

filed a registration statement with the Securities and Exchange Commission (or a comparable document with a State agency regulating securities) for the specific purpose of such issuance.

(iii) *Election to apply this paragraph (j) retroactively*—(A) *Election*. A loss corporation may elect to apply paragraphs (j)(1) through (j)(13) of this section to all issuances or deemed issuances of stock to which § 1.382-2T(j)(2)(iii)(B) or (D) applied (or would have applied taking paragraph (j)(7) of this section into account) occurring in taxable years beginning prior to November 4, 1992. This election is made by filing with the loss corporation's first income tax return filed more than 60 days after October 4, 1993, the statement, "This is an Election to Apply § 1.382-3(j) Retroactively," accompanied by the amended returns and revised information statements described in paragraphs (j)(14)(iii)(B) and (C) of this section. An election under this paragraph (j)(14)(iii) is irrevocable.

(B) *Amended returns*. If the retroactive application of the rules of this paragraph (j) affects the amount of taxable income or loss for a prior taxable year, then, except as precluded by the applicable statute of limitations, the loss corporation (or the common parent of any consolidated group of which the loss corporation was a member for the year) must file an amended return for the year that reflects the effects of the retroactive application of the rules of this paragraph (j). If the statute of limitations precludes the filing of an amended return for one or more such prior taxable years, the loss corporation (or the common parent) must make appropriate adjustments under the principles of section 382(l)(2)(A) in subsequent taxable years to reflect the difference between the losses and credits actually used in such prior taxable years and the amount that would have been used in those years applying the rules of this paragraph (j).

(C) *Revised information statements*. If the retroactive application of the rules of this paragraph (j) affects the information reported on an information statement filed for any prior taxable year pursuant to § 1.382-2T(a)(2)(ii), then the loss corporation (or the common parent of any consolidated group of which the loss corporation was a

member for the year) must file a revised information statement for the year that reflects the retroactive application of the rules of this paragraph (j).

(k) *Special rules for certain regulated investment companies*—(1) *In general*. The segregation rules of § 1.382-2T(j)(2) do not apply to the issuance (as described in § 1.382-2T(j)(2)(iii)(B)(1)(ii)) or the redemption (as described in § 1.382-2T(j)(2)(iii)(C)) of any redeemable security, as defined in 15 U.S.C. 80a-2(a)(32), by a regulated investment company in the ordinary course of business.

(2) *Effective date*—(i) *General rule*. Paragraph (k)(1) of this section applies to testing dates after December 31, 1986. A corporation may file an amended return for taxable years ending before August 21, 1992 (subject to any applicable statute of limitations) to take into account paragraph (k)(1) of this section only if corresponding adjustments are made in amended returns for all affected taxable years ending after December 31, 1986 (subject to any applicable statute of limitations).

(ii) *Election to apply prospectively*. A corporation may elect to apply paragraph (k)(1) of this section only to testing dates on or after October 29, 1991. The election must be made on the first return which is filed after October 20, 1992 by stating on such return, "This is an Election To Apply § 1.382-3(k)(1) Only to Testing Dates on or After October 29, 1991."

[T.D. 8428, 57 FR 38282, Aug. 24, 1992. Redesignated by T.D. 8440, 57 FR 45712, Oct. 5, 1992; 57 FR 52827, Nov. 5, 1992; T.D. 8490, 59 FR 51573, Oct. 4, 1993]

#### § 1.382-4 Constructive ownership of stock.

(a) *In general*. [Reserved]

(b) *Attribution from corporations, partnerships, estates and trusts*. (1) [Reserved].

(2) *Limitation*. Section 1.382-2T(h)(2)(i)(A) applies solely for purposes of determining whether a loss corporation has an ownership change.

(c) *Attribution to corporations, partnerships, estates and trusts*. [Reserved]

(d) *Treatment of options as exercised*—(1) *General rule*. Except as provided in paragraph (d)(2) of this section, an option is not treated as exercised under section 382(l)(3)(A).

(2) *Options treated as exercised*—(i) *Issuance or transfer.* For purposes of determining whether an ownership change occurs, an option is treated as exercised on the date of its issuance or transfer if, on that date, the option satisfies—

(A) The ownership test of paragraph (d)(3) of this section,

(B) The control test of paragraph (d)(4) of this section, or

(C) The income test of paragraph (d)(5) of this section.

(ii) *Subsequent testing dates.* Except as provided in paragraph (d)(10) of this section, an option that is treated as exercised on the date of its issuance or transfer is treated as exercised on any subsequent testing date (as defined in § 1.382-2(a)(4)) for purposes of determining whether an ownership change occurs.

(3) *The ownership test.* An option satisfies the ownership test if a principal purpose of the issuance, transfer, or structuring of the option (alone or in combination with other arrangements) is to avoid or ameliorate the impact of an ownership change of the loss corporation by providing the holder of the option, prior to its exercise or transfer, with a substantial portion of the attributes of ownership of the underlying stock.

(4) *The control test*—(i) *In general.* An option satisfies the control test if—

(A) A principal purpose of the issuance, transfer, or structuring of the option (alone or in combination with other arrangements) is to avoid or ameliorate the impact of an ownership change of the loss corporation, and

(B) The holder of the option and any persons related to the option holder have, in the aggregate, a direct and indirect ownership interest in the loss corporation of more than 50 percent (determined as if the increase in such persons' percentage ownership interest that would result from the exercise of the option in question and any other options to acquire stock held by such persons, and any other intended increases in such persons' percentage ownership interest, actually occurred on the date the option is issued or transferred).

(ii) *Operating rules*—(A) *Person and related persons.* For purposes of this paragraph (d)(4)—

(1) The term *person* includes an individual or entity, but not a public group, as defined in § 1.382-2T(f)(13), and

(2) Persons are related if they bear a relationship specified in section 267(b) or 707(b) or if they have a formal or informal understanding among themselves to make a coordinated acquisition of stock, within the meaning of § 1.382-3(a)(1)(i).

(B) *Indirect ownership interest.* The indirect ownership interest that the holder of the option and any persons related to the holder have in the loss corporation is determined by applying the constructive ownership rules of § 1.382-2T(h), other than § 1.382-2T(h)(2)(i)(A) (which treats stock attributed pursuant to section 318(a)(2) as no longer being owned by the entity from which it is attributed) and § 1.382-2T(h)(4) (which treats options as exercised in certain circumstances). If, however, the application of such constructive ownership rules without regard to § 1.382-2T(h)(2)(i)(A) would result in the same stock of the loss corporation being owned by two or more such persons, appropriate adjustments must be made so that such stock is not counted more than once in computing the aggregate ownership interests of such persons.

(5) *The income test.* An option satisfies the income test if a principal purpose of the issuance, transfer, or structuring of the option (alone or in combination with other arrangements) is to avoid or ameliorate the impact of an ownership change of the loss corporation by facilitating the creation of income (including accelerating income or deferring deductions) or value (including unrealized built-in gains) prior to the exercise or transfer of the option.

(6) *Application of the ownership, control, and income tests*—(i) *In general.* Whether an option satisfies the ownership, control, or income test depends on all the relevant facts and circumstances. Among the factors that are relevant in applying all three tests are any business purposes for the issuance, transfer, or structure of the option, the likelihood of exercise of the

option (taking into account, for example, any contingencies to its exercise), transactions related to the issuance or transfer of the option, and the consequences of treating the option as exercised.

An option is not treated as exercised under any of the three tests, however, if a principal purpose of its issuance, transfer, or structuring is to avoid an ownership change by having it treated as exercised. Paragraphs (d)(6)(ii), (iii) and (iv) of this section describe additional examples of factors that are relevant in applying each test. The weight given to any factor depends on all the facts and circumstances. The presence or absence of any factor described in this paragraph (d)(6) does not create a presumption.

(ii) *Application of ownership test.* Among the additional factors that are taken into account in applying the ownership test are the relationship, at the time of issuance or transfer of the option, between the exercise price of the option and the value of the underlying stock, whether the option provides its holder or a related person with the right to participate in the management of the loss corporation or with other rights that ordinarily would be afforded to owners of the underlying stock, and the existence of reciprocal options (e.g., a call option held by the prospective purchaser and a corresponding put option held by the prospective seller). The ability of the holder of an option with a fixed exercise price to share in future appreciation of the underlying stock is also a relevant factor, but is not sufficient, by itself, for the option to satisfy the ownership test. Conversely, the fact that the holder of such an option does not bear the risk of loss due to declines in value of the underlying stock does not preclude the option from satisfying the ownership test.

(iii) *Application of control test.* Among the additional factors that are taken into account in applying the control test are the economic interests in the loss corporation of the option holder or related persons and the influence of those persons over the management of the loss corporation (in either case, through the option or a related arrangement, or through rights in stock).

(iv) *Application of income test.* Among the additional factors that are taken into account in applying the income test are whether, in connection with the issuance or transfer of the option, the loss corporation engages in income acceleration transactions or the holder of the option or a related person purchases stock (including section 1504(a)(4) stock) from, or makes a capital contribution or loan to, the loss corporation that can reasonably be expected to avoid or ameliorate the impact of an ownership change. Examples of income acceleration transactions are those outside the ordinary course of the loss corporation's business that accelerate income or gain into the period prior to the exercise of the option (or defer deductions to the period after the exercise of the option). A stock purchase, capital contribution, or loan is more probative toward an option satisfying the income test the larger the amount received by the loss corporation in the transaction or related transactions. A stock purchase, capital contribution, or loan is generally not taken into account in applying the income test if it is made to enable the loss corporation to continue basic operations of its business (e.g., to meet the monthly payroll or fund other operating expenses of the loss corporation).

(7) *Safe harbors.* Except as provided in paragraph (d)(7)(i) of this section, an option described in this paragraph (d)(7) is not treated as exercised pursuant to the ownership, control, or income test. The failure of an option to be described in this paragraph (d)(7) does not affect the determination of whether the option satisfies the ownership, income, or control test. The following options are described in this paragraph (d)(7):

(i) *Contracts to acquire stock.* A stock purchase agreement or a similar arrangement, the terms of which are commercially reasonable, in which the parties' obligations to complete the transaction are subject only to reasonable closing conditions, and which is closed on a change date within one year after it is entered into. An option is not exempt from the income test of paragraph (d)(5) of this section solely by reason of its description in this paragraph (d)(7)(i).

(ii) *Escrow, pledge, or other security agreements.* An option that is part of a security arrangement in a typical lending transaction (including a purchase money loan), if the arrangement is subject to customary commercial conditions. For this purpose, a security arrangement includes, for example, an agreement for holding stock in escrow or under a pledge or other security agreement, or an option to acquire stock contingent upon a default under a loan.

(iii) *Compensatory options.* An option to acquire stock in a corporation with customary terms and conditions provided to an employee, director, or independent contractor in connection with the performance of services for the corporation or a related person (and that is not excessive by reference to the services performed) and which—

(A) Is nontransferable within the meaning of §1.83-3(d); and

(B) Does not have a readily ascertainable fair market value as defined in §1.83-7(b) on the date the option is issued.

(iv) *Options exercisable only upon death, disability, mental incompetency, or retirement.* An option entered into between stockholders of a corporation (or a stockholder and the corporation) with respect to stock of either stockholder, that is exercisable only upon the death, disability, mental incompetency of the stockholder, or, in the case of stock acquired in connection with the performance of services for the corporation or a related person (and that is not excessive by reference to the services performed), the stockholder's retirement.

(v) *Rights of first refusal.* A bona fide right of first refusal with customary terms, entered into between stockholders of a corporation (or between the corporation and a stockholder), and regarding the corporation's stock.

(vi) *Options designated in the Internal Revenue Bulletin.* An option designated by the Internal Revenue Service in the Internal Revenue Bulletin as being exempt from one or more of the ownership, control, or income tests. See §601.601(d)(2)(ii) of this chapter (relating to the Internal Revenue Bulletin).

(8) *Additional rules—(i) Contracts to acquire stock.* For purposes of this para-

graph (d), a contract is considered to be issued or transferred on the date it is entered into or assigned, respectively.

(ii) *Indirect transfer of an option.* If an entity is formed or availed of for a principal purpose of facilitating an indirect transfer of an option by issuing or transferring interests in the entity, an issuance or transfer of an interest in the entity will be treated as a transfer of the option for purposes of applying the ownership, control, and income tests of paragraphs (d)(3) through (5) of this section.

(iii) *Options related to interests in non-corporate entities.* The rules of this paragraph (d) apply, with appropriate adjustments, to options to acquire or transfer interests in non-corporate entities.

(iv) *Puts.* In applying the rules of this section to puts, appropriate adjustments must be made to take into account that the put provides its holder with a right to transfer, instead of acquire, stock.

(9) *Definition of option—(i) In general.* Any contingent purchase, warrant, convertible debt, put, stock subject to a risk of forfeiture, contract to acquire stock, or similar interest is treated as an option for purposes of this paragraph (d), regardless of whether it is contingent or otherwise not currently exercisable.

(ii) *Convertible stock.* Convertible stock is treated as an option for purposes of this paragraph (d) (in addition to being treated as stock under §1.382-2(a)(3)(ii)) only if the terms of the conversion feature permit or require consideration other than the stock being converted.

(iii) *Series of options.* For purposes of this paragraph (d), an option to acquire an option with respect to the stock of the loss corporation, and each one of a series of such options, is treated as an option to acquire such stock.

(iv) *General principles of tax law.* This paragraph (d) does not affect the determination under general principles of tax law (such as substance over form) of whether an instrument is an option or stock.

(10) *Subsequent treatment of options treated as exercised on a change date—(i) In general.* The following rules apply to options that are treated as exercised

under paragraph (d)(2) of this section on a change date:

(A) The option is not treated as exercised under paragraph (d)(2) of this section on any testing date after the change date and prior to a transfer of the option that would itself (*i.e.*, without regard to the purposes for the issuance or any prior transfers of the option) cause the option to satisfy the ownership test of paragraph (d)(3) of this section, the control test of paragraph (d)(4) of this section, or the income test of paragraph (d)(5) of this section; and

(B) The exercise of the option, if by the person who owned the option immediately after the ownership change (or by a transferee of the option who acquired the option, directly or indirectly, from that person in one or more transfers described in paragraph (d)(11) of this section), does not contribute to another ownership change on any testing date on or after the date of exercise.

(ii) *Alternative look-back rule for options exercised within 3 years after change date.* If a loss corporation, on its return, as originally filed, for a taxable year that includes a change date, properly treats an option as exercised under paragraph (d)(2) of this section on the change date, and the option is actually exercised within three years after the change date, the loss corporation may treat the rules of paragraph (d)(10)(i) of this section as inapplicable to the option and instead treat the option as having been exercised on the change date for the purpose of determining whether an ownership change occurs on any and all testing dates after the change date (filing such amended returns as may be necessary for taxable years ending after the change date and before the date of exercise of the option). A transfer after the change date of an option to which this paragraph (d)(10)(ii) applies is treated as a transfer of the stock subject to the option. The exercise of an option to which this paragraph (d)(10)(ii) applies is not taken into account for the purpose of determining whether an ownership change occurs on or after the date of exercise.

(1) *Transfers not subject to deemed exercise.* Paragraph (d)(2) of this section

does not apply to the transfer of an option (including a transfer described in paragraph (d)(8)(i) or (ii) of this section), if—

(i) Neither the transferor nor the transferee is a 5-percent shareholder and neither person would be a 5-percent shareholder if all options held by that person to acquire stock were treated as exercised;

(ii) The transfer is between members of separate public groups resulting from the application of the segregation rules of § 1.382-2T(j)(2) and (3)(iii); or

(iii) The transfer occurs in any of the circumstances described in section 382(l)(3)(B) (relating to stock acquired by reason of death, gift, divorce, separation, etc.).

(12) *Certain rules regarding non-stock interests as stock.* Section 1.382-2T(f)(18)(iii) does not apply to treat an option (whether or not treated as exercised under this paragraph (d)) as stock.

(e) *Stock transferred under certain agreements.* [Reserved]

(f) *Family attribution.* [Reserved]

(g) *Definitions.* The terms and nomenclature used in this section, and not otherwise defined herein, have the same meaning as in section 382 and the regulations thereunder.

(h) *Effective date—(1) In general.* [Reserved]

(2) *Option attribution rules—(i) General rule.* The rules of paragraph (d) of this section apply, instead of the rules of § 1.382-2T(h)(4), on any testing date on or after November 5, 1992. See paragraph (h)(2)(vi) of this section for an election relating to the effective date.

(ii) *Special rule for control test.* An option issued on or before March 17, 1994, or an option issued within 60 days after that date pursuant to a plan existing before that date, is not treated as exercised under the control test provided in paragraph (d)(4) of this section on any testing date prior to a transfer of the option after March 17, 1994 that would itself cause the option to satisfy the control test.

(iii) *Convertible stock issued prior to July 20, 1988—(A) In general.* Except as provided in paragraph (h)(2)(iii)(B) of this section, convertible stock issued prior to July 20, 1988, is not treated as an option subject to the rules of § 1.382-

2T(h)(4) or paragraph (d)(2) of this section.

(B) *Exceptions—(1) Nonvoting convertible preferred stock.* Convertible stock issued prior to July 20, 1988, is treated as an option subject to the rules of § 1.382-2T(h)(4) or paragraph (d)(2) of this section if—

(i) The stock, 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; and

(ii) 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 Notice 88-67 or December 7, 1992.

(2) *Other convertible stock.* Convertible stock issued prior to July 20, 1988, is treated as an option subject to the rules of § 1.382-2T(h)(4) or paragraph (d)(2) of this section if—

(i) The terms of the conversion feature permit or require the tender of consideration other than the stock being converted; and

(ii) The loss corporation makes the election described in Notice 88-67 on or before the date prescribed in the Notice.

(iv) *Convertible stock issued on or after July 20, 1988, and before November 5, 1992.* Convertible stock issued on or after July 20, 1988, and before November 5, 1992, is treated as an option subject to the rules of § 1.382-2T(h)(4) or paragraph (d) of this section only if—

(A) The stock, 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; or

(B) The terms of the conversion feature permit or require the tender of consideration other than the stock being converted.

(v) *Certain options in existence immediately before and after an ownership change.* If an option existed immediately before and after an ownership change occurring on a testing date to which § 1.382-2T(h)(4) applies—

(A) The option is not treated as exercised under paragraph (d)(2) of this sec-

tion on any testing date after the change date and prior to a transfer of the option that would itself cause the option to satisfy the ownership test of paragraph (d)(3) of this section, the control test of paragraph (d)(4) of this section, or the income test of paragraph (d)(5) of this section; and

(B) Except as provided in § 1.382-2T(m)(4)(vi) (which relates to the effective date of the rules provided in § 1.382-2T(h)(4) and includes a special rule related to options that are actually exercised within 120 days after they are treated as exercised under that section), the actual exercise of the option, if by the person who owned the option immediately after the ownership change (or by a transferee of the option who acquired the option, directly or indirectly, from that person in one or more transfers described in paragraph (d)(11) of this section), will not contribute to an ownership change on any testing date on or after the date of exercise.

(vi) *Election to apply § 1.382-2T(h)(4)—*

(A) *In general.* If a loss corporation makes an election under this paragraph (h)(2)(vi), §§ 1.382-2T(a)(2)(i) and (h)(4) (relating to testing dates and option attribution) apply (instead of the definition of testing date in § 1.382-2(a)(4) and paragraph (d) of this section) for the purpose of determining whether an ownership change occurs—

(1) On any testing date on or before May 17, 1994, or

(2) In the case of a loss corporation that is under the jurisdiction of a court in a title 11 or similar case filed on or before May 17, 1994, subject to § 1.382-9(o)(1), on any testing date at or before the time the plan of reorganization becomes effective.

(B) *Additional consequences of election.* If a loss corporation makes an election under this paragraph (h)(2)(vi)—

(1) In determining whether any convertible preferred stock issued by the loss corporation during the period that the election is in effect is treated as stock or as an option, the convertible preferred stock is treated as if it were issued on November 4, 1992, and

(2) The special effective date for the control test provided in paragraph (h)(2)(ii) of this section does not apply

to any option with respect to stock of the loss corporation.

(C) *Time and manner of making the election.* The election described in paragraph (h)(2)(vi)(A) of this section is made by attaching a statement to the loss corporation's income tax return for the first taxable year ending after November 4, 1992, in which a testing date (within the meaning of § 1.382-2T(a)(2)(i)) occurs, or if such return is filed on or before May 17, 1994, with its first return filed after May 17, 1994. However, a loss corporation that is under the jurisdiction of a court in a title 11 or similar case filed on or before May 17, 1994, may make the election described in paragraph (h)(2)(vi)(A) by attaching a statement to its tax return for its first taxable year ending after that date. The statement must say "THIS IS AN ELECTION UNDER § 1.382-4(h)(2)(vi) TO APPLY § 1.382-2T(h)(4) ON OR AFTER NOVEMBER 5, 1992." Any amended returns required by paragraph (h)(2)(vi)(D) of this section must accompany the return with which the election is made. An election under paragraph (h)(2)(vi)(A) of this section is irrevocable.

(D) *Amended returns.* If an election under this paragraph (h)(2)(vi) affects the amount of taxable income or loss for a prior taxable year, the loss corporation (or the common parent of any consolidated group of which the loss corporation was a member for the year) must file an amended return for the year that reflects the effect of the election.

(3) *Special rule for options subject to attribution under § 1.382-2T(h)(4).* Section § 1.382-2T(h)(4)(i) does not apply to any option designated by the Internal Revenue Service in the Internal Revenue Bulletin as being excepted from the operation of § 1.382-2T(h)(4)(i).

[T.D. 8531, 59 FR 12837, Mar. 18, 1994, as amended by T.D. 8825, 64 FR 36178, July 2, 1999]

**§ 1.382-5 Section 382 limitation.**

(a) *Scope.* Following an ownership change, the section 382 limitation for any post-change year is an amount equal to the value of the loss corporation multiplied by the long-term tax-exempt rate that applies with respect

to the ownership change, and adjusted as required by section 382 and the regulations thereunder. See, for example, section 382(b)(2) (relating to the carryforward of unused section 382 limitation), section 382(b)(3)(B) (relating to the section 382 limitation for the post-change year that includes the change date), section 382(m)(2) (relating to short taxable years), and section 382(h) (relating to recognized built-in gains and section 338 gains).

(b) *Computation of value.* [Reserved]

(c) *Short taxable year.* The section 382 limitation for any post-change year that is less than 365 days is the amount that bears the same ratio to the section 382 limitation determined under section 382(b)(1) as the number of days in the post-change year bears to 365. The section 382 limitation, as so determined, is adjusted as required by section 382 and the regulations thereunder. This paragraph (c) does not apply to a 52-53 week taxable year that is less than 365 days unless a return is required under section 443 (relating to short periods) for such year.

(d) *Successive ownership changes and absorption of a section 382 limitation—(1) In general.* If a loss corporation has two (or more) ownership changes, any losses attributable to the period preceding the earlier ownership change are treated as pre-change losses with respect to both ownership changes. Thus, the later ownership change may result in a lesser (but never in a greater) section 382 limitation with respect to such losses. In any case, the amount of taxable income for any post-change year that can be offset by pre-change losses may not exceed the section 382 limitation for such ownership change, reduced by the amount of taxable income offset by pre-change losses subject to any earlier ownership change(s).

(2) *Recognized built-in gains and losses.* [Reserved]

(3) *Effective date.* This paragraph (d) applies to taxable years of a loss corporation beginning on or after January 1, 1997.

(e) *Controlled groups.* See § 1.382-8 for rules for determining the value of a loss corporation that is a member of a controlled group.

(f) *Effective date.* Except as otherwise provided, this section applies to a loss