

**Internal Revenue Service, Treasury****§ 1.382-2**

- (6) Effective date.
  - (i) In general.
  - (ii) Elections and amended returns.
    - (A) Election to apply this paragraph (d) retroactively.
    - (B) Election to revoke section 382(l)(5)(H) election.
    - (C) Amended returns.
  - (e) Option attribution for purposes of determining stock ownership under section 382(l)(5)(A)(ii).
    - (1) In general.
    - (2) Special rules.
      - (i) Lapse or forfeiture of options deemed exercised.
      - (ii) Actual exercise of options not deemed exercised.
    - (iii) Amended returns.
  - (3) Examples.
  - (4) Effective dates.
    - (i) In general.
    - (ii) Special rule for interest or dividends.
  - (f)-(h) [Reserved]
  - (i) Election not to apply section 382(l)(5).
  - (j) Value of the loss corporation in an ownership change to which section 382(l)(6) applies.
    - (k) Rules for determining the value of the stock of the loss corporation.
      - (1) Certain ownership interests treated as stock.
        - (2) Coordination with section 382(e)(2).
        - (3) Coordination with section 382(e)(3).
        - (4) Coordination with section 382(l)(1).
        - (5) Coordination with section 382(l)(4).
        - (6) Special rule for stock not subject to the risk of corporate business operations.
          - (i) In general.
          - (ii) Coordination of special rule and other rules affecting value.
        - (7) Limitation on value of stock.
          - (1) Rules for determining the value of the loss corporation's pre-change assets.
            - (1) In general.
            - (2) Coordination with section 382(e)(2).
            - (3) Coordination with section 382(e)(3).
            - (4) Coordination with section 382(l)(1).
            - (5) Coordination with section 382(l)(4).
          - (m) Continuity of business requirement.
            - (1) Under section 382(l)(5).
            - (2) Under section 382(l)(6).
          - (n) Ownership change in a title 11 or similar case succeeded by another ownership change within two years.
            - (1) Section 382(l)(5) applies to the first ownership change.
            - (2) Section 382(l)(6) applies to the first ownership change.
          - (o) Options not subject to attribution.
          - (p) Effective date for rules relating to section 382(l)(6).
            - (1) In general.
            - (2) Ownership change to which section 382(l)(6) applies occurring before March 17, 1994.

*§ 1.382-10* [Reserved]

*§ 1.382-10T Special rules for determining time and manner of acquisition of an interest in a loss corporation (temporary).*

*§ 1.382-11 Effective dates.* [Reserved]

[T.D. 8149, 52 FR 29674, Aug. 11, 1987, as amended by T.D. 8264, 54 FR 38666, Sept. 20, 1989; T.D. 8352, 56 FR 29434, June 27, 1991. Re-designated by T.D. 8440, 57 FR 45711, Oct. 5, 1992; T.D. 8490, 58 FR 51573, Oct. 4, 1993; T.D. 8531, 59 FR 12835, Mar. 18, 1994; T.D. 8530, 59 FR 12842, Mar. 18, 1994; T.D. 8529, 59 FR 12846, Mar. 18, 1994; T.D. 8546, 59 FR 32080, June 22, 1994; T.D. 8679, 61 FR 33314, June 27, 1996; T.D. 8825, 64 FR 36177, July 2, 1999; T.D. 9063, 68 FR 38177, June 27, 2003; T.D. 9063, 68 FR 53219, Sept. 9, 2003]

**§ 1.382-1T** [Reserved]

**§ 1.382-2 General rules for ownership change.**

(a) *Certain definitions for purposes of sections 382 and 383 and the regulations thereunder.* The following definitions apply for purposes of sections 382 and 383 and the regulations thereunder.

(1) *Loss corporation—(i) In general.* The term *loss corporation* means a corporation which—

(A) Is entitled to use a net operating loss carryforward, a capital loss carryover, a carryover of excess foreign taxes under section 904(c), a carryforward of a general business credit under section 39, or a carryover of a minimum tax credit under section 53,

(B) For the taxable year that includes a testing date, as defined in paragraph (a)(4) of this section or § 1.382-2T(a)(2)(i), whichever is applicable (determined for purposes of this paragraph (a)(1) without regard to whether the corporation is a loss corporation), has a net operating loss, a net capital loss, excess foreign taxes under section 904(c), unused general business credits under section 38, or an unused minimum tax credit under section 53, or

(C) Has a net unrealized built-in loss (determined for purposes of this paragraph (a)(1) by treating the date on which such determination is made as the change date). See section 382(h)(3) for the definition of net unrealized built-in loss.

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See section 383 and § 1.383-1 for rules relating to a loss corporation that has an ownership change and has capital losses, excess foreign taxes, general business credits or minimum tax credits. Any predecessor or successor to a loss corporation described in this paragraph (a)(1) is also a loss corporation.

(ii) *Distributor or transferor loss corporation in a transaction under section 381.* Notwithstanding that a loss corporation ceases to exist under state law, if its net operating loss carryforwards, excess foreign taxes, or other items described in section 381(c) are succeeded to and taken into account by an acquiring corporation in a transaction described in section 381(a), such loss corporation shall be treated as continuing in existence until—

(A) Any pre-change losses (excluding pre-change credits described in § 1.383-1(c)(3)), determined as if the date of such transaction were the change date, are fully utilized or expire under either section 172 or section 1212,

(B) Any net unrealized built-in losses, determined as if the date of such transaction were the change date, may no longer be treated as pre-change losses, and

(C) Any pre-change credits (described in § 1.383-1(c)(3)), determined as if the date of such transaction were the change date, are fully utilized or expire under sections 39, 53, or 904(c).

Following a transaction described in the preceding sentence, the stock of the acquiring corporation shall be treated as the stock of the loss corporation for purposes of determining whether an ownership change occurs with respect to the pre-change losses and net unrealized built-in losses that may be treated as pre-change losses of the distributor or transferor corporation.

(iii) *Separate accounting required for losses and credits of an acquiring corporation and a distributor or transferor loss corporation.* Except as provided in paragraph (a)(1)(iv) of this section, pre-change losses (determined as if the testing date were the change date and treating the amount of any net unrealized built-in loss as a pre-change loss), that are succeeded to and taken into account by an acquiring corporation in a transaction to which section 381(a)

applies must be accounted for separately from losses and credits of the acquiring corporation for purposes of applying this section. See *Example (2)* of § 1.382-2T(e)(2)(iv) of this section.

(iv) *End of separate accounting for losses and credits of distributor or transferor loss corporation.* The separate tracking of owner shifts of the stock of an acquiring corporation required by paragraph (a)(1)(iii) of this section with respect to the net operating loss carryovers and other attributes described in paragraph (a)(1)(ii) of this section ends when a fold-in event occurs. A fold-in event is either an ownership change of the distributor or transferor corporation in connection with, or after, the transaction to which section 381(a) applies, or a period of 5 consecutive years following the section 381(a) transaction during which the distributor or transferor corporation has not had an ownership change. Starting on the day after the earlier of the change date (but not earlier than the day of the section 381(a) transaction) or the last day of the 5 consecutive year period, the losses and other attributes of the distributor or transferor corporation are treated as losses and attributes of the acquiring corporation for purposes of determining whether an ownership change occurs with respect to such losses. Also, for purposes of determining the beginning of the acquiring corporation's testing period, such losses are considered to arise either in a taxable year that begins not earlier than the later of the day following the change date or the day of the section 381(a) transaction, or in a taxable year that begins 3 years before the end of the 5 consecutive year period. Pre-change losses of a distributor or transferor corporation that are subject to a limitation under section 382 continue to be subject to the limitation notwithstanding the occurrence of a fold-in event. Any ownership change that occurs in connection with, or subsequent to, the section 381 transaction may result in an additional, lesser limitation with respect to such pre-change losses. This paragraph (a)(1)(iv) applies to any testing date occurring on or after January 29, 1991.

(v) *Application to other successor corporations.* This paragraph (a)(1) also applies, as the context may require, to successor corporations other than successors in section 381(a) transactions. For example, if a corporation receives assets from the loss corporation that have basis in excess of value, the recipient corporation's basis for the assets is determined, directly or indirectly, in whole or in part, by reference to the loss corporation's basis, and the amount by which basis exceeds value is material, the recipient corporation is a successor corporation subject to this paragraph (a)(1). This paragraph (a)(1)(v) applies to any testing date occurring on or after January 1, 1997.

(2) *Pre-change loss.* The term *pre-change loss* means—

(i) Any net operating loss carryforward of the old loss corporation to the taxable year ending on the change date or in which the change date occurs,

(ii) Any net operating loss of the old loss corporation for the taxable year in which the ownership change occurs to the extent such loss is allocable to the period in such year on or before the change date.

(iii) Any recognized built-in loss for any recognition period taxable year (within the meaning of 382(h)),

(iv) Any pre-change capital losses described in §1.383-1T(c)(2)(i) and (ii), and

(v) Any pre-change credits described in 1.383-1T(c)(3).

(3) *Stock*—(i) *In general.* Except as provided in this paragraph (a)(3)(i) and §1.382-2T(f)(18)(ii) and (iii), the term *stock* means stock other than stock described in section 1504(a)(4). Notwithstanding the preceding sentence, stock that is not described in section 1504(a)(4) solely because it is entitled to vote as a result of dividend arrearages shall be treated as so described and thus shall not be considered stock. Stock described in section 1504(a)(4), however, is not excluded for purposes of determining the value of the loss corporation under section 382(e). The determination of the percentage of stock of any corporation owned by any person shall be made on the basis of the relative fair market value of the stock owned by such person to the total fair market value of the out-

standing stock of the corporation. Solely for purposes of determining the percentage of stock owned by a person, each share of all the outstanding shares of stock that have the same material terms is treated as having the same value. Thus, for example, a control premium or blockage discount is disregarded in determining the percentage of stock owned by any person. The previous two sentences of this paragraph (a)(3)(i) apply to any testing date occurring on or after January 29, 1991.

(ii) *Convertible stock.* The term *stock* includes any convertible stock. For rules regarding the treatment of certain convertible stock as an option, see §1.382-4(d)(9)(ii).

(4) *Testing date*—(i) *In general.* Except as provided in paragraph (a)(4)(ii) of this section, a loss corporation is required to determine whether an ownership change has occurred immediately after any owner shift, or issuance or transfer (including an issuance or transfer described in §1.382-4(d)(8)(i) or (ii)) of an option with respect to stock of the loss corporation that is treated as exercised under §1.382-4(d)(2). Each date on which a loss corporation is required to make a determination of whether an ownership change has occurred is referred to as a testing date. All computations of increases in percentage ownership are to be made as of the close of the testing date and any transactions described in this paragraph (a)(4) that occur on that date are treated as occurring simultaneously at the close of the testing date. See §1.382-2T(e)(1) for the definition of owner shift. The term *option*, as used in this paragraph (a)(4), includes interests that are treated as options under §1.382-4(d)(9). For rules regarding the determination of whether dates prior to November 5, 1992, are testing dates, see §1.382-2T(a)(2)(i).

(ii) *Exceptions.* A loss corporation is not required to determine whether an ownership change has occurred immediately after—

(A) Any transfer of stock, or an option with respect to stock, of the loss corporation in any of the circumstances described in section 382(l)(3)(B) (death, gift, divorce, etc.); or

(B) The transfer of an option described in §1.382-4(d)(11)(i) or (ii) (relating to transfers between persons who are not 5-percent shareholders or between members of certain public groups).

(5) *Successor corporation.* A successor corporation is a distributee or transferee corporation that succeeds to and takes into account items described in section 381(c) from a corporation as the result of an acquisition of assets described in section 381(a). A successor corporation also includes, as the context may require, a corporation which receives an asset or assets from another corporation if the corporation's basis for the asset(s) is determined, directly or indirectly, in whole or in part, by reference to the other corporation's basis and the amount by which basis differs from value is, in the aggregate, material. The previous sentence of this paragraph (a)(5) applies to any testing date occurring on or after January 1, 1997.

(6) *Predecessor corporation.* A predecessor corporation is a distributor or transferor corporation that distributes or transfers its assets to an acquiring corporation in a transaction described in section 381(a). A predecessor corporation also includes, as the context may require, a corporation which transfers an asset or assets to another corporation if the transferee's basis for the asset(s) is determined, directly or indirectly, in whole or in part, by reference to the corporation's basis and the amount by which basis differs from value is, in the aggregate, material. The previous sentence of this paragraph (a)(6) applies to any testing date occurring on or after January 1, 1997.

(b) *Effective dates—(1) In general.* [Reserved]

(2) *Rules provided in paragraph (a)(3)(ii) of this section—(i) In general.* Except as provided in paragraph (b)(2)(ii) of this section, the rules provided in paragraph (a)(3)(ii) of this section apply with respect to any convertible stock.

(ii) *Certain convertible preferred stock.* Convertible stock that, when issued, would be described in section 1504(a)(4) by disregarding subparagraph (D) thereof and by ignoring the potential participation in corporate growth that

the conversion feature may offer is treated as stock described in that section (and thus is not treated as stock for the purpose of determining whether an ownership change occurs, but is taken into account for the purpose of determining the value of the loss corporation immediately before an ownership change; see sections 382(e)(1) and 382(k)(6)(A)) if—

(A) The stock was issued on or after July 20, 1988, and prior to November 5, 1992; or

(B) The stock was issued prior to July 20, 1988, and the loss corporation makes the election described in Notice 88-67, 1988-1 C.B. 555, (see §601.601(d)(2)(ii)(b) of this chapter for availability of Cumulative Bulletins (C.B.)) on or before the earlier of the date prescribed in the Notice or December 7, 1992.

(3) *Rules provided in paragraph (a)(4) of this section.* The rules provided in paragraph (a)(4) of this section apply to determine whether dates on or after November 5, 1992, are testing dates.

[T.D. 8352, 56 FR 29434, June 27, 1991, as amended by T.D. 8405, 57 FR 10740, Mar. 30, 1992; 57 FR 24188, June 8, 1992; T.D. 8531, 59 FR 12836, Mar. 18, 1994; T.D. 8679, 61 FR 33315, June 27, 1996; T.D. 8825, 64 FR 36177, 36178, July 2, 1999]

**§ 1.382-2T Definition of ownership change under section 382, as amended by the Tax Reform Act of 1986 (temporary).**

(a) *Ownership change—(1) In general.* A corporation is a new loss corporation and thus subject to limitation under section 382 only if an ownership change has occurred with respect to such corporation. An ownership change occurs with respect to a corporation if it is a loss corporation on a testing date and, immediately after the close of the testing date, the percentage of stock of the corporation owned by one or more 5-percent shareholders has increased by more than 50 percentage points over the lowest percentage of stock of such corporation owned by such shareholders at any time during the testing period. See paragraph (a)(2)(i) of this section for the definition of testing date. See paragraph (d) of this section for the definition of testing period. See §1.382-2(a)(1) and paragraph (f)(3) of