DALLAS BAR ASSOCIATION · SECURITIES SECTION

Securities Issues in Private Credit

The Fastest-Growing Corner of Private Capital

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ROADMAP

What We Will Cover

I The Market and the Players

What private credit actually covers, why the capital moved, and who sits on each side of the table.

II Where the Securities Laws Attach

Three levels of analysis, the Reves question, and the fund-level statutory architecture.

III Pressure Points

Equity kickers, syndication and the broker question, the retail channel, valuation and conflicts.

IV Representing the Source and the Borrower

Practice points for corporate credit and commercial real estate credit, side by side.

V Takeaways and Discussion

Three things to carry into the next deal, and questions.

I

SECTION I

The Market and the Players

What private credit covers, why the capital moved, and who sits on each side of the table.

What “Private Credit” Actually Covers

CORPORATE

Direct Lending and Unitranche

Senior secured cash flow loans to sponsor-backed and closely held borrowers, underwritten to be held rather than syndicated.

CORPORATE

Junior and Hybrid Capital

Second lien, mezzanine, holdco PIK and structured preferred, usually carrying an equity kicker of some kind.

CORPORATE

Asset-Based and Specialty Finance

Receivables, equipment, royalties, litigation finance and fund NAV lines. The fastest-growing sleeve of the asset class.

REAL ESTATE

Bridge and Transitional Debt

Floating rate senior loans on assets being leased up, repositioned, or carried to a better refinance window.

REAL ESTATE

Subordinate CRE Capital

B-notes, mezzanine secured by equity pledges, and preferred equity filling the gap between senior proceeds and payoff.

REAL ESTATE

Construction, Land and C-PACE

Ground-up, completion and program capital, often placed with a small club or funded through a dedicated vehicle.

Why the Money Moved

$1.7T to $3.5T

Estimated global private credit assets under management, depending on what is counted

$875B to $936B

U.S. commercial mortgage debt maturing in 2026 alone, against roughly $5 trillion outstanding

FOUR DRIVERS, PUSHING CORPORATE AND REAL ESTATE CREDIT FOR DIFFERENT REASONS

1

Bank capital rules and retrenchment

Post-crisis capital treatment and the 2023 regional bank stress moved origination off bank balance sheets and into funds.

2

Borrowers pay for certainty and speed

A single counterparty through closing, no flex, no ratings process and a bespoke covenant package are worth real basis points.

3

Floating rate yield pulled in new capital

Insurance and annuity balance sheets, pensions and now retail channels wanted contractual yield with duration they could match.

4

In real estate, the extensions ran out

Loans written at three to four percent are maturing into a six to eight percent market against lower values. Someone has to fill the gap.

PRACTICE POINT

The spread in that first number is not sloppy reporting. There is no agreed definition of the asset class, which is precisely why the regulatory perimeter around it is contested. When a client cites a market figure, ask what it counts.

Who Is On Each Side of the Table

CAPITAL SOURCES

- Pensions and sovereign funds
- Insurance and annuity affiliates
- Endowments and foundations
- Family offices and wealth channels
- Retail through registered vehicles
- Banks, through risk transfer

MANAGERS AND VEHICLES

- Closed-end private credit funds
- Evergreen and semi-liquid funds
- BDCs, listed and non-traded
- Interval and tender offer funds
- Mortgage REITs and CRE debt funds
- SBICs and separate accounts

INTERMEDIARIES

- Placement agents and capital raisers
- Mortgage bankers and debt brokers
- Administrative and collateral agents
- Servicers and special servicers
- Wealth platforms and RIAs

BORROWERS

- Sponsor-backed portfolio companies
- Founder and family-owned businesses
- CRE sponsors and developers
- Programmatic joint venture platforms
- Specialty finance originators

PRACTICE POINT

Every arrow between these columns is a place where somebody may be getting paid for locating capital. That is the distribution question in Section II, and it is the single most common unexamined securities exposure in a credit transaction.

The two columns in the middle are where the analysis concentrates. Managers and vehicles raise capital, which is a securities offering. Intermediaries move capital between the outer columns, which is where broker status is decided. Note also that mortgage bankers and debt brokers sit in a materially different regulatory position from placement agents, and on smaller transactions the same person sometimes plays both roles.

Same Asset Class, Different Deal

	CORPORATE CREDIT	COMMERCIAL REAL ESTATE CREDIT
Collateral	All-asset lien on an operating business, with equity pledges at holdco.	The property itself, or a pledge of the equity in the property owner.
Credit thesis	Enterprise value and free cash flow, tested by leverage and coverage covenants.	Asset value and net operating income, tested by LTV, debt yield and DSCR.
Typical structure	Unitranche or first lien with a revolver, one lender or a small club.	Senior mortgage with a mezzanine or preferred equity layer stacked above it.
Core documents	Credit agreement, security agreement, intercreditor, sponsor support letter.	Loan agreement, deed of trust, recognition and intercreditor agreements, guaranties.
The borrower	A company with a board, a sponsor, employees and other creditors.	A single purpose entity with a sponsor, joint venture partners and passive investors.
Where securities law bites	Equity kickers, syndication mechanics, fund-level offering, adviser status.	Preferred equity, passive investor capital, note programs, mortgage fund exemption.
Distress path	Amend and extend, out of court restructuring, Chapter 11.	Extension and reserves, deed in lieu, UCC foreclosure on the pledged equity.

Read the sixth row twice. The two columns fail in different places, and the diligence that catches one will not catch the other.

II

SECTION II

Where the Securities Laws Attach

Three levels of analysis, the Reves question, and the fund-level statutory architecture.

Three Levels, Three Different Questions

1

The vehicle level

Whoever is raising the capital is almost certainly selling a security, whether it is labeled a fund interest, a note program or a joint venture unit. The Securities Act, the Investment Company Act and the Advisers Act all engage here.

2

The instrument level

The loan itself is usually not a security. That is a conclusion, not an assumption. Reves governs, and the answer moves with the plan of distribution and the presence of another regulatory scheme.

3

The distribution level

Anyone compensated for locating capital, borrowers or investors may be acting as a broker. Exchange Act Section 15(a)(1) does not care what the parties called the arrangement or what the business card says.

PRACTICE POINT

These three questions are **independent** of one another. A transaction can clear cleanly at the instrument level and fail badly at the distribution level, and the answer at the vehicle level does not change either one. Run all three or you have not run the analysis.

Is the Loan a Security?

Every note is presumed to be a security. The presumption is rebutted only if the note bears a strong family resemblance to a judicially recognized exception, tested against four factors.

1 Motivations of buyer and seller

Investment motivation on both sides points toward a security. A commercial or corporate purpose points away.

2 Plan of distribution

Broad offering to the public points toward a security. Transfer restrictions, minimum assignment amounts and a bar on assignment to natural persons point away.

3 Reasonable expectations of the investing public

What the market and the documents call the instrument matters. Marketing that leans on “investor,” “investment” and “yield” cuts the wrong way.

4 Another regulatory scheme reducing risk

Bank regulatory guidance, perfected collateral and a first priority lien reduce the need for securities law protection.

KIRSCHNER v. JPMORGAN CHASE BANK, 79 F.4th 290 (2d Cir. 2023), cert. denied (2024)

The Second Circuit applied these factors and held that a $1.775 billion syndicated term loan was not a security, relying heavily on the second factor: consent requirements, million-dollar minimum assignment amounts and a prohibition on assignment to natural persons. The holding is not nationally binding, the SEC declined to file a view, and *every factor the court relied on was a drafting choice*.

PRACTICE POINT

Run the contrast for your own files. An institutional club loan with consent-based assignment sits comfortably outside *Reves*. A commercial real estate bridge note fractionalized into thirty passive interests, marketed as a yield product with no transfer restrictions and no consent rights, is a different case on three of the four factors. Same asset class, opposite answer, and the difference is in documents transactional counsel drafted.

Fund-Level Architecture: The Four Statutes

THE OFFERING

Securities Act of 1933

- Rule 506(b) where the manager has pre-existing substantive relationships; 506(c) with verification where it wants to market openly
- Form D within fifteen days of first sale; blue sky preemption for Rule 506, but Texas notice filings still required
- Regulation S for offshore capital; Section 17(a) and Rule 10b-5 apply to exempt offerings too

THE VEHICLE

Investment Company Act of 1940

- Section 3(c)(1) for one hundred or fewer beneficial owners; Section 3(c)(7) for qualified purchasers
- For real estate credit, Section 3(c)(5)(C) is the workhorse: primarily mortgages and other liens on real estate
- The 3(c)(5)(C) test is an asset mix test. Preferred equity and mezzanine positions must be tested, not assumed

THE MANAGER

Investment Advisers Act of 1940

- Section 203(m) private fund adviser exemption below $150 million; Section 203(l) for venture
- State registration below the federal threshold; exempt reporting advisers still file a truncated Form ADV
- Fiduciary duty and the marketing rule apply whether or not the adviser is registered

THE DISTRIBUTION

Securities Exchange Act of 1934

- Section 15(a) broker registration for anyone paid to locate capital or investors
- Rule 10b-5 in every offering, exempt or not, and in every secondary transfer
- Section 29(b) rescission exposure where an unregistered broker was compensated

Where Securities Law Attaches

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	Separate equity security; needs 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 is allowed to buy	Accredited investors or qualified purchasers	Accredited, plus retail through registered funds	Rule 501; ICA investor tests; Reg BI at the platform

PRACTICE POINT

Six elements, and a single transaction can trigger analysis under all six. The exposure in most deals is not that any one row was analyzed incorrectly. It is that only two or three rows were analyzed at all.

III

SECTION III

Pressure Points

Equity kickers, syndication and the broker question, the retail channel, and valuation and conflicts.

When Debt Carries Equity

CORPORATE CREDIT

- Warrants and penny warrants issued with the note
- Conversion rights and PIK toggle features
- Structured or participating preferred taken alongside the loan
- Co-investment offered to the lender's own limited partners

REAL ESTATE CREDIT

- Preferred equity with a fixed return and a back-end participation
- Mezzanine secured by a pledge of equity in the property owner
- Profit participation, exit fees tied to value, shared appreciation
- Co-general partner and joint venture positions taken alongside the loan

THE RULE

The credit instrument and the equity instrument are **two separate offerings**, analyzed separately. The loan may sit entirely outside the securities laws while the warrant, the conversion right or the preferred unit plainly does not. The equity piece needs its own exemption, its own investor representations, its own disclosure and its own Form D coverage.

PRACTICE POINT

Ask two questions every time. First, to whom is the equity actually issued? A mezzanine fund taking a warrant is straightforward: one institutional holder, accredited, sophisticated, represented by counsel. A preferred equity piece syndicated to eleven individuals introduced by the sponsor's mortgage broker is a private placement with a Form D obligation, a Texas notice filing and a broker-status problem attached to the same set of facts.

Second, does the borrower have room to issue it. Preemptive rights, existing investor consents, transfer restrictions in the operating agreement and, in real estate, the senior lender's prohibition on equity transfers all bear on whether the kicker can be delivered at all. This is a closing condition, not a post-closing cleanup item.

Moving the Paper and Getting Paid for It

Assignment

The lender of record changes. Borrower and agent consent, minimum amounts, and a bar on natural persons are the Reves-protective features.

Participation

Economic interest only, no privity with the borrower. Historically outside the securities laws, but the analysis is not automatic.

Fractionalized interests

Note interests sold to passive individual holders with no consent rights and no transfer restrictions. This is the structure that fails Reves.

THE COMPENSATION QUESTION

Transaction-based compensation for locating capital, borrowers or investors is the single strongest indicator of broker status under Exchange Act Section 15(a)(1). The title on the business card is irrelevant.

- Capital raisers marketing fund interests to prospective limited partners for a percentage of the raise
- Finders introducing a borrower to a lender, or a lender to a deal, for a share of the fee
- Mortgage brokers who cross from placing the loan into placing investors in the loan or in the preferred equity above it
- The 2023 federal M&A broker exemption in Exchange Act Section 15(b)(13) is narrow and does not reach capital raising for credit funds or note offerings
- Texas dealer and agent registration under the Texas Securities Act applies independently of the federal analysis

PRACTICE POINT

Section 29(b) makes a contract made in violation of the Exchange Act voidable at the election of the innocent party. That exposure runs against the transaction, not just against the unregistered finder, which is why this belongs in diligence rather than in the fee letter. Ask early and in writing: who is being paid, by whom, on what, and are they registered.

The Retail Channel and Why It Reaches Your Deal

THE VEHICLES

- Non-traded BDCs
- Interval funds
- Tender offer funds
- Private credit ETFs
- Non-traded mortgage REITs

WHAT CHANGED

- An August 2025 executive order directed regulators to open alternative assets to defined contribution plans
- The Department of Labor followed with a proposed rule in March 2026
- The SEC held a March 2026 roundtable on retailization and has signaled rulemaking on retail access and accredited investor status

WHERE THE RISK LANDS

- Valuation and reported net asset value
- Liquidity, redemption gating and disclosure of both
- Suitability and Regulation Best Interest at the distribution platform
- Rule 10b-5 exposure when marks move sharply

THE CONNECTION TO YOUR CLIENT AND ITS DEAL

Retail capital sits at the top of the same structures that fund your client's loan. When a non-traded BDC or an interval fund holds the paper, the disclosure, valuation and liquidity obligations of that vehicle reach down into how the underlying credit is documented, marked and reported.

PRACTICE POINT

This matters even if your client never touches a retail vehicle. The retail channel is the reason valuation discipline, side letter parity, and disclosure of payment-in-kind income and non-accrual status have moved from commercial preferences to examination topics. Litigation has followed the capital: securities claims against business development companies alleging overstated net asset value and untimely marks are now a recognizable fact pattern.

For real estate credit specifically, watch the non-traded mortgage REIT and program note channels, where the same retail pressure arrives without the Investment Company Act reporting apparatus that surrounds a business development company.

Valuation, Disclosure and Conflicts

WHAT WAS VACATED

The SEC's 2023 Private Fund Adviser Rules were vacated in full by the Fifth Circuit in June 2024. The quarterly statement rule, the mandatory audit rule, the adviser-led secondary fairness opinion requirement and the preferential treatment restrictions are gone as rules.

WHAT WAS NOT

- The adviser's fiduciary duty, registered or exempt
- The custody rule and its audit or surprise examination path
- The marketing rule, including performance presentation
- Rule 10b-5 and Advisers Act antifraud provisions

WHERE THE PRESSURE ACTUALLY SITS NOW

- Valuation methodology consistency, and internal marks versus third party marks
- Payment-in-kind income and non-accrual disclosure
- Cross-fund and affiliate transactions, including loans between related vehicles
- In real estate, appraisal timing and the age of the underlying value
- Servicer and special servicer conflicts where the lender controls the workout
- Lender-affiliated equity positions taken alongside the credit

PRACTICE POINT

What the vacated rules would have mandated, institutional limited partners now demand by contract. Read the limited partnership agreement and the side letters together, because after the vacatur the enforceable obligations live wherever the parties put them, and side letter parity has become the practical substitute for the preferential treatment rule.

IV

SECTION IV

Representing the Source and the Borrower

Practice points for corporate credit and commercial real estate credit, side by side.

Representing the Capital Source

CORPORATE CREDIT

- Paper the loan so *Reves* comes out the way you intend: consent-based assignment, minimum assignment amounts, no assignment to natural persons
- Keep “investor,” “investment” and “broker” out of the credit agreement and the marketing materials where a neutral word will do
- Give the warrant or preferred its own exemption analysis, its own accredited investor representations, and its own Form D coverage
- Diligence how the fund’s own capital was raised before relying on the fund’s authority to lend
- Confirm nobody in the chain took transaction-based compensation without registration

REAL ESTATE CREDIT

- Test the Section 3(c)(5)(C) asset mix continuously, not only at formation. Preferred equity and mezzanine positions move the ratio
- Where the loan is placed with passive individuals, treat it as an offering: real disclosure, subscription documents, Form D and a Texas notice filing
- Run mortgage licensing and usury analysis in every state where collateral sits, alongside the securities analysis
- Fix the valuation and appraisal methodology before the first mark, not after the first investor challenge
- Document the workout authority and the consent thresholds before you need them

PRACTICE POINT

Both columns share one habit worth noting: run the *Reves* analysis, and the offering analysis, at the term sheet stage, ***not*** at the closing checklist stage. By the time the documents are circulating, the plan of distribution and the identity of the equity holders are already fixed, and the cheap fixes are no longer available.

The corresponding diligence question on both sides is the same one: who else is in the capital chain, and how is each of them being paid. That single question surfaces the finder problem, the syndication problem and the passive investor problem at once.

Representing the Borrower or Sponsor

CORPORATE CREDIT

- Read the equity kicker as a securities issuance by your client, and confirm cap table capacity, preemptive rights and existing investor consents
- Watch the information covenants: what the lender may share with its own limited partners and syndicate is a disclosure decision your client is making
- Do not let a finder be paid a success fee out of loan proceeds without resolving broker status first
- Preserve the record of what was told to the lender. Rule 10b-5 exposure travels with the equity component even where the loan is not a security

REAL ESTATE CREDIT

- Preferred equity is not a loan, whatever the term sheet calls it. Confirm what the operating agreement, the senior loan and existing investors permit
- If gap capital is coming from the sponsor's own investor list, that is a securities offering by the sponsor, with its own exemption, disclosure and Texas notice filing
- Check change of control, forced sale and removal rights in the preferred documents against existing joint venture and limited partner obligations
- Plan the workout before the extension. A UCC foreclosure on pledged equity resolves faster than a mortgage foreclosure and is often the real remedy

PRACTICE POINT

The borrower-side error that recurs in both columns is treating the capital raise and the credit facility as one transaction because they closed on the same day. They are two transactions with two different bodies of law, and only one of them is a lending matter.

The practical test: ask your client to name every person who will receive money at closing and why. Anyone paid for finding capital, on either side, belongs in the securities analysis rather than in the sources and uses.

THREE THINGS TO TAKE AWAY

Securities Issues in Private Credit

1

Private credit is three securities analyses stacked on one transaction.

The vehicle, the instrument and the distribution are separate questions with separate answers. Clearing one does not clear the others, and most real exposure comes from rows of the analysis that were never run at all.

2

The loan is usually not a security because of choices counsel made.

Consent-based assignment, minimum assignment amounts, a bar on natural persons and disciplined vocabulary are the Reves factors that carried Kirschner. Every one of them is a drafting decision, available for free at the term sheet stage.

3

Corporate and real estate credit fail in different places.

Corporate deals get into trouble on the equity kicker and on the person who found the money. Real estate deals get into trouble on passive investor capital, on preferred equity, and on whether the fund still fits its own Investment Company Act exemption.

Questions & Discussion

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