

# FAIR VALUE™

Reprinted from Volume XX, Number 2

Summer/Fall 2013

## THE IRS DOES NOT LIKE YOUR MARKETABILITY DISCOUNT

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**IRS Agent:** *I'm sorry but the IRS frontline cannot allow the discounts you took on your non-controlling interest in this private company. The most my manager will let me allow is an 18% total discount. The marketability studies you relied upon are seriously flawed and we have case law that supports our position.*

**Introduction.** Does this sound familiar? We seem to be hearing it more frequently in various gift and estate tax valuations. While we are not sure what is behind this new policy, our leading suspect is the influence of the *Discount for Lack of Marketability Job Aid for IRS Valuation Professionals* (the “*DLOM Job Aid*,” available at [www.businessvalue.com](http://www.businessvalue.com) on both the Cases page and Tools page). Published in 2009, the *DLOM Job Aid* was originally intended for internal use by the IRS only. Not surprisingly, the document was leaked and now exists in the public domain. The *DLOM Job Aid* cautions:

This job aid is meant to provide information to IRS Valuation Analysts when considering the Discount for Lack of Marketability (DLOM). The job aid does not make any bright line selections or exclusions as to what approach to DLOM is best in any given set of circumstances – that is up to the Valuation Analyst's professional judgment. This job aid is not an Official IRS position and was prepared for reference purposes only; it may not be used or cited as authority for setting any legal position.

Despite this seemingly benign language, we believe the *DLOM Job Aid* may in fact be playing a critical role in the challenging of marketability discounts in the gift and estate tax context by the IRS.

On one hand, the *DLOM Job Aid* does an excellent job in identifying and analyzing the many marketability studies and formulas currently existing. This is a necessary exercise given the increasing complexity of this issue. Back when we started our valuation practice in the 1980s, there were only two DLOM methods available: the restricted stock and pre-IPO studies. At the current time, there are at least 20 available methods that attempt to determine the DLOM. As discussed in the *DLOM Job Aid*, each method has certain strengths and weaknesses and no single method is the dominant or obvious method.

On the other hand, the *DLOM Job Aid* does more than merely describe the many marketability studies and formulas. The *DLOM Job Aid* also takes a clear position against what it believes are high marketability discounts. In several places, the *DLOM Job Aid* shifts from unbiased reporting to strong opinion, providing a toolkit for IRS agents to challenge the accepted and conventional wisdom on marketability discounts in what could be interpreted as an effort for lower discounts. This advice, unfortunately, is neither reasonable (a standard required by the *DLOM Job Aid*), nor is it supported by reality.

**Overview of the *DLOM Job Aid*.** In addition to



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the introduction and conclusion sections, there are three main sections of the *DLOM Job Aid*. These sections are summarized as follows:

### A. General Marketability Discount Information

As its title suggests, this first section is largely informational in nature. This section has five sub-sections:

**1. Marketability Defined.** In this section, the *DLOM Job Aid* discusses the difference between liquidity and marketability and notes when it is appropriate to apply the DLOM in the valuation process.

**2. Factors Influencing Marketability.** This section highlights the importance of considering the numerous factors that influence the marketability of an interest in a privately-owned company. The ten factors cited in the 1995 *Mandelbaum* Tax Court case are noted, as well as a more expanded list of 33 factors involving both the company and the specific interest in the company (note: most if not all of these 33 factors can be incorporated in a thorough *Mandelbaum* analysis).

**3. Consideration of the Willing Seller.** The *DLOM Job Aid* opines that many appraisers consider only the willing buyer in the determination of the DLOM. Of course, it also takes a willing seller to consummate a transaction. Several court cases are cited as examples of valuers failing to consider the complete universe of willing buyers.

**4. Marketability of Non-Controlling vs. Controlling Interests.** This section notes that a DLOM is appropriate in most if not all cases for a non-controlling interest in a private company. The application of a DLOM for a controlling interest is less clear, however, in most cases the DLOM for a controlling interest should be lower than for a non-controlling interest. One comment of particular interest in this section is the first comment made: “There is little dispute that minority interests in non-publicly traded entities lose value due to lack of marketability.” There is nothing shocking about this comment as it is verified by real-world data and is widely accepted by business valuers and the courts. This comment, however, directly conflicts with the later recommendation in the *DLOM Job Aid* that a 0% baseline DLOM be assumed with factors then considered to build up the DLOM. This issue is discussed in more detail later in this article.

**5. Identification of Information to Request to Determine Marketability.** This section outlines the necessary information to be collected and analyzed to determine the proper DLOM. Banister Financial also provides comprehensive information needs lists under

the Tools tab at [www.businessvalue.com](http://www.businessvalue.com).

### B. Summary of Approaches to DLOM

The second main section is also largely informational in nature and classifies the numerous DLOM models into four main groups:

**1. Benchmark Approaches.** These include the two “grand old men” of DLOM studies: the restricted stock and pre-IPO studies. In addition, some derivative methodologies from these two studies are discussed. This section also discusses in more detail the ten marketability factors suggested by the *Mandelbaum* case. The *DLOM Job Aid* notes that benchmark approaches are “increasingly common” in use but that an attempt to cover all ten *Mandelbaum* factors may be difficult unless it is undertaken by an experienced valuator. Among other issues, it is noted that “(1) the courts recognize there are reasons to go above or below the medians, but they will do so only when presented with soundly reasoned and empirically supported arguments, (2) one size discount should not apply to all, and (3) blanket approaches using historical averages are not sustainable; a case-specific analysis is needed.” Again, there is nothing controversial about this comment except that it too conflicts with the later recommendation in the *DLOM Job Aid* that a 0% baseline DLOM be assumed with factors then considered to build up the DLOM.

**2. Securities-Based Approaches.** These approaches include theoretical option-pricing models, option prices, and illiquidity as indicated in the bid-ask spread of traded securities. One of the criticisms by the *DLOM Job Aid* of these models is: “This approach is not seen very often for estimating DLOM for a privately held company [and] has not been vetted in any meaningful way by the courts.”

**3. Analytical Approaches.** This method consists of various transactional data sets involving stock sales conducted outside of public markets. Many of these studies find DLOMs lower than those indicated by the various Benchmark Approaches. The *DLOM Job Aid* comments on these studies is as follows: “As a result of the weaknesses cited relating to sample selection, sample point classification and measurement point concerns, it is unlikely that these approaches can be used to derive a numerical result that will go forth unchallenged. Instead, the raw data collected and the many component factors proposed can be used to make subjective judgments about discount magnitudes that would seem more satisfactory than using the gross averages generated by the benchmark studies, either with

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or without unsupportable adjustments for changing facts and circumstances.”

This statement may sound logical as written in the *DLOM Job Aid* but it ultimately makes no sense. The *DLOM Job Aid* in effect says the following: “The data in these studies is flawed due to numerous reasons but go ahead and use this data to determine your DLOM.” Pulling back the curtain a bit, this comment could be interpreted as an endorsement by the *DLOM Job Aid* to do two things: (1) subjectively pick desired marketability discount data from certain studies and (2) specifically exclude all data from the Benchmark Approaches (restricted stock and pre-IPO studies which, incidentally, tend to show higher discounts).

**4. Other Approaches.** As its name suggests, this is a catch-all category that contains several different models and theories on determining the DLOM. One general group includes various DLOM formulas whereby various objective and subjective inputs are made in an attempt to quantify a DLOM. The strongest criticisms of these models are their subjectivity (which can produce widely divergent results) and their premise that the DLOM can be objectively and accurately determined via a formula.

Another method mentioned in this section is the use of data on resales of minority interests in Real Estate Limited Partnerships (RELPs). This is a widely-accepted method for the determination of the discount for lack of control in real estate holding entities, however, it is less-accepted in the determination of both discounts (control and marketability). This data is particularly offensive to the IRS as it can indicate discounts for lack of control as high as 60% (before marketability considerations).

The final method mentioned in this section is the use of transaction multiples between public and private companies as contained in *Mergerstat Review*. The *DLOM Job Aid* indicates that this data is used primarily for analysis of the discount for lack of control and is not widely seen for use of determining the DLOM.

### C. Evaluation and Recommendations

The third main section is the culmination of the *DLOM Job Aid* as it takes the raw information discussed in the prior two sections (General Marketability Discount Information and Summary of Approaches to DLOM) and provides advice and strategy to the IRS examining agent. This section has four sub-sections, one of which is a mere listing of available resources (and is not discussed in this article). The other three sub-

sections that offer advice and strategy for critique are as follows:

**1. Approaching Marketability Discount as a Reviewer.** The *DLOM Job Aid* offers the IRS agent the following direction:

In considering the discount for lack of marketability as a reviewer, you will be presented with an approach and be concerned with judging its reasonableness, its reliability, its adherence to the prevailing facts and circumstances of the valuation problem at hand, its general acceptance within the valuation community and the treatment that the approach has received at the hands of the Courts. Hopefully, the taxpayer and/or the taxpayer's appraiser will have offered arguments for the approach or approaches chosen and for the numerical result decided upon. These arguments will need to be considered in detail and judged upon their merits. If the taxpayer or the appraiser has not offered any real analysis but rather simply presented a numerical result without substantial back-up that does not automatically make the result achieved wrong or unsustainable. You will need to analyze the result in the light of the prevailing facts and circumstances to determine whether it is reasonable or unreasonable.

If the result is considered unreasonable as a result of your review, you will likely be called upon by the client to produce an alternative independent estimate of DLOM based on your own analysis of the valuation problem. Your estimate should be constructed so as to not exhibit the same weaknesses found in the appraisal being reviewed. If the taxpayer or appraiser has used a valid approach or approaches but reached an unreasonable result you may be able to simply discuss what makes that result unreasonable and why you believe that your analysis yields a more reasonable result. If the taxpayer or appraiser has not used a valid approach in your view then you will have to start from scratch in preparing your opinion.

In and of itself, this advice is not controversial. Of course the valuator should present a marketability analysis and result that is reasonable and supported. Likewise, it is completely reasonable to expect the reviewing IRS agent to attempt to determine whether the marketability analysis and result is reasonable and supported. If the IRS agent believes that the marketability analysis and result is not reasonable and/or unsupported, it then falls upon the IRS agent to provide a marketability analysis and result that is reasonable and supported.

**2. Approaching Marketability Discount as a Valuator.** Here the *DLOM Job Aid* turns sharply from reporting to strategy, offering the IRS agent the



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following direction:

If you are approaching the question of DLOM fresh, either as a reviewer confronted with an unreasonable taxpayer position based on invalid approaches or as a valuator charged with making your own valuation discount decisions, it is often helpful to start with a basic question as relates to DLOM. ***That question is: “Under the prevailing facts and circumstances and considering the nature of the interest to be valued why is the DLOM not zero?”*** [emphasis added]” By enumerating the factors that would lead to a conclusion that some DLOM at all is appropriate you will be building a framework as to how substantial a discount for lack of marketability might be reasonable. This process will give you a reality check on DLOM amounts that you might ultimately derive using some of the approaches discussed in this job aid.

This comment provides the most significant insight into the IRS' strategy on the DLOM. Based on the language in the *DLOM Job Aid*, it appears that the starting presumption with the IRS is that the DLOM should be 0% with potential factors then presumably “building up” the DLOM to some appropriate level. This is a sharp contrast to the findings of the various marketability studies available. The marketability studies based on actual transactions (i.e., benchmark) clearly indicate the existence of a DLOM in the context of a non-controlling interest in a private company. After analyzing these studies, the logical question facing the valuator is not: “Is the marketability discount something or nothing?” The logical question is: “Where on the scale of observed marketability discounts does the discount for this company lie?” The skewed perspective in the *DLOM Job Aid* has the potential of biasing the IRS examining agent to believing that zero is the baseline or normal DLOM and therefore virtually any DLOM determined by a valuator is potentially too high.

Furthermore, as noted earlier, the baseline 0% DLOM strategy conflicts with at least two other statements made in the *DLOM Job Aid*. First, in its discussion of the application of marketability discounts for non-controlling interests versus controlling interests (see earlier discussion in the Under General Marketability Discount Information section), the *DLOM Job Aid* states: “There is little dispute that minority interests in non-publicly traded entities lose value due to lack of marketability.” In other words, the DLOM clearly exists for minority interests in closely-held companies, i.e., it is not zero. Secondly, in its discussion of the Benchmark approaches (see earlier discussion in the Summary of Approaches to DLOM section), the

*DLOM Job Aid* states: “the courts recognize there are reasons to go above or below the medians, but they will do so only when presented with soundly reasoned and empirically supported arguments.” In other words, the proper analysis is to start at the median DLOM and then determine whether a DLOM above, equal to, or lower than the median DLOM is appropriate. Both of these comments reflect the reality of marketability discounts for non-controlling interests in privately-held entities: these discounts do exist, they exist on a continuum depending on the facts and circumstances, and they do not start with the assumption of a 0% marketability discount and a “build-up” from there.

**3. Dealing with Marketability Discount in a Report Review Under Certain Specific Situations – Typical Report Language for Getting Started.** This section in the *DLOM Job Aid* provides ammunition for attacks on specific DLOM arguments and analyses that may be made in valuation reports. There are five main areas in this part of the *DLOM Job Aid*, the first two of which involve criticism of the two oldest and most widely-used marketability studies (pre-IPO and restricted stock).

### Pre-IPO Studies

As for the pre-IPO studies, the *DLOM Job Aid* flatly states: “These studies overstate DLOM and are unreliable for assessing the size of a discount for lack of marketability for many reasons.” Earlier in the *DLOM Job Aid* various strengths of the pre-IPO studies were noted, including the fact that they are based on empirical evidence (market data) and cover a broad time period. In this section of the *DLOM Job Aid*, however, no positives of the pre-IPO studies are mentioned – only the negatives. This again marks a notable shift in the *DLOM Job Aid* from reporting to opinion. This also clearly violates the initial caution in the *DLOM Job Aid* that it “does not make any bright line selections or exclusions as to what approach to DLOM is best in any given set of circumstances.” Here, the *DLOM Job Aid* is clearly recommending that the IRS agent disregard any DLOM that is based on the pre-IPO studies.

### Restricted Stock Studies

The *DLOM Job Aid* then offers similar criticism of the use of the restricted stock studies. Despite a number of positives mentioned in the earlier section explaining the restricted stock studies, the *DLOM Job Aid* in this section lists only negative factors on the restricted stock studies, providing the IRS agent with a number of arguments as to why these studies should be

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disregarded and the DLOM should be lower. Again the tone of the *DLOM Job Aid* has shifted from unbiased reporting to a clear recommendation that IRS agents disregard marketability discounts based on the restricted stock studies.

### Getting Behind the Data

The *DLOM Job Aid* charges Valuation Analysts as follows:

[W]hile certain of the [DLOM] studies reviewed may indicate large discounts, such discounts are not appropriate in all facts and circumstances. The Valuation Analyst must have a clear understanding of the facts and circumstances of each interest to be valued, use professional judgment in choosing a DLOM just as is done for all other parts of a valuation, and apply a reasonableness test. In other words, the Analyst must get behind the data used to support a DLOM choice rather than simply using summary statistics and resulting conclusions.

Here, the warning is against simply taking the mean or median from a particular study. Many of these studies are dated, are from a particular period in time, or consist of a very small sample of transactions. Also, some of the studies stratify their data by various criteria with the valuator being able to select some sub-component of the data to employ in his or her report. This is a valid comment insofar as the reasonableness and support of the DLOM is concerned. Simply taking an average or median figure without supporting analysis is insufficient for a DLOM or any other assumption in a valuation report.

But what exactly does it mean to get behind the data? In its discussion of the Benchmark Approaches, the *DLOM Job Aid* states that “detailed data developed first hand by the testifying expert, as opposed to medians cited from studies performed by others, are required to sustain discount opinions.” The interpretation of this comment is unclear. If it means that the valuator needs to understand the various methods and thoroughly analyze the subject interest being valued prior to determining the DLOM, this is a valid recommendation. On the other hand, if it means that a valuator is to develop his or her own marketability study based on a sufficiently broad sample of observed transactions, this comment is entirely unreasonable. Our firm has done thousands of valuations in our collective 75 years of experience but we would not begin to be able to develop a marketability study based on this body of work. The vast majority of valuations deal with privately-held companies that (1) are not going public and (2) do not have restricted and non-restricted (and publicly-traded)

shares. Furthermore, remember that the IRS holds its agents to the same standard (see earlier comments in the Approaching Marketability Discount as a Reviewer section), therefore, each IRS agent would be expected to have developed the same kind of “first hand” marketability study.

### Theoretical Models

The *DLOM Job Aid* strongly frowns on the use of theoretical models (DLOM formulas) that are not based on market data. Its criticism is unambiguous: “Although the model may seem conceptually sound in the abstract, there is no attempt to **validate the model using actual current market data**. For this reason, there is no way for the reviewer to **perform a reality check** on the model results. The discount for lack of marketability must be **firmly based on current market evidence**. No matter how conceptually sound a model may appear to be, unless it can be demonstrated that it produces results that can be **verified with market evidence**, it remains a theoretical construct that assumes a negotiation pattern between willing buyers and sellers rather than being based on the **results of such a pattern**. A valuator must remember that a discount for lack of marketability is but a step towards arriving at fair market value. Thus, without a **verifiable basis in the market**, the valuator is asking the audience to take his result on faith based on what sounds reasonable rather than on **what has been empirically demonstrated**.” [emphasis added and discussed below]

As noted in the *DLOM Job Aid*, the key problem with these models is the large number of subjective inputs required and the wide disparity of results (including some very high marketability discounts based on what may appear to be very reasonable assumptions). We agree with this recommendation in the *DLOM Job Aid*. While our thinking on this issue may change some day, we remain unconvinced that the DLOM can be calculated with any greater accuracy by a formula that it can by consideration of real-world market data. In fact, we believe the use of formulas in an attempt to calculate the DLOM creates a false sense of security and implies a level of accuracy that is neither present nor currently achievable.

Furthermore, note the repeated references in this section of the *DLOM Job Aid* to the importance of market data (as emphasized above). The *DLOM Job Aid* clearly recognizes the importance of market data in determining the DLOM. As noted before, however, this support is limited to those studies and discounts that the IRS finds more palatable and does not include the market data of the restricted stock and pre-IPO studies.

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### Court Cases

Finally, this section of the *DLOM Job Aid* cautions that pure reliance on court decisions to support a DLOM is unacceptable: “The courts are an excellent source of information when legal precedent is in question but can be a very questionable source when valuation guidance is desired. If the decisions from various court deliberations are to be utilized in the selection of valuation methods or parameters such should be looked at for the underlying reasoning applied and the logic and flow of the judge's thinking not for the results that were finally reached. No two valuation assignments are identical. Therefore, basing one's results on the results of another assignment whether litigated or not is a failure of proper diligence with regard to the assignment presently at hand.”

We also agree with the IRS position on court cases (which is why it is confusing when an agent offers certain cases as support for a particular DLOM figure). There are many limitations on the reliance on court cases to support a discount:

1. As noted in the *DLOM Job Aid*, each case is unique and the determination of a DLOM in one case does not imply that the same DLOM is applicable in another situation. There are few certainties in life, however, one of them is that you will never find a reported case with the exact same fact pattern as your situation.

2. Many court decisions do a very poor job of discussing the DLOM. Some cases are concerned with other legal issues and do not address the discount issue at all. Other cases do not provide enough detail to determine the marketability arguments and decisions. Also, some cases determine the DLOM with no rationale or discussion at all.

3. Most cases have issues other than just the DLOM. This muddies the water in pointing to a particular outcome in a case as support for a desired DLOM. For example, the taxpayer and IRS may disagree on the overall, pre-discount value of the company, the discount for lack of control, the DLOM, and many other issues. It may be impossible to know if decisions were made among these items in a “balancing” fashion to reach some desired end result.

Because of the above limitations, arguing with cases is an exercise in futility. That said, we recognize that it is irresistible for many valuers, IRS agents, lawyers and judges to cite cases supporting a certain position or discount. There are as many valuation cases as there are stars in the sky and each side can always find “one more case” to use. Be ready when the IRS cites the following:

1. In *Holman (130 T.C. No. 12)*, the taxpayer took a 35%+ DLOM, the IRS countered with a 12.5% DLOM and the Court allowed the 12.5% DLOM.

2. In *Robertson (2006 U.S. Dist. Lexis 1167, January 13, 2006)*, the taxpayer took a 25% DLOM, the IRS countered with a 12.5% DLOM and the Court allowed the 12.5% DLOM.

3. In *Temple (423 F.Supp.2d 605, 2006)*, the taxpayer took a 45% DLOM, the IRS countered with a 12.5% DLOM and the Court allowed the 12.5% DLOM.

As a taxpayer, however, you can counter with these:

1. In *Estate of Murphy (No. 07-CV-1013, 2009 U.S. Dist. LEXIS 94923, D. Ark. Oct 2, 2009)*, the taxpayer took a 32.5% DLOM, the IRS argued for a 12.5% DLOM and the Court allowed the 32.5% DLOM.

2. In *McCord (461 F.3d 614, 5th Cir. 2006)*, the taxpayer took a 35% DLOM, the IRS argued for a 7% DLOM and the Court allowed the 35% DLOM.

3. In *Huber (T.C. Memo 2006-96)*, the taxpayer took a 50% DLOM on multiple transactions, the IRS argued for a 25% to 40% DLOMs and the Court allowed the 50% DLOM on each transaction.

And on and on and on....

### Final Thoughts

First, we applaud the IRS for the obvious work and detail that went into the *DLOM Job Aid*. As we noted before, the DLOM issue is significantly more complex now than it was 25 years ago. The *DLOM Job Aid* does a good job in identifying, explaining, and noting the various positives and negatives of the numerous DLOM studies and methods. We also believe the *DLOM Job Aid* makes some reasonable and practical suggestions:

1. Whether determined by a valuator or an IRS agent, the DLOM must be reasonable and supported. In fact, every part of a valuation report and opinion must be reasonable and supported.

2. Merely taking the mean or average from a marketability study without any further analysis is insufficient.

3. The use of theoretical models that are not based on or validated by market data is too subjective.

4. The use of court cases to support a particular DLOM has very limited applicability. Court cases may be helpful in understanding an appropriate analysis of a DLOM, however, they are not useful in the sense of indicating that a specific DLOM in a case is also



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applicable to the interest at hand.

That said, the *DLOM Job Aid* also takes some positions that are not grounded in reason or reality:

**1. Disregarding the Restricted Stock and Pre-IPO Studies.** Despite an even treatment of two of the oldest and most widely-accepted marketability studies (restricted stock and pre-IPO) earlier in the Summary of Approaches to DLOM section of the *DLOM Job Aid*, in the later Evaluation and Recommendation section, the *DLOM Job Aid* presents a one-sided analysis of only the negative aspects of these two studies. We can only speculate as to why this occurs, however, one possibility is the widespread use of these two studies, their widespread acceptance by the courts over many years, and the relatively high marketability discounts indicated by these studies (20% to 45% range for studies of restricted stocks with a two-year holding period and 33% to 68% range for the pre-IPO studies).

Other marketability studies have been conducted that indicated marketability discounts lower than the ranges seen in the restricted stock and pre-IPO studies, however, none of these studies has been proven to be any more accurate or reliable than another, a fact that is noted in the *DLOM Job Aid*. Every study is imperfect in some form or fashion, however, the *DLOM Job Aid* is unique in its specific criticism of the restricted stock and pre-IPO studies as none of the other studies receive such one-sided criticism.

Furthermore, one key point that is often overlooked in the debate over these studies is the fact that all of these studies involve privately-held interests for which a public market is either known with certainty (i.e., restricted stock, where the shareholder is guaranteed liquidity in two years or less) or else highly likely (i.e., pre-IPO where the shareholder is clearly aware that the private company is a likely candidate for a public offering). As you would expect, the closer in time the owner of the private stock is to a liquidity event, the lower the marketability discount with the marketability discount eventually reaching zero on the day of the liquidity event. In sharp contrast to these situations, the typical non-controlling shareholder in a privately-held company has no expectation of a near-term liquidity event with some private companies existing for generations without any liquidity opportunities for shareholders. This much longer time horizon may suggest in some cases a DLOM at or even above the range indicated by the restricted stock and pre-IPO studies.

**2. DIY Marketability Study?** As discussed above, the *DLOM Job Aid* suggests that “detailed data

developed first hand by the testifying expert, as opposed to medians cited from studies performed by others, are required to sustain discount opinions.” The ambiguous nature of this comment is discussed above. If it means that every valuator (including every IRS examining agent) has to develop his or her own marketability study based on first-hand observations, we all have a significant amount of work to do.

**3. 0% Baseline DLOM.** The most troubling language in the *DLOM Job Aid* is the recommendation that the IRS examining agent assume that the DLOM is 0% as starting point and then build-up any incremental DLOM from there based on various factors. This recommendation skews reality by completely ignoring the numerous studies that clearly show the existence of a DLOM in the context of a non-controlling interest in a privately-held company (a fact that is pointed out by the *DLOM Job Aid*). The logical analysis is to start with the observed range of marketability discounts then analyze the non-controlling interest in the privately-held company to determine if the marketability discount should fall above, below, or within the observed range. Throughout the *DLOM Job Aid* there is repeated mention and discussion of finding what is “reasonable.” The 0% baseline DLOM theory defies reason and is not supported by either real-world results or by case law.

As noted in the *DLOM Job Aid*, there are shortcomings with all of the studies and methods. In contrast to its even-handed treatment of many of the studies and methods, the *DLOM Job Aid* singles out the restricted stock and pre-IPO studies for additional criticism. The suggestions of a 0% baseline DLOM assumption as well as the use of flawed data from certain marketability studies are both illogical and irrational. The shift from reporting to opinion in the *DLOM Job Aid* provides fodder for lower marketability discounts. These positions, however, are neither reasonable nor are they supported by real world data and case law. Our criticism of the *DLOM Job Aid* on these issues is **not** an argument for a bigger discount – it is an argument for the **right discount** as supported by real-world data. Valuers and gift and estate tax planning attorneys should be prepared to anticipate these arguments by the IRS and be able to support their own conclusions in light of this strategy. ♦

**This article is an abbreviated discussion of a complex topic and does not constitute advice to be applied to any specific situation. No valuation, tax or legal advice is provided herein. Readers of this article should seek the services of a skilled and trained professional.**