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## H.R. 436: Current View: Threat to Discounting or Not?

H.R. 436, otherwise known as Certain Estate Tax Relief Act of 2009, is a bill that, as proposed, will make certain changes to the estate tax code and whose text can be found at: <http://www.govtrack.us/congress/billtext.xpd?bill=h111-436>. Not surprisingly, this is not very welcome news to appraisers and wealth transfer attorneys.

In particular, Section 4 of H.R. 436 discusses the “Limitation on Minority Discounts” and basically the bill appears to proffer the tradeoff between the higher exclusion of up to \$3.5MM with the closing of “minority discounts” on partnerships (FLPs, LLCs, LLPs) holding passive / liquid underlying assets.

However the specific wording we find to be interesting:

‘(e) Limitation on Minority Discounts- For purposes of this chapter and chapter 12, in the case of the transfer of any interest in an entity other than an interest which is actively traded (within the meaning of section 1092), no discount shall be allowed by reason of the fact that the transferee does not have control of such entity if the transferee and members of the family (as defined in section 2032A(e)(2)) of the transferee have control of such entity.’

We are left wondering if this also includes other discounts including Discount for Lack of Marketability? The discount for lack of marketability, which is oftentimes a much larger discount than the discount for lack of control, has been highly documented in study after study of both Pre-Initial Public Offering placements and Restricted Stock studies since 1964.

What is so problematic is that Congress is now trying to legislate what couldn't be accomplished in the various courts – shutting down logical discounts associated with market analyzed behavior. Our firm doesn't just generate discounts; we only apply what is observed in the marketplace and in various methodical studies. Judges in courts throughout the country have held that discounts are appropriate.

As of now, this bill is in committee, but many professionals believe it has a 50% likelihood of passing in some form. From our perspective we hope the final bill will reflect the reality that discounts, depending on the facts and circumstances, are a logical part of both the marketplace and the planning process. Stay tuned!