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Law Note - Securities Commission Clarifies Material Change Reporting Obligations

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In a highly anticipated decision, the Ontario Securities Commission ("OSC") provided new guidance to the business community as to when a public issuer is required to disclose its intention to complete a merger and acquisition transaction.

Although the OSC decision does not purport to provide a bright line test, it does provide considerable comfort to public issuers that sale or acquisition transactions will not be a material change requiring disclosure until all parties are firmly committed. In almost all commercial cases, we expect that the "firm commitment" time will be when definitive agreements are signed.

The decision is also helpful in confirming the generally accepted practice of not disclosing non-binding letters of intent. However, the OSC decision suggests the issuer is likely to have a disclosure obligation when, in what we expect would be a highly unusual circumstance, the letter of intent contains all of the key terms of the transaction and such terms are binding. Additionally, the fact pattern in this case serves as a caution to drafters of resolutions that appear to approve transactions before the terms have been fully negotiated or finally settled.

The OSC staff's statement of allegations and the Settlement Agreements led many to believe that, if the OSC decision followed the reasoning behind the Settlement Agreements, public issuers would be required to disclose non-binding letters of intent, or even merger or acquisition negotiations, at an early stage. However, issuers can now breathe a sigh of relief as the OSC decision departed from the staff's recommendation and, instead, confirmed the current practice in the context of merger or acquisition transactions.

This law note was prepared by Khorshid Hakemi and Leo Raffin.

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