THE ULTIMATE
Section 382 Study Checklist

- Schedules 13D and 13G
- Forms 3, 4, and 5
- Form 10-Q
- Form 10-K

A publication of
Ultimate Section 382 Study Checklist for SECTION 382 Preparers

So you are preparing a Section 382 Study. Regardless of whether this is the first study you will prepare or the fortieth study, make sure you know what you are doing. The following is a checklist of information and documents that should be carefully reviewed by tax and accounting professionals in connection with a Section 382 Study.

GETTING STARTED

☐ Familiarize yourself with how Section 382 works, when it applies, and what certain rules mean (Small Issuance Limitation, Cash Issuance Exception, Segregation Rules, Aggregation Rules, Actual Knowledge, etc).

☐ Ask Management to provide copies of any prior Section 382 Studies.

☐ If this is the Company's initial Section 382 Study, confirm the date that it first became a loss corporation. This will be the start of the Analysis Period.

☐ Identify the transactions that qualify as an “Equity Structure Shift” or an “Owner Shift”. The dates on which these transactions occurred will be Testing Dates. See Section 382(g)(2).

☐ Review transaction agreements or tax opinions to identify any reorganizations that occurred during the Analysis Period. Type D, Type F and Type G Reorganizations are not considered Equity Structure Shifts. See Section 382(g)(3)(A).

☐ Determine what classes of stock were issued and outstanding during the Analysis Period. This may include stock options, warrants, convertible securities, restricted stock, stock appreciation rights, and phantom stock rights.

☐ If the Company had preferred stock, review its terms to determine if the stock is Section 1504(a)(4) stock. If so, it is not counted as stock for Section 382 purposes. See Treas. Reg. § 1.382-2(a)(3).
Determine if the Company had any restricted common stock outstanding during the Analysis Period. If so, find out whether and when Section 83(b) elections were made.

Obtain the fair market value of each class of stock on each Testing Date. If the Company is publicly traded, this information is available online at www.google.com/finance. If Company is not publicly traded, request a copy of its 409A Valuation Report.

Review the current and all historic Cap Tables to get a better view of the company’s ownership in chronological order.

If applicable, review the Company’s Option Exercise and Restricted Stock vesting schedules.

If applicable, review the Company’s stock repurchase schedules.

If applicable, review the Company’s conversion schedules for any Convertible Preferred Stock and/or Convertible Debt that was converted into Common Stock.

If Company is publicly traded, review all Schedules 13D and 13G. These are available online at www.sec.gov. Analyze the ownership of these reporting persons to identify any public groups or individuals that would be treated as 5-percent shareholders by virtue of their ownership in the reporting person. Also, review PLR 9104043, PLR 9533024 and PLR 9725039 to understand the IRS’ position on the difference between economic ownership vs. reporting ownership.

Review similar schedules, such as Forms 3, 4, and 5. These are available online at www.sec.gov.

If Company is publicly traded and issued securities in a business merger or exchange offer, review Form S-4.

If Company is publicly traded and issued securities in a Private Placement Transaction, review For D. Also review private placement memoranda.

If Company undertook a Tender Offer, review either the Tender Offer Statement by Issuer (SC TO-I) or Tender Offer Statement by Third Part (SC TO-T).

Review prospectuses, offering circulars or similar documents pertaining to the sale and/or issuance of Company’s securities.
Review stockholder agreements, put or call agreements, stock transfer agreements or other such arrangement among the 5-percent shareholders of the Company.

Review Forms 10-K and 10-Q. The balance sheet and accompanying notes will provide more detail on the Company’s equity transactions. These are available online at www.sec.gov.

Find out if Company issued any options, convertible notes, warrants or similar instruments during the Analysis Period. If so, ask Management if any of these instruments issued with a principal purpose to avoid or ameliorate the impact of an ownership change.

Determine if any options, convertible notes, warrants or similar instruments fall within the safe harbor. See Treas. Reg. § 1.382-4(d).

Find out if any 5-percent shareholders were related for purposes of Section 382(l)(3)(A).

Identify all first-tier, higher-tier and highest-tier entities. If any such entities were investment or venture capital funds, analyze their ownership to determine whether they should be treated as a single 5-percent shareholder.

Determine what methodology will be applied for the entire Section 382 Study – Full Value Methodology or Hold Constant Principle. If the Hold Constant Principle, see Notice 2010-65 for a description of the three approaches that can be used to apply the Hold Constant Principle methodology.

Determine how the Small Issuance Exception will be applied (class-by-class basis or corporation-wide basis).

For testing dates occurring on or after October 27, 2013, determine how the Small Redemption Exception will be applied (class-by-class basis or corporation-wide basis).
RESEARCH AND ANALYSIS

☐ If using spreadsheets, make sure the formulas are correct for each calculation.

☐ Determine what, if any, significant assumptions will be made and list them.

☐ If applicable, determine what if any, representations will need to be made by the Company and list them.

☐ Check the Company’s balance sheets for each taxable year for the total number of outstanding shares as of the beginning of each taxable year. You will need this information in order to calculate both the Small Issuance Limitation and the Small Redemption Limitation (if applicable).

☐ If an ownership change occurred during the Analysis Period, compute the annual Section 382 Limitation. See Section 382(b)(1).

☐ Review Notice 2003-65 to determine which approach (Section 338 vs. Section 1374) will be used to compute the Company’s Section 382 Limitation.

☐ Determine whether any capital contributions were made within the preceding 2 years of the change date. If so, find out if they were made for “general corporate purposes”. See Section 382(l)(1) and Notice 2008-78.

☐ Find out if any redemptions or corporate contractions were made in connection with the ownership change. See Section 382(e)(2).

☐ Review the company’s balance sheets to determine if it had substantial nonbusiness assets immediately after the ownership change. See Section 382(l)(4).

☐ Check the Internal Revenue Bulletin to get the long-term tax-exempt rate for the month of the ownership change. See Section 382(f).
If Company is the common parent of a loss group, also review the rules under Treas. Reg. § 1.1502-92.

Consider the impact, if any, of the Section 382 limitation on Company's state NOL carryforwards.

Compute the Section 383 Credit Limitation.

**NEXT STEPS**

- Prepare a Report for the file that:
  - Describes the Methodologies that were used
  - Uses Relevant Documents and Information
  - Uses a Common Nomenclature
  - Explains the Legal Analysis
  - Lists all Testing Dates
  - Lists all Stock Values by Testing Dates
  - Identifies and lists all Equity Transactions
  - Analyzes and identifies all 5-percent Shareholders
  - Reconciles Shares Outstanding Balance on Quarter and Year-End Basis
  - Explains the treatment of Options and Option-Like Instruments

- Prepare the Information Statement.

- File any elections, as necessary.

- Update the Section 382 Study on a quarterly basis (or more frequently if necessary).