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Small Business Credit Availability Act: Increasing Capital and Flexibility for Business Development Companies

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Dechert LLP

Small Business Credit Availability Act: Increasing Capital and Flexibility for Business Development Companies

Highlights

- On March 23, 2018, President Trump signed the Small Business Credit Availability Act (the Act), which aims to increase the availability of funding to small to mid-sized private U.S. companies and startups by increasing the capital available to business development companies (BDCs) and reducing certain regulatory burdens on BDCs.
- The Act loosens the leverage limits under the Investment Company Act of 1940, as amended (the 1940 Act), applicable to BDCs by reducing the asset coverage requirements for senior securities from 200% asset coverage to 150% asset coverage, subject to certain conditions described herein.
- The Act also reduces disparities in treatment for BDCs as compared to other SEC registrants under the Securities Act of 1933, as amended (the 1933 Act), related to offering and reporting requirements, streamlining securities registration and reporting for BDCs.

BDCs are an important source of funding for small to mid-sized private U.S. companies with limited access to traditional capital markets. The Act, which was included as part of the Consolidated Appropriations Act, 2018 (H.R. 1625),[1] aims to increase the availability of funding to small to mid-sized private U.S. companies by increasing the capital available to BDCs, subject to certain requirements, and reducing certain regulatory burdens on BDCs. By modernizing the BDC regulatory framework, the Act allows BDCs to take advantage of certain streamlined regulations related to registration and offerings that are currently available to other public companies.

Overview

BDCs are closed-end investment companies designed to facilitate capital raising by small to mid-sized private U.S. companies. They are subject to requirements under the 1940 Act that are, in many cases, less onerous than the provisions of the 1940 Act applicable to traditional closed-end investment companies. Nevertheless, certain aspects of the regulatory scheme governing BDCs limit the ability of BDCs to invest efficiently in small to mid-sized private U.S. companies. In particular, 1940 Act limitations on borrowings and other forms of leverage have been seen to have impeded BDCs from making more extensive investments in small to mid-sized private U.S. companies. In addition, BDCs generally register their securities under the Securities Exchange Act of 1934, as amended (the 1934 Act), and are required to file an election for BDC status under the 1940 Act. As such, they are generally subject to the same reporting requirements under the 1934 Act as operating companies. Currently, however, certain rules under the 1933 Act that facilitate capital raising by operating companies are not available to BDCs when they are registering their securities under the 1933 Act in connection with potential public offerings or are applied to such BDCs in a less favorable manner than to other 1933 Act registrants.

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[1] Consolidated Appropriations Act, 2018, H.R. 1625 115th Cong. (2018). The Act is included as Title VIII of Division S.

The Act will make capital more readily available to BDCs and allow them to invest in their target companies by relaxing leverage limits applicable to BDCs and enabling BDCs to use take advantage of certain rules that are available to other 1933 Act registrants. To achieve these goals, the Act both amends Section 61 of the 1940 Act and compels the Securities and Exchange Commission (SEC) to amend certain rules to:

- loosen the 1940 Act leverage limits applicable to BDCs by reducing the asset coverage requirements for indebtedness from 200% asset coverage to 150% asset coverage (equivalent to a 66-2/3% debt-to-total capital ratio), provided that BDCs satisfy certain disclosure and approval requirements as set forth in the Act; and

- reduce disparities in treatment for BDCs as compared to other 1933 Act registrants related to offering and reporting requirements, streamlining securities registration and reporting for BDCs, including permitting forward incorporation by reference and more flexible shelf registration requirements for larger, more established BDCs.

President Trump signed the Act into law on March 23, 2018.

Changes under the Act

Amendments to Increase BDC Leverage

The 1940 Act's asset coverage requirements limit the ability of BDCs to incur leverage. As a result, BDCs typically incur much lower levels of leverage than private funds, such as hedge funds or private equity funds, small business investment companies, and operating companies. Under the prior asset coverage requirements of the 1940 Act, a BDC could not borrow or issue a senior security unless, immediately following such borrowing or issuance, the BDC has asset coverage of at least 200%, equivalent to a 50% debt-to-total capital ratio. The Act reduces this 200% asset coverage requirement for BDCs to 150%, equivalent to a 66-2/3% debt to total capital ratio, if the relevant approvals are received.[2] Put another way, a BDC was previously required to hold $2.00 in assets for every $1.00 borrowed; under the Act, a BDC would need only $1.50 in assets for each $1.00 borrowed if the relevant approvals are received. This reduction in the asset coverage requirement allows BDCs to incur more leverage, enabling them to raise additional capital to invest in small to mid-sized private U.S. companies, with a corresponding increase in the default risk associated with investments in BDCs.

A BDC wishing to reduce its asset coverage requirement to 150% may elect to do so in one of two ways. First, (i) a majority of the BDC's board of directors and (ii) a majority of directors who are not interested persons of the BDC may approve the decreased asset coverage ratio. The decreased ratio would then become effective on the one-year anniversary of such approval. Alternatively, a BDC's stockholders, by majority vote at an annual or special meeting of the stockholders at which a quorum is present, may approve the decreased asset coverage ratio, which ratio would become effective on the first day following the date of such approval. In either case, a BDC electing to take advantage of the increased leverage must disclose within five business days that it has made the election and must provide additional disclosures about the election, the amount of the BDC's outstanding leverage and the potential risks of such leverage to its investors in SEC filings and stockholder reports. Significantly, the availability of two different paths for a BDC to become subject to the lower asset coverage requirements will allow each BDC to

[2] Compared with the 300% asset coverage requirement generally applicable to registered investment companies, BDCs already enjoy a less restrictive regime with respect to leverage.

determine based on its individual needs and circumstances whether to incur the cost of obtaining stockholder approval in order to be able to incur greater leverage or to simply wait a year following board approval to gain that ability. Factors to be considered in evaluating these two paths include timing of any necessary amendments to existing debt documents and scheduling of a stockholder meeting as well as management's views on prospects of obtaining stockholder approval.

In addition, a BDC which does not have its common stock listed on a national securities exchange must offer each stockholder of record on the approval date the opportunity for the BDC to repurchase such stockholder's securities held on such date. The BDC then must repurchase, by tender offer or otherwise, 25% of the securities held by electing stockholders of record on the approval date in each of the four succeeding calendar quarters following the quarter during which the reduced asset coverage ratio was approved. Significantly, the Act does not specify the purchase price at which such shares must be repurchased, which may allow for the development of different practices and approaches in this area.

The amendments to Section 61 of the 1940 Act, marked to show changes from the prior text, are included as **Exhibit A.**

Registration and Proxy Parity for BDCs

Additionally, the Act streamlines the SEC registration and reporting requirements applicable to BDCs by requiring the SEC to revise relevant rules and forms so that a BDC can "use the securities offering and proxy rules that are available to other" 1934 Act registrants. Prior to the enactment of the Act, for example, BDCs: (i) were excluded from the definition of "well-known seasoned issuer," or WKSI, and thus could not enjoy the benefits of such status, such as flexibility to add different types of securities to an effective shelf registration statement; and (ii) could not benefit from universal registration by incorporating certain SEC filings into a prospectus by reference as other 1934 Act registrants have done for several decades. A chart detailing the amendments to these rules is included as **Exhibit B.** The SEC has until March 23, 2019 to adopt implementing rules to make these provisions effective. If not implemented by such date, the changes would become self-implementing.

Conclusion

The Act aims to facilitate capital formation by BDCs, thereby increasing the availability of funding for small to mid-sized private U.S. companies and startups, by increasing the amount of leverage BDCs may incur and by conforming BDC registration and reporting to established norms for other public companies. We expect that passage of the Act will have broad, favorable implications for the BDC industry and is likely to make BDCs a more attractive vehicle for investment managers to offer into the market.

EXHIBIT A

H.R. 1625: AMENDMENTS TO THE INVESTMENT COMPANY ACT OF 1940

CAPITAL STRUCTURE

Section 61. (a) Notwithstanding the exemption set forth in Section 6(f), Section 18 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except as follows:

(1) ~~The asset coverage requirements of Section 18(a)(1)(A) and (B) applicable to business development companies shall be 200 per centum.~~ Except as provided in paragraph (2), the asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) (and any related rule promulgated under this Act) applicable to business development companies shall be 200 percent.

(2) The asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) and of subparagraphs (A) and (B) of section 18(a)(2) (and any related rule promulgated under this Act) applicable to a business development company shall be 150 percent if—

(A) not later than 5 business days after the date on which those asset coverage requirements are approved under subparagraph (D) of this paragraph, the business development company discloses that the requirements were approved, and the effective date of the approval, in—

(i) any filing submitted to the Commission under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a); 78o(d)); and

(ii) a notice on the website of the business development company;

(B) the business development company discloses, in each periodic filing required under section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a))—

(i) the aggregate outstanding principal amount or liquidation preference, as applicable, of the senior securities issued by the business development company and the asset coverage percentage as of the date of the business development company's most recent financial statements included in that filing;

(ii) that the business development company, under subparagraph (D), has approved the asset coverage requirements under this paragraph; and

(iii) the effective date of the approval described in clause (ii);

(C) with respect to a business development company that is an issuer of common equity securities, each periodic filing of the company required under section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a)) includes disclosures that are reasonably designed to ensure that shareholders are informed of—

(i) the amount of senior securities (and the associated asset coverage ratios) of the company, determined as of the date of the most recent financial statements of the company included in that filing; and

(ii) the principal risk factors associated with the senior securities described in clause (i), to the extent that risk is incurred by the company; and

(D) the company—

(i)(I) through a vote of the required majority (as defined in section 57(o)), approves the application of this paragraph to the company, to become effective on the date that is 1 year after the date of the approval; or

(II) obtains, at a special or annual meeting of shareholders or partners at which a quorum is present, the approval of more than 50 percent of the votes cast for the application of this paragraph to the company, to become effective on the first day after the date of the approval; and

(ii) if the company is not an issuer of common equity securities that are listed on a national securities exchange, extends, to each person that is a shareholder as of the date of an approval described in subclause (I) or (II) of clause (i), as applicable, the opportunity (which may include a tender offer) to sell the securities held by that shareholder as of that applicable approval date, with 25 percent of those securities to be repurchased in each of the 4 calendar quarters following the calendar quarter in which that applicable approval date takes place.

~~(2)~~ (3) Notwithstanding Section 18(c), a business development company may issue more than one class of senior security representing indebtedness.

~~(3)~~ (4) Notwithstanding Section 18(d)—

(A) A business development company may issue warrants, options, or rights to subscribe or convert to voting securities of such company accompanied by securities, if—

(i) Such warrants, options, or rights expire by their terms within 10 years;

(ii) Such warrants, options, or rights are not separately transferable unless no class of such warrants, options, or rights and the securities accompanying them has been publicly distributed;

(iii) The exercise or conversion price is not less than the current market value at the date of issuance, or if no such market value exists, the current net asset value of such voting securities; and

(iv) The proposal to issue such securities is authorized by the shareholders or partners of such business development company, and such issuance is approved by the required majority (as defined in Section 57(o)) of the directors of or general partners in such company on the basis that such issuance is in the best interests of such company and its shareholders or partners;

(B) A business development company may issue, to its directors, officers, employees, and general partners, warrants, options, and rights to purchase voting securities of such company pursuant to an executive compensation plan, if—

(i)(I) In the case of warrants, options, or rights issued to any officer or employee of such business development company (including any officer or employee who is also a director of such company), such securities satisfy the conditions in clauses (i), (iii), and (iv) of subparagraph (A); or (II) in the case of warrants, options, or rights issued to any director of such business development company who is not also an officer or employee of such company, or to any general partner in such company, the proposal to issue such securities satisfies the conditions in clauses (i) and (iii) of subparagraph (A), is authorized by the shareholders or partners of such company, and is approved by order of the Commission, upon application, on the basis that the terms of the proposal are fair and reasonable and do not involve overreaching of such company or its shareholders or partners;

(ii) Such securities are not transferable except for disposition by gift, will, or intestacy;

(iii) No investment adviser of such business development company receives any compensation described in Section 205(a)(1) of Title II of this Act, except to the extent permitted by paragraph (1) or (2) of Section 205(b); and

(iv) Such business development company does not have a profit-sharing plan described in Section 57(n); and

(C) A business development company may issue warrants, options, or rights to subscribe to, convert to, or purchase voting securities not accompanied by securities, if—

(i) Such warrants, options or rights satisfy the conditions in clauses (i) and (iii) of subparagraph (A); and

(ii) The proposal to issue such warrants, options, or rights is authorized by the shareholders or partners of such business development company, and such issuance is approved by the required majority (as defined in Section 57(o)) of the directors of or general partners in such company on the basis that such issuance is in the best interests of the company and its shareholders or partners.

Notwithstanding this paragraph, the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance shall not exceed 25 per centum of the outstanding voting securities of the business development company, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to such company's directors, officers, employees, and general partners pursuant to any executive compensation plan meeting the requirements of subparagraph (B) of this paragraph would exceed 15 per centum of the outstanding voting securities of such company, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance shall not exceed 20 per centum of the outstanding voting securities of such company.

~~(4)~~ (5) For purposes of measuring the asset coverage requirements of Section 18(a), a senior security created by the guarantee by a business development company of indebtedness issued by another company

shall be the amount of the maximum potential liability less the fair market value of the net unencumbered assets (plus the indebtedness which has been guaranteed) available in the borrowing company whose debts have been guaranteed, except that a guarantee issued by a business development company of indebtedness issued by a company which is a wholly-owned subsidiary of the business development company and is licensed as a small business investment company under the Small Business Investment Act of 1958 shall not be deemed to be a senior security of such business development company for purposes of Section 18(a) if the amount of the indebtedness at the time of its issuance by the borrowing company is itself taken fully into account as a liability by such business development company, as if it were issued by such business development company, in determining whether such business development company, at that time, satisfies the asset coverage requirements of Section 18(a).

(b) A business development company shall comply with the provisions of this section at the time it becomes subject to Sections 55 through 65, as if it were issuing a security of each class which it has outstanding at such time.

EXHIBIT B

H.R. 1625, Division S, SECTION 803: PARITY FOR BUSINESS DEVELOPMENT COMPANIES REGARDING OFFERING AND PROXY RULES

Rule(s)	Current Operation	Change and Effect
Rule 405	Rule 405: Definitions of Terms Rule 405: excludes BDCs from the definition of "well-known seasoned issuer"; and omits registration statements filed on Form N-2 from the definition "automatic shelf registration statement."	***Change:*** Instructs the SEC to revise Rule 405 to remove the exclusion of BDCs from the definition of "well-known seasoned issuer" and add registration statements filed on Form N-2 to the definition of "automatic shelf registration statement." ***Effect:*** The changes will permit BDCs to qualify as well-known seasoned issuers (WKSIs). WKSIs face less stringent disclosure and communication requirements. For example, many rules exempt WKSI communications from the "gun-jumping" restrictions of Section 5 of the 1933 Act. The changes will also allow BDCs qualifying as WKSIs to file automatic shelf registration statements and to add classes of securities to effective shelf registration statements. Automatic shelf registration statements become effective upon filing, offering a quicker registration process.
Rules 168 and 169	Rule 168 provides reporting companies a safe harbor from Sections 5(c) and 2(a)(10) of the 1933 Act for certain factual business communications and forward looking information. Rule 169 provides a similar, but more limited, safe harbor for non-reporting companies.	***Change:*** Instructs the SEC to revise Rules 168 and 169 to remove the exclusion of BDCs. ***Effect:*** The changes will permit BDCs to release factual business information with more certainty. Reduction in potential prospectus liability would offer BDCs more flexibility in communicating to the investor community.

Rule(s)	Current Operation	Change and Effect
Rule 163	Rule 163 provides WKSIs a safe harbor from Section 5(c)'s prohibition on pre-filing offers if certain conditions are met (ex. filing of a prescribed legend).	***Change:*** Instructs the SEC to revise Rule 163 to remove the exclusion of communications made by BDCs. ***Effect:*** The changes will reduce a BDC's potential for prospectus liability under the 1933 Act by allowing BDCs greater flexibility in communications. For example, BDCs that qualify as WKSIs would be able to utilize free-writing prospectuses before filing a registration statement.
Rule 163A	Rule 163A provides issuers a safe harbor from Section 5(c)'s prohibition on pre-filing offers for communications made more than 30 days before the filing of a registration statement.	***Change:*** Instructs the SEC to revise Rule 163A to remove the exclusion of communications made by BDCs. ***Effect:*** The changes will reduce a BDC's potential for prospectus liability under the 1933 Act by allowing BDCs greater flexibility in communications before filing a registration statement.
Rule 134	Rule 134 provides a safe harbor that allows an issuer to make certain communications during the waiting period (the period between initial provision of the registration statement to the SEC and when the SEC declares the registration statement effective) of the public registration process.	***Change:*** Instructs the SEC to revise Rule 134 to remove the exclusion of communications relating to BDCs. ***Effect:*** The change will reduce a BDC's potential for prospectus liability under the 1933 Act by permitting BDCs greater flexibility in communications. For example, issuers commonly use Rule 134 to safely issue press releases and advertisements.
Rules 138 and 139	Rules 138 and 139 provide safe harbors for brokers and dealers that provide market analysis to the investor community. Publications, distributions or reports within either rule will not constitute offers to/for sale under Sections 2(a)(10) and 5(c) of the 1933 Act.	***Change:*** Instructs the SEC to revise Rules 138 and 139 to specifically include BDCs. ***Effect:*** Brokers and dealers will be better able to provide coverage and analysis of a BDC's securities.

Rule(s)	Current Operation	Change and Effect
Rule 156	Rule 156 provides that it is unlawful for any person to use in interstate commerce sales literature which is materially misleading in connection with the offer or sale of securities by an investment company.	***Change:*** Instructs the SEC to revise Rule 156 to provide that Rule 156 does not prevent a BDC from qualifying for an exemption under Rule 168 or Rule 169. ***Effect:*** The change will further permit BDCs to release factual business information with more certainty.
Rule 164	Rule 164 provides a safe harbor for issuers that utilize post-filing free writing prospectuses. For instance, an unintentional or immaterial failure to comply with legend, filing or retention requirements may be curable under Rule 164.	***Change:*** Instructs the SEC to revise Rule 164 to remove the exclusion of BDCs. ***Effect:*** BDCs would be able to communicate to potential investors through free writing prospectuses.
Rule 433	Rule 433 provides guidelines for when seasoned issuers, well-known seasoned issuers, non-reporting issuers, and unseasoned issuers can utilize post-filing free writing prospectuses.	***Change:*** Instructs the SEC to revise Rule 433 to specifically include BDCs. ***Effect:*** BDCs that qualify as seasoned issuers or well-known seasoned issuers would be able to utilize free-writing prospectuses after filing a registration statement as long as the registration statement contains a preliminary or base prospectus.
Rule 415	Rule 415 specifies which offerings qualify for shelf registration and imposes certain obligations to remain qualified. For instance, Rule 415 requires issuers to update their prospectuses to disclose fundamental changes.	***Change:*** Instructs the SEC to revise Rule 415 to state that the registration for securities under Rule 415(a)(1)(x) includes securities registered on Form N-2 by a BDC. ***Effect:*** BDCs would be able to utilize continuous or delayed offerings.

Rule(s)	Current Operation	Change and Effect
Rule 497	Rule 497 governs when investment companies must file prospectuses during the registration process.	***Change:*** Instructs the SEC to revise Rule 497 to include a process for a BDC to file a form of prospectus in the same manner as the process for filing a form of prospectus under Rule 424(b). ***Effect:*** Rule 424(b) provides requirements for post-effective filings of prospectuses. Prospectuses and prospectus supplements prepared and given to investors after the SEC has declared the registration statement effective must be filed in accordance with one of eight subsections of Rule 424(b).
Rules 172 and 173	Rule 172 exempts written confirmations of sales, notifications of allocations and deliveries of securities from the prospectus delivery requirements of Section 5(b)(1) of the 1933 Act if the issuer has already filed the final prospectus with the SEC or makes a good faith effort to file a final prospectus within the timeframe required by Rule 424. Rule 173 allows an issuer, underwriter or broker to provide to purchasers, upon completion of a sale, either: a copy of the final prospectus; or a notice that the sale was made pursuant to a valid registration statement.	***Change:*** Instructs the SEC to revise Rules 172 and 173 to remove the exclusion of BDCs. ***Effect:*** The change will permit BDCs greater flexibility in the sales process in parity with other issuers covered by the rules.
Rule 418	Rule 418 permits the SEC to request supplemental information concerning the registrant, the registration statement, a distribution of securities, underwriters' activities and other information.	***Change:*** Instructs the SEC to revise Rule 418 to exclude BDCs from the provisions of Rule 418(a)(3). ***Effect:*** BDCs will not be required to provide the SEC with certain reports or memoranda relating to broad aspects of such BDC's business.

REVISIONS TO SCHEDULE 14A

Schedule	Current Operation	Change and Effect
14A	Public companies, including BDCs, use Schedule 14A to file proxy statements pursuant to Section 14(a) of the 1934 Act. Item 13 of Schedule 14A requires companies to make certain disclosures if action is to be taken at the related stockholders' meeting regarding (i) an authorization or issuance of securities other than for exchange or (ii) a modification or exchange of securities.	***Change:*** Instructs the SEC to revise Item 13(b)(1) of Schedule 14A to include BDCs. ***Effect:*** The change will permit a BDC to incorporate the information required by Item 13(a) by reference to previously filed documents, subject to certain conditions.

REVISIONS TO REGULATION FD

Rule	Current Operation	Change and Effect
Rule 103	Rule 103 provides that a failure to make a public disclosure under Rule 100 of Regulation FD shall not affect whether an issuer has filed all material required pursuant to Section 13 or Section 15(d) of the 1934 Act.	***Change:*** Instructs the SEC to revise Rule 103 to provide that Rule 103(a) applies for purposes of Form N-2. ***Effect:*** BDCs will not lose eligibility to use Form N-2 due to a failure to make a public disclosure pursuant to the selective disclosure requirements under Regulation FD.

REVISIONS TO FORM N-2

Form	Current Operation	Change and Effect
N-2	BDCs use Form N-2 to register their shares under the 1933 Act. Presently, a BDC's registration statement on Form N-2 must contain in the document all information that investors must be provided, whereas other issuers are permitted to incorporate information, such as their financial statements, by including in the registration statement a reference to where the required information is publicly available in another SEC filing.	***Change:*** Instructs the SEC to include instructions in Form N-2: to provide that any BDC that meets the requirements of Form S-3 shall incorporate by reference its reports and documents filed under the 1934 Act into its registration statement filed on Form N-2. to provide that a BDC that is a well-known seasoned issuer may file automatic shelf offerings on Form N-2 (or any successor form).

Form	Current Operation	Change and Effect
		Effect: The changes will permit BDCs to incorporate information that they already file under the 1934 Act into the registration process. Incorporation would enhance the efficiency with which BDCs register securities. Furthermore, the changes would allow BDCs that qualify as well-known seasoned issuers to file automatic shelf offerings on Form N-2. Automatic offerings would provide BDCs with more options in choosing when to offer securities.
N-2 (Item 34)	Item 34 of Form N-2 requires BDCs to furnish certain undertakings in registration statements on Form N-2.	***Change:*** Instructs the SEC to revise Item 34 of Form N-2 to require BDCs to provide undertakings that are no more restrictive than those required of a registrant under Rule 512 under the 1933 Act. ***Effect:*** The change will reduce a BDC's potential for liability under the 1933 Act with respect to its registration statement on Form N-2.

This update was authored by:

Thomas J. Friedmann
Partner
Boston
+1 617 728 7120
thomas.friedmann@dechert.com

David J. Harris
Partner
Washington, D.C.
+1 202 261 3385
david.harris@dechert.com

William J. Tuttle
Partner
Washington, DC
+1 202 261 3352
william.tuttle@dechert.com

James M. Curtis
Counsel
Washington, D.C.
+1 202 261 7734
james.curtis2@dechert.com

Owen T. Williams
Associate
Washington, DC
+1 202 261 3346
owen.williams@dechert.com