not to be securities. The plan of distribution weighed heavily: consent requirements, high minimum assignments and a bar on assignment to natural persons. Not nationally binding, and every factor the court relied on was a drafting choice.

Run the contrast. An institutional club loan with consent-based assignment sits comfortably outside *Reves*. A CRE bridge note fractionalized into thirty passive interests, marketed as yield, with no transfer restrictions, is a different case on three of four factors.

03 Fund-level architecture: the four statutes

The offering: Securities Act of 1933

- Rule 506(b) with pre-existing relationships; 506(c) with verification to market openly.
- Form D within 15 days of first sale; Texas notice filing.
- Section 17(a) and Rule 10b-5 apply to exempt offerings.

The manager: Investment Advisers Act

- §203(m) private fund adviser exemption below $150 million; §203(l) for venture.
- Fiduciary duty and the marketing rule apply whether or not the adviser is registered.

The vehicle: Investment Company Act

- §3(c)(1) for 100 or fewer beneficial owners; §3(c)(7) for qualified purchasers.
- For real estate credit, §3(c)(5)(C) is the workhorse. It is an asset-mix test: preferred equity and mezzanine positions must be tested, not assumed.

The distribution: Exchange Act

- §15(a) broker registration for anyone paid to locate capital or investors.
- §29(b) rescission exposure where an unregistered broker was compensated.

General information for educational purposes, current as of November 2026. Not legal advice; does not create an attorney-client relationship.

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Where the securities laws attach

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04 Across a private credit deal

DEAL ELEMENT	CORPORATE CREDIT	REAL ESTATE CREDIT	THE SECURITIES HOOK
Raising the capital	Closed-end credit fund, BDC or separate account	CRE debt fund, mortgage REIT or program vehicle	1933 Act offering; ICA 3(c)(1), 3(c)(7) or 3(c)(5)(C)
The instrument	Unitranche, second lien or holdco note	Bridge note, B-note or mezzanine note	*Reves* family resemblance test
The upside	Warrants, conversion rights, penny options	Preferred equity, profit participation, exit fee	A separate equity security with its own exemption
Moving the paper	Assignment, participation or club syndication	Syndicated bridge, note participations, A/B split	*Reves* plan of distribution; 10b-5 on resale
Paying for capital	Placement agent or finder fee on the raise	Mortgage broker or capital markets fee on the placement	Exchange Act §15(a)(1); Texas dealer registration
Who may buy	Accredited investors or qualified purchasers	Accredited, plus retail through registered funds	Rule 501; ICA investor tests; Reg BI at the platform

One transaction can trigger all six rows. Most exposure comes from rows that were never analyzed, not from rows analyzed wrongly.

05 When debt carries equity

The loan and the kicker are two offerings, analyzed separately. The kicker needs its own exemption, investor representations, disclosure and Form D coverage.

- **To whom is it issued?** One institutional mezzanine fund is simple. Preferred sold to eleven individuals introduced by a mortgage broker is a private placement with a Form D, a Texas filing and a broker question.
- **Does the borrower have room?** Preemptive rights, investor consents, operating agreement transfer limits and senior lender equity-transfer bans. A closing condition, not cleanup.

06 Moving the paper and getting paid for it

- **Assignment:** consent, minimum amounts and no natural persons are the *Reves*-protective features.
- **Participation:** historically outside the securities laws, but not automatically.
- **Fractionalized interests** sold to passive individuals with no consent rights: the structure that fails *Reves*.
- **Transaction-based pay** for locating capital is the strongest indicator of broker status. The 2023 M&A broker exemption (§15(b)(13)) does not reach credit fund raises or note offerings. Texas registration applies independently.

07 Representing the capital source

- Paper the loan so *Reves* comes out as intended; keep "investor," "investment" and "broker" out where a neutral word will do.
- Give the warrant or preferred its own exemption analysis and filing.
- Diligence how the fund's own capital was raised; confirm no unregistered transaction-based pay.
- Real estate: test the 3(c)(5)(C) mix continuously; fix valuation and appraisal methodology before the first mark.

08 Representing the borrower or sponsor

- Read the equity kicker as a securities issuance by your client.
- Preferred equity is not a loan, whatever the term sheet calls it.
- Gap capital from the sponsor's own investor list is the sponsor's own offering.
- No finder success fee out of loan proceeds until broker status is resolved.
- Ask the client to name every person who will receive money at closing, and why.

Three analyses on one transaction.
Vehicle, instrument and distribution have separate answers. Most real exposure is in the rows never run.

The loan is usually not a security because of choices counsel made.
The *Kirschner* factors are drafting decisions, free at the term sheet stage.

Corporate and real estate credit fail in different places.
Corporate: the kicker and the finder. Real estate: passive capital, preferred equity and 3(c)(5)(C).

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