

Publications

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"Backdating" In M&A?

The date of an agreement is an important part of most business transactions and M & A is no exception. Many acquisition agreements begin with an "Agreement between" the parties "effective as of" a given date. Does it matter if this effective date is prior to the date the parties actually entered into the agreement? And if so, is this 'backdating' problematic or even potentially illegal?

The answer should be 'no' - as long as the effective date reflects the economic understanding of the parties and not just an attempt to gain an unpermitted benefit under law, such as, a tax benefit. For example, a purchase agreement might be dated "effective as of" March 31, 2012" even though the parties executed it on April 4, in order to reflect a cut off of an accounting period on March 31, after which Buyer gets the benefit and risk of changes in the Company's financial position. That's a legitimate use of a retroactive effective date.

Contrast that with an agreement dated "effective as of December 31, 2012" when the parties did not reach agreement until January 2013, but used the 2012 date to get last year's substantially lower long term capital gain rates. In that case - yes there is a problem!

For a very good article on this topic from an excellent resource for the M & A lawyer, see [Backdating \(63 Bus. Law. 1153 2008\)](#).

One good rule of thumb is this - would you expect the parties to object to signing the signature page if the actual date of execution (which is after the effective date) was adjacent to their signatures? In the first example above, they would not. But in the second example, the parties would presumably not want the actual execution date anywhere on the agreement!

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