

directly owned immediately after the ownership change in determining the value of its own stock unless the other corporation is a component member of the controlled group on January 29, 1991.

(3) *Amended returns.* A taxpayer that has had an ownership change before January 1, 1997, may file an amended return for any taxable year to modify the amount of a limitation under section 382 with respect to a controlled group loss only if—

(i) The modification complies with the rules contained in this section for computing a limitation under section 382;

(ii) Any other component member of the controlled group with respect to the controlled group loss who elects to restore value and whose taxable income is affected by the election to restore value also files amended returns that comply with such rules; and

(iii) Corresponding adjustments are made in amended returns for all taxable years ending after December 31, 1986.

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§ 1.382-9 Special rules under section 382 for corporations under the jurisdiction of a court in a title 11 or similar case.

(a) *Introduction.* Either section 382(l)(5) or section 382(l)(6) may apply to an ownership change which occurs in a title 11 or similar case (as defined in section 368(a)(3)(A)) if the transaction resulting in the ownership change is ordered by the court or is pursuant to a plan approved by the court. Terms and nomenclature used in this section, and not otherwise defined herein (including the nomenclature and assumptions in § 1.382-2T(b) relating to the examples) have the same respective meanings as in section 382 and the regulations thereunder.

(b) *Application of section 382(l)(5).* section 382(a) does not apply to any ownership change if—

(1) The old loss corporation is (immediately before the ownership change) under the jurisdiction of the court in a title 11 or similar case; and

(2) The pre-change shareholders and qualified creditors of the old loss corporation (determined immediately before the ownership change) own (after the ownership change and as a result of being pre-change shareholders or qualified creditors immediately before the ownership change) stock of the new loss corporation (or stock of a controlling corporation if also in bankruptcy) that meets the requirements of section 1504(a)(2) (determined by substituting “50 percent” for “80 percent” each place it appears).

(c) [Reserved]

(d) *Rules for determining whether stock of the loss corporation is owned as a result of being a qualified creditor—(1) Qualified creditor.* A qualified creditor is the beneficial owner, immediately before the ownership change, of qualified indebtedness of the loss corporation. A qualified creditor owns stock of the new loss corporation (or a controlling corporation) as a result of being a qualified creditor only to the extent that the qualified creditor receives stock in full or partial satisfaction of qualified indebtedness (including interest accrued on such indebtedness) in a transaction that is ordered by the court or is pursuant to a plan approved by the court in a title 11 or similar case. For purposes of this paragraph (d)(1), ownership of stock after the ownership change is determined without applying the attribution rules generally applicable under section 382(l)(3)(A) or § 1.382-2T(h).

(2) *General rules for determining whether indebtedness is qualified indebtedness—*

(i) *Definition.* Indebtedness of the loss corporation is qualified indebtedness if it—

(A) Has been owned by the same beneficial owner since the date that is 18 months before the date of the filing of the title 11 or similar case; or

(B) Arose in the ordinary course of the trade or business of the loss corporation and has been owned at all times by the same beneficial owner.

(ii) *Determination of beneficial ownership.* For purposes of paragraph (d)(2)(i) of this section, beneficial ownership of indebtedness is determined without applying attribution rules.

(iii) *Duty of inquiry.* The loss corporation must determine that indebtedness

that the loss corporation treats as qualified indebtedness, other than indebtedness to which paragraph (d)(3)(i) of this section applies, has been owned for the requisite period by the beneficial owner who owns the indebtedness immediately before the ownership change. The loss corporation may rely on a statement, signed under penalties of perjury, by a beneficial owner regarding the amount of indebtedness the beneficial owner owns and the length of time that the beneficial owner has owned the indebtedness.

(iv) *Ordinary course indebtedness.* For purposes of this paragraph (d)(2), indebtedness arises in the ordinary course of the loss corporation's trade or business only if the indebtedness is incurred by the loss corporation in connection with the normal, usual, or customary conduct of business, determined without regard to whether the indebtedness funds ordinary or capital expenditures of the loss corporation. For example, indebtedness (other than indebtedness acquired for a principal purpose of being exchanged for stock) arises in the ordinary course of the loss corporation's trade or business if it is trade debt; a tax liability; a liability arising from a past or present employment relationship, a past or present business relationship with a supplier, customer, or competitor of the loss corporation, a tort, a breach of warranty, or a breach of statutory duty; or indebtedness incurred to pay an expense deductible under section 162 or included in the cost of goods sold. A claim that arises upon the rejection of a burdensome contract or lease pursuant to the title 11 or similar case is treated as arising in the ordinary course of the loss corporation's trade or business if the contract or lease so arose.

(3) *Treatment of certain indebtedness as continuously owned by the same owner—*

(i) *In general.* For purposes of paragraph (d)(2) of this section, a loss corporation may treat indebtedness as always having been owned by the beneficial owner of the indebtedness immediately before the ownership change if the beneficial owner is not, immediately after the ownership change, either a 5-percent shareholder or an entity through which a 5-percent share-

holder owns an indirect ownership interest in the loss corporation (a *5-percent entity*). This paragraph (d)(3)(i) does not apply to indebtedness beneficially owned by a person whose participation in formulating a plan of reorganization makes evident to the loss corporation (whether or not the loss corporation had previous knowledge) that the person has not owned the indebtedness for the requisite period.

(ii) *Operating rules.* For purposes of paragraph (d)(3)(i) of this section: (A) If a loss corporation has actual knowledge of a coordinated acquisition of its indebtedness by a group of persons, through a formal or informal understanding among themselves, for a principal purpose of exchanging the indebtedness for stock, the indebtedness (and any stock received in exchange therefor) is treated as owned by an entity. A principal element in determining if an understanding exists among members of a group is whether the investment decision of each member is based upon the investment decision of one or more other members.

(B) If the loss corporation has actual knowledge regarding stock ownership described in §1.382-2T(k)(2), the loss corporation must take that ownership into account in determining which beneficial owners of indebtedness are, immediately after the ownership change, 5-percent shareholders or 5-percent entities. The loss corporation is not required to take into account an ownership interest described in §1.382-2T(k)(4) unless the loss corporation has actual knowledge of the ownership interest.

(C) The term *5-percent shareholder* includes any person who is a 5-percent shareholder of the loss corporation within the meaning of §1.382-2T(g), without regard to the option attribution rules of section 382(l)(3)(A) or §1.382-4(d) (or, if applicable, §1.382-2T(h)(4)).

(D) Paragraph (d)(3)(i) of this section does not apply to indebtedness if the loss corporation has actual knowledge immediately after the ownership change that the exercise of an option to acquire or dispose of stock of the loss corporation would cause the beneficial owner of the indebtedness immediately before the ownership change to

be, after the ownership change, either a 5-percent shareholder or a 5-percent entity. An interest that is treated as an option under § 1.382-4(d)(9) (or § 1.382-2T(h)(4)(v) if applicable) is treated as an option for purposes of this paragraph (d)(3)(ii)(D).

(iii) *Indebtedness owned by beneficial owner who becomes a 5-percent shareholder or 5-percent entity.* If the beneficial owner of indebtedness immediately before the ownership change is a 5-percent shareholder or 5-percent entity immediately after the ownership change, the general rules of paragraph (d)(2) of this section apply to determine whether the indebtedness has been owned for the requisite period by the beneficial owner.

(iv) *Example.* The following example illustrates paragraph (d)(3) of this section.

(A)(1) L is a loss corporation in a title 11 case. The plan of reorganization of L approved by the bankruptcy court provides for the satisfaction of claims by the issuance of new L common stock to its creditors as follows:

A—2 percent
B—7.5 percent
C—2.5 percent
P1—3 percent
P2—10 percent
P3—4.9 percent
P4—4.9 percent
P5—4.9 percent

(2) P2 is owned by Public P2. B owns 10 percent of the stock of P1 and L has no actual knowledge of this ownership. L has actual knowledge that D owns P3, P4 and P5. In addition, L has actual knowledge, immediately after the ownership change, that C owns an option to acquire newly-issued stock of L that, if exercised, would increase C's percentage ownership of L stock from 2.5 percent to 8 percent. An ownership change of L occurs on the date the plan becomes effective.

(B) Under paragraph (d)(3)(i) of this section, L may treat the indebtedness owned by A and P1 immediately before the ownership change as always having been owned by A and P1. Neither A nor P1 is a 5-percent shareholder immediately after the ownership change. Further, because P1 owns less than 5 percent of the L stock (and L has no actual knowledge of B's ownership interest in P1), P1 is treated as an individual, and the L stock owned by P1 is not attributed to any other person, including B. See § 1.382-2T(h)(2)(iii). Therefore, P1 is not a 5-percent entity.

(C) Paragraph (d)(3)(i) of this section does not apply to the indebtedness owned by B, C, P2, P3, P4, or P5. B is a 5-percent shareholder immediately after the ownership change. L has actual knowledge immediately after the ownership change that the exercise of C's option would cause C to be a 5-percent shareholder immediately after the ownership change. (L does not take into account the effect of the exercise of the option, however, in determining the percentage stock ownership of any person other than C because the deemed exercise would not cause any other person to be a 5-percent shareholder or a 5-percent entity after the ownership change.) P2 is a 5-percent entity, because Public P2, a 5-percent shareholder, owns an indirect ownership interest in L through P2. P3, P4, and P5 are 5-percent entities because D, a 5-percent shareholder, owns an indirect ownership interest in L through P3, P4, and P5. Because L has actual knowledge that D would be a 5-percent shareholder but for the application of § 1.382-2T(h)(2)(iii), that section does not apply to P3, P4, or P5. See § 1.382-2T(k)(2). Thus, under § 1.382-2T(h)(2)(i), the L stock owned by P3, P4, and P5 is attributed to D, and D is a 5-percent shareholder. Because paragraph (d)(3)(i) of this section does not apply to the indebtedness owned by B, C, P2, P3, P4, and P5, L may treat as qualified indebtedness only indebtedness that it determines had been owned by such persons for the requisite period. See paragraph (d)(2)(iii) of this section.

(4) *Special rule if indebtedness is a large portion of creditor's assets—(i) In general.* Indebtedness is not qualified indebtedness if—

(A) The beneficial owner of the indebtedness is a corporation or other entity that had an ownership change on any day during the applicable period;

(B) The indebtedness represents more than 25 percent of the fair market value of the total gross assets (excluding cash or cash equivalents) of the beneficial owner on its change date; and

(C) The beneficial owner is a 5-percent entity immediately after the ownership change of the loss corporation (determined by applying the rules of paragraph (d)(3) of this section).

(ii) *Applicable period.* For purposes of paragraph (d)(4)(i) of this section, the term *applicable period* means the period beginning on the day 18 months before the filing of the title 11 or similar case (or the day on which the beneficial owner acquired the indebtedness, if later) and ending with the change date of the loss corporation.

(iii) *Determination of ownership change.* For purposes of paragraph (d)(4)(i) of this section, the determination whether a beneficial owner of indebtedness has an ownership change is made under the principles of section 382 and the regulations thereunder, without regard to whether the beneficial owner is a loss corporation and by beginning the testing period no earlier than the latest of the day three years before the change date, the day 18 months before the filing of the title 11 or similar case, or the day on which the beneficial owner acquired the indebtedness.

(iv) *Reliance on statement.* Paragraph (d)(4)(i) of this section does not apply to indebtedness if the loss corporation obtains a statement, signed under penalties of perjury, by the beneficial owner of the indebtedness that states that paragraph (d)(4)(i) of this section does not apply to the indebtedness.

(5) *Tacking of ownership periods—(i) Transferee treated as owning indebtedness for period owned by transferor.* To determine whether indebtedness transferred in a qualified transfer is qualified indebtedness, the transferee is treated as having owned the indebtedness for the period that it was owned by the transferor.

(ii) *Qualified transfer.* For purposes of paragraph (d)(5)(i) of this section, a transfer of indebtedness is a qualified transfer if—

(A) The transfer is between parties who bear a relationship to each other described in section 267(b) or 707(b) (substituting at least 80 percent for more than 50 percent each place it appears in section 267(b) (and section 267(f)(1)) or 707(b));

(B) The transfer is a transfer of a loan within 90 days after its origination, pursuant to a customary syndication transaction;

(C) The transfer is a transfer of newly incurred indebtedness by an underwriter that owned the indebtedness for a transitory period pursuant to an underwriting;

(D) The transferee's basis in the indebtedness is determined under section 1014 or 1015 or with reference to the transferor's basis in the indebtedness;

(E) The transfer is in satisfaction of a right to receive a pecuniary bequest;

(F) The transfer is pursuant to any divorce or separation instrument (within the meaning of section 71(b)(2));

(G) The transfer is pursuant to a subrogation in which the transferee acquires a claim against the loss corporation by reason of a payment to the claimant pursuant to an insurance policy or a guarantee, letter of credit or similar security arrangement; or

(H) The transfer is a transfer of an account receivable in a customary commercial factoring transaction made within 30 days after the account arose to a transferee that regularly engages in such transactions.

(iii) *Exception.* A transfer of indebtedness is not a qualified transfer for purposes of paragraph (d)(5)(i) of this section if the transferee acquired the indebtedness for a principal purpose of benefiting from the losses of the loss corporation by—

(A) Exchanging the indebtedness for stock of the loss corporation pursuant to the title 11 or similar case; or

(B) Selling the indebtedness at a profit that reflects the expectation that, by reason of section 382(l)(5), section 382(a) will not apply to any ownership change resulting from the title 11 or similar case.

(iv) *Debt-for-debt exchanges.* If the loss corporation satisfies its indebtedness with new indebtedness, either through an exchange of new indebtedness for old indebtedness or a change in the terms of indebtedness that results in an exchange under section 1001—

(A) The owner of the new indebtedness is treated as having owned that indebtedness for the period that it owned the old indebtedness; and

(B) The new indebtedness is treated as having arisen in the ordinary course of the trade or business of the loss corporation if the old indebtedness so arose.

(6) *Effective date—(i) In general.* This paragraph (d) applies to ownership changes occurring on or after March 17, 1994.

(ii) *Elections and amended returns—(A) Election to apply this paragraph (d) retroactively.* A loss corporation may elect to apply this paragraph (d) to an ownership change occurring prior to March 17, 1994. This election must be made by

the later of the due date (including any extensions of time) of the loss corporation's tax return for the taxable year which includes the change date or the date that the loss corporation files its first tax return after May 16, 1994. The election is made by attaching the following statement to the return: "This is an Election to Apply §1.382-9(d) Retroactively with Respect to the Ownership Change on [Insert Date of Ownership Change] That Occurred in Connection with the Title 11 or Similar Case filed on [Insert Date of Filing]." This statement must be accompanied by the amended returns described in paragraph (d)(6)(ii)(C) of this section. An election under this paragraph (d)(6) is irrevocable.

(B) *Election to revoke section 382(l)(5)(H) election.* A loss corporation may elect to revoke a prior election made under section 382(l)(5)(H) with respect to an ownership change occurring before March 17, 1994 by including the following statement with its election to apply §1.382-9(d) retroactively: "This is an Election to Revoke a Prior Election Made Under Section 382(l)(5)(H) With Respect to the Ownership Change on [Insert Date of Ownership Change] That Occurred in Connection With the Title 11 or Similar Case Filed on [Insert Date of Filing]."

(C) *Amended returns.* If the retroactive application of this paragraph (d) 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 (d). 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 (d).

(e) *Option attribution for purposes of determining stock ownership under section 382(l)(5)(A)(ii)—(1) In general.* Solely for purposes of determining whether the stock ownership requirements of section 382(l)(5)(A)(ii) are satisfied at the time of an ownership change, stock of the loss corporation (or of a controlling corporation if also in bankruptcy) that is subject to an option is treated as acquired at that time, pursuant to an exercise of the option by its owner, if such deemed exercise would cause the pre-change shareholders and qualified creditors of the loss corporation to own (after such ownership change and as a result of being pre-change shareholders or qualified creditors immediately before such change) less than an amount of such stock sufficient to satisfy the ownership requirements of section 382(l)(5)(A)(ii). An option that is owned as a result of being a pre-change shareholder or qualified creditor and that, if exercised, would result in the ownership of stock by a pre-change shareholder or qualified creditor is not treated as exercised under this paragraph (e). For purposes of this paragraph (e)(1), rules similar to those option attribution rules under §1.382-2T(h)(4)(iii), (iv), (v), (vii), and (x)(A), (B) (except with respect to a debt instrument that was issued after the filing of the petition in the title 11 or similar case), (D), (E) (except with respect to a right to receive or obligation to issue stock as interest or dividends on a debt instrument or stock that was issued after the filing of the petition in the title 11 or similar case), (G), (H), and (Z), apply.

(2) *Special rules—(i) Lapse or forfeiture of options deemed exercised.* A loss corporation may apply rules similar to the rules of §1.382-2T(h)(4)(viii) with respect to an option except to the extent any person owning the option at any time on or after the change date acquires additional stock or an option to acquire additional stock during the period of time on or after the ownership change and on or before the lapse or forfeiture of the option.

(ii) *Actual exercise of options not deemed exercised.* In determining whether the ownership change pursuant to the plan of reorganization qualifies

under section 382(l)(5), a loss corporation may take into account stock acquired pursuant to the actual exercise of an option issued pursuant to the plan of reorganization if that option was not deemed exercised under paragraph (e)(1) of this section. However, this paragraph (e)(2)(ii) applies only if the option is actually exercised within the 3 years of the ownership change by the 5-percent shareholder who, as a result of being a pre-change shareholder or qualified creditor, acquired the option under the plan.

(iii) *Amended returns.* A loss corporation may file an amended return for a prior taxable year (subject to any applicable statute of limitations) if it determines that section 382(l)(5) applies to an ownership change as a result of the operation of paragraph (e)(2)(i) or (ii) of this section, but only if the loss corporation makes corresponding adjustments on amended returns for all affected taxable years (subject to any applicable statute of limitations).

(3) *Examples.* In each of the examples in this paragraph (e)(3), assume that there is an ownership change of loss corporation L on the date the plan of reorganization is effective.

Example 1. L is a loss corporation in a title 11 case. The plan of reorganization of L approved by the bankruptcy court provides for the cancellation of all existing L stock, the issuance of 100 shares of new L common stock to qualified creditors, and the issuance of an option to a new investor to acquire, at any time during the next 3 years, 90 shares of new L common stock from L at its fair market value on the date the plan becomes effective. Under paragraph (e)(1) of this section, on the date the plan becomes effective, the option held by the new investor is deemed exercised if the exercise would cause the qualified creditors of L to own less than 50 percent of the total voting power or value of the L stock after the ownership change. Because the qualified creditors would receive at least 50 percent of the voting power and value of the new L common stock even if the option were deemed exercised, the stock ownership requirements of section 382(l)(5)(A)(ii) are satisfied.

Example 2. The facts are the same as in *Example 1*, except that L issues an option to the new investor to acquire 110 shares of new L common stock. This option is deemed exercised under paragraph (e)(1) of this section on the date the plan becomes effective, because, as a result of the deemed exercise, the qualified creditors would own only 100 of 210

shares of the new L common stock (approximately 48 percent) after the ownership change. Accordingly, the stock ownership requirements of section 382(l)(5)(A)(ii) are not satisfied and section 382(a) applies to the ownership change.

Example 3. (a) L is a loss corporation in a title 11 case. The plan of reorganization of L approved by the bankruptcy court provides for the cancellation of all existing L stock, the issuance of new L common stock and 5-year options to acquire L common stock as follows:

(i) To qualified creditors—100 shares of stock and options to acquire 50 shares;

(ii) To a new investor—options to acquire 110 shares.

(b) Under paragraph (e)(1) of this section, the option held by the new investor is deemed exercised on the date the plan becomes effective because the exercise would cause the qualified creditors of L to own less than 50 percent of the total voting power and value of the L stock after the ownership change (100 of 210 shares or approximately 48 percent). Accordingly, the stock ownership requirements of section 382(l)(5)(A)(ii) are not satisfied initially and section 382(a) applies to the ownership change.

(c) Assume, however, that the qualified creditors actually exercise enough options that were acquired pursuant to the plan of reorganization to purchase 30 additional shares during the 3 year period after the plan becomes effective. Under paragraph (e)(2)(ii) of this section, L may take into account the 30 shares purchased by the qualified creditors by the exercise of the options in determining whether the stock ownership requirements of section 382(l)(5)(A)(ii) were satisfied on the date the plan of reorganization became effective. If L takes such purchases into account, the qualified creditors of L are deemed to own as of the date of the ownership change more than 50 percent of the total voting power or value of the L stock after the ownership change (130 of 240 shares or approximately 54 percent), with the result that the stock ownership requirements of section 382(l)(5)(A)(ii) are satisfied and section 382(l)(5) applies to the ownership change as of the effective date of the plan.

(d) Assume instead that the qualified creditors acquire 30 additional shares by exercise of options more than 3 years after the plan becomes effective. Such exercise is not taken into account under paragraph (e)(2)(ii) of this section for purposes of determining whether the stock ownership requirements of section 382(l)(5)(A)(ii) are satisfied as of the effective date of the plan. Thus, the qualified creditors are deemed to own less than 50 percent of the total voting power and value of the L stock after the ownership change (100 of 210 shares) and section 382(l)(5) does not apply to the ownership change.

(e) Assume instead that, during the 3 year period after the plan becomes effective, the new investor exercises part of his option and purchases 105 shares of stock. The exercise causes a lapse of the rights to acquire the remaining 5 shares of stock. Also during that time, the qualified creditors exercise part of their options and acquire 6 additional shares of stock. Under paragraph (e)(2)(i) of this section, L may treat the lapse of that part of the new investor's option to acquire 5 shares of stock as if that part of the option had never been issued for purposes of determining whether the stock ownership requirements of section 382(l)(5)(A)(ii) are satisfied as of the effective date of the plan. Also, under paragraph (e)(2)(ii) of this section, L may take into account the 6 shares purchased by the qualified creditors by the exercise of the options in determining whether the stock ownership requirements of section 382(l)(5)(A)(ii) are satisfied as of the effective date of the plan. If L takes all of this information into account, the qualified creditors are deemed to own more than 50 percent of the total voting power or value of the L stock after the ownership change (106 of 211 shares or approximately 50.2 percent) and section 382(l)(5) applies to the ownership change as of the effective date of the plan.

(4) *Effective dates*—(i) *In general.* This paragraph (e) applies to ownership changes occurring on or after September 5, 1990.

(ii) *Special rule for interest or dividends.* Rules similar to the rules of § 1.382-2T(h)(4)(x)(E) (relating to option attribution for purposes of determining whether an ownership change occurs) apply to a right to receive or obligation to issue stock as interest or dividends on a debt instrument or stock that was issued after the filing of the petition in the title 11 or similar case for ownership changes occurring before April 8, 1992.

(f)–(h) [Reserved]

(i) *Election not to apply section 382(l)(5).* Under section 382(l)(5)(H), a loss corporation may elect not to have the provisions of section 382(l)(5) apply to an ownership change in a title 11 or similar case. This election is irrevocable and must be made by the due date (including any extensions of time) of the loss corporation's tax return for the taxable year which includes the change date. The election is to be made by attaching the following statement to the tax return of the loss corporation for that taxable year: "This is an Election Under § 1.382-9(i) not to Apply

the Provisions of Section 382(l)(5) to the Ownership Change Occurring Pursuant to a Plan of Reorganization Confirmed by the Court on [Insert Confirmation Date]."

(j) *Value of the loss corporation in an ownership change to which section 382(l)(6) applies.* Section 382(l)(6) applies to any ownership change occurring pursuant to a plan of reorganization in a title 11 or similar case to which section 382(l)(5) does not apply. In such case, the value of the loss corporation under section 382(e) is equal to the lesser of—

(1) The value of the stock of the loss corporation immediately after the ownership change (determined under the rules of paragraph (k) of this section); or

(2) The value of the loss corporation's pre-change assets (determined under the rules of paragraph (l) of this section).

(k) *Rules for determining the value of the stock of the loss corporation*—(1) *Certain ownership interests treated as stock.* For purposes of paragraph (j)(1) of this section—

(i) Stock includes stock described in section 1504(a)(4) and any stock that is not treated as stock under § 1.382-2T(f)(18)(ii) for purposes of determining whether a loss corporation has an ownership change; and

(ii) Stock does not include an ownership interest that is treated as stock under § 1.382-2T(f)(18)(iii) for purposes of determining whether a loss corporation has an ownership change.

(2) *Coordination with section 382(e)(2).* In the case of a redemption or other corporate contraction occurring after and in connection with the ownership change, the value of the stock of the loss corporation under paragraph (j)(1) of this section is reduced under section 382(e)(2).

(3) *Coordination with section 382(e)(3).* If the loss corporation is a foreign corporation, in determining the value of the stock under paragraph (j)(1) of this section, only items treated as connected with the conduct of a trade or business in the United States are taken into account.

(4) *Coordination with section 382(l)(1).* Section 382(l)(1) does not apply in determining the value of the stock of the

loss corporation under paragraph (j)(1) of this section.

(5) *Coordination with section 382(l)(4).* If, immediately after the ownership change, the loss corporation has substantial nonbusiness assets (as determined under section 382(l)(4)(B) taking into account only those assets the loss corporation held immediately before the ownership change), the value of the stock of the loss corporation under paragraph (j)(1) of this section is reduced by the excess of the value of such nonbusiness assets over those assets' share of the loss corporation's indebtedness (determined under section 382(l)(4)(D) taking into account the loss corporation's assets and liabilities immediately after the ownership change).

(6) *Special rule for stock not subject to the risk of corporate business operations—*
(i) *In general.* The value of the stock of the loss corporation under paragraph (j)(1) of this section is reduced by the value of stock that is issued as part of a plan one of the principal purposes of which is to increase the section 382 limitation without subjecting the investment to the entrepreneurial risks of corporate business operations.

(ii) *Coordination of special rule and other rules affecting value.* If the value of the loss corporation is modified under another rule affecting value, appropriate adjustments are to be made so that such modification is not duplicated under this paragraph (k)(6).

(7) *Limitation on value of stock.* For purposes of paragraph (j)(1) of this section, the value of stock of the loss corporation issued in connection with the ownership change cannot exceed the cash and the value of any property (including indebtedness of the loss corporation) received by the loss corporation in consideration for the issuance of that stock.

(l) *Rules for determining the value of the loss corporation's pre-change assets—*
(1) *In general.* Except as otherwise provided in this paragraph (l), the value of the loss corporation's pre-change assets is the value of its assets (determined without regard to liabilities) immediately before the ownership change.

(2) *Coordination with section 382(e)(2).* Section 382(e)(2) does not apply in determining the value of the pre-change

assets of the loss corporation under paragraph (j)(2) of this section.

(3) *Coordination with section 382(e)(3).* If the loss corporation is a foreign corporation, in determining the value of the pre-change assets under paragraph (j)(2) of this section, only assets treated as connected with the conduct of a trade or business in the United States are taken into account.

(4) *Coordination with section 382(l)(1).* For purposes of paragraph (j)(2) of this section, the value of the pre-change assets of the loss corporation is determined without regard to the amount of any capital contribution to which section 382(l)(1) applies. For purposes of applying this paragraph (l)(4), the receipt of cash or property by the loss corporation in exchange for the issuance of indebtedness is considered a capital contribution if it is part of a plan one of the principal purposes of which is to increase the value of the loss corporation under paragraph (j) of this section.

(5) *Coordination with section 382(l)(4).* If, immediately after the ownership change, the loss corporation has substantial nonbusiness assets (as determined under section 382(l)(4)(B) taking into account only those assets the loss corporation held immediately before the ownership change), the value of the loss corporation's pre-change assets is reduced by the value of the nonbusiness assets.

(m) *Continuity of business requirement—*
(1) *Under section 382(l)(5).* If section 382(l)(5) applies to an ownership change of a loss corporation, section 382(c) and the regulations thereunder do not apply with respect to the ownership change.

(2) *Under section 382(l)(6).* If section 382(l)(6) applies to an ownership change of a loss corporation, section 382(c) and the regulations thereunder apply to the ownership change.

(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.* If section 382(l)(5) applies to an ownership change and, within the two-year period immediately following such ownership change, a second ownership change occurs, section 382(l)(5) cannot apply to the second ownership

change and the section 382(a) limitation with respect to the second ownership change is zero.

(2) *Section 382(l)(6) applies to the first ownership change.* If the value of a loss corporation in an ownership change was determined under section 382(l)(6) and a second ownership change occurs within the two-year period immediately following the first ownership change, the value of the loss corporation under section 382(e) with respect to the second ownership change is not reduced under section 382(l)(1) for any increase in value of the loss corporation previously taken into account under section 382(l)(6) with respect to the first ownership change.

(o) *Treatment of certain options for ownership change purposes*—(1) Neither § 1.382-2T(h)(4)(i) nor § 1.382-4(d) (relating to the treatment of options as exercised) applies to the following options to acquire stock of a loss corporation reorganized pursuant to a plan of reorganization that is confirmed in a title 11 or similar case (within the meaning of section 368(a)(3)(A)) but only until the time the plan becomes effective—

(i) Any option created by the solicitation or receipt of acceptances to the plan;

(ii) The option created by the confirmation of the plan; and

(iii) Any option created under the plan.

(2) This paragraph (o) generally applies to any testing date occurring on or after September 5, 1990. However, this paragraph (o) does not apply on any testing date occurring on or after April 8, 1992, if, in connection with the plan of reorganization, the loss corporation issues stock (including stock described in section 1504(a)(4)) or otherwise receives a capital contribution before the effective date of the plan for a principal purpose of using before the effective date losses and credits that would be subject to limitation under section 382(a) or would be eliminated under section 382(l)(5)(B) or (C) if this paragraph (o) did not apply on the testing date. A loss corporation may elect to apply this paragraph (o) to any testing date occurring before September 5, 1990, by filing a statement substantially similar to the following with its income tax return: "THIS IS AN

ELECTION TO APPLY § 1.382-3(o) (OR § 1.382-9(o) AFTER REDESIGNATION) FOR TESTING DATES PRIOR TO SEPTEMBER 5, 1990, TO OPTIONS CREATED BY OR UNDER A PLAN OF REORGANIZATION CONFIRMED IN A TITLE 11 OR SIMILAR CASE." A loss corporation may elect to not apply this paragraph (o) to testing dates occurring on or after September 5, 1990, to April 8, 1992, by filing a statement substantially similar to the following with its income tax return: "THIS IS AN ELECTION TO NOT APPLY § 1.382-3(o) (OR § 1.382-9(o) AFTER REDESIGNATION) FOR TESTING DATES OCCURRING ON OR AFTER SEPTEMBER 5, 1990, TO APRIL 8, 1992, TO OPTIONS CREATED BY OR UNDER A PLAN OF REORGANIZATION CONFIRMED IN A TITLE 11 OR SIMILAR CASE."

(p) *Effective date for rules relating to section 382(l)(6)*—(1) *In general.* Paragraphs (i), (j), (k), (l), (m)(2), and (n)(2) of this section apply to any ownership change occurring on or after March 17, 1994.

(2) *Ownership change to which section 382(l)(6) applies occurring before March 17, 1994.* In the case of an ownership change occurring before March 17, 1994, the loss corporation may elect to apply the rules of paragraphs (j), (k), (l), (m)(2), and (n)(2) of § 1.382-9 in their entirety. The election must be made by the later of the due date (including any extensions of time) of the loss corporation's tax return for the taxable year which includes the change date or the date that the loss corporation files its first tax return after May 16, 1994. The election is made by attaching the following statement to the return: "This is an Election to Apply §§ 1.382-9 (j), (k), (l), (m)(2), and (n)(2) of the Income Tax Regulations to the Ownership Change Occurring Pursuant to a Plan of Reorganization Confirmed by the Court on [Insert Confirmation Date]." In connection with making this election, on the same return the loss corporation may also elect not to apply section 382(l)(5) to the ownership change under paragraph (i) of this section (if the loss corporation has not already done so pursuant to § 301.9100-7T(a) of this chapter). If, under the applicable statute of limitations, the loss corporation may file amended returns for the year

of the ownership change and all subsequent years (an open year), an electing loss corporation must file an amended return for each prior affected year to reflect the elections. If, under the applicable statute of limitations, the loss corporation may not file an amended return for the year of the ownership change or any subsequent year (a closed year), an electing loss corporation must file an amended return for each affected open year to reflect the elections and the section 382 limitation resulting from the ownership change must be appropriately adjusted for the earliest open year (or years) to reflect the difference between the amount of pre-change losses actually used in closed years and the amount of pre-change losses that would have been used in such years applying the rules of paragraphs (j), (k), (l), (m)(2), (n)(2) of this section to the ownership change.

[T.D. 8388, 57 FR 346, Jan. 6, 1992; T.D. 8407, 57 FR 12210, Apr. 9, 1992. Redesignated by T.D. 8440, 57 FR 45712, 45713, Oct. 5, 1992; 57 FR 52827, Nov. 5, 1992; T.D. 8531, 59 FR 12840, Mar. 18, 1994; T.D. 8530, 59 FR 12843, Mar. 18, 1994; T.D. 8529, 59 FR 12846, Mar. 18, 1994]

§ 1.382-10 [Reserved]

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

(a) *Distributions from qualified trusts*—(1) *In general.* For purposes of § 1.382-2T, if a qualified trust described in section 401(a) (qualified trust) distributes an ownership interest in an entity (as defined in § 1.382-3(a)(1)), then for testing dates on or after the date of the distribution, the distributed ownership interest is treated as having been acquired by the distributee on the date and in the manner acquired by the trust and not as having been acquired or disposed of by the trust. The distribution does not cause the day of the distribution to be a testing date.

(2) *Accounting for dispositions*—(i) *General rule.* For purposes of this paragraph (a), in order to determine which ownership interest in an entity is distributed from a qualified trust, a loss corporation must either specifically identify the ownership interests that are the subject of all dispositions by the qualified trust of ownership inter-

ests in an entity, or apply the first-in, first-out (FIFO) method to all such dispositions.

(ii) *Special rules.* For purposes of this paragraph (a)(2):

(A) The FIFO method must be applied on a class-by-class basis; and

(B) The term dispositions includes distributions, sales, and other transfers.

(3) *Examples.* The following examples illustrate the principles of this paragraph (a). For purposes of these examples, unless otherwise stated, the nomenclature and assumptions of the examples in § 1.382-2T(b) apply, all corporations file separate income tax returns on a calendar year basis, the only 5-percent shareholder of a loss corporation is a public group, and the facts set forth the only acquisitions of stock by any participants in a qualified plan and the only owner shifts with respect to the loss corporation during the testing period. The examples are as follows:

Example 1. (i) *Facts.* In 1994, E, a qualified trust established under Plan F, acquires 10 percent of L stock. A is a participant in Plan F. On January 1, 2002, A acquires 4 percent of L stock, and B, who is not a participant or a beneficiary of a participant in Plan F, acquires 5 percent of L stock. On January 1, 2004, E distributes 2 percent of L stock to A. On July 1, 2004, A acquires 1 percent of L stock.

(ii) *Analysis.* January 1, 2002, is a testing date because B's acquisition of 5 percent of L stock causes an increase in the percentage ownership of B, a 5-percent shareholder. As of the close of that testing date, A is treated as owning only 4 percent of L stock. Therefore, A is treated as a member of the public group of L. In addition, E is treated as owning 10 percent of L stock that it acquired in 1994.

(iii) As a result of the application of paragraph (a)(1) of this section to E's distribution of 2 percent of L stock to A on January 1, 2004, for testing dates on and after January 1, 2004, A is treated as having acquired that 2 percent interest in L in 1994, and E is treated as having acquired only 8 percent of L stock in 1994. Because there are no owner shifts on January 1, 2004, that date is not a testing date.

(iv) July 1, 2004, is a testing date because on that date A, a 5-percent shareholder, acquires 1 percent of L stock. As of the close of that testing date, A's percentage of ownership of L stock is 7 percent, and A's lowest percentage of ownership of L stock at any time within the testing period is 2 percent (deemed acquired in 1994), representing an