Certain Important Tax Consequences of Amending Debt Instruments

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In considering any proposal to amend a bank loan or other debt instrument, it is important to recognize that, if the proposed modifications are considered "significant" for U.S. federal income tax purposes, the amendment may in certain circumstances cause the borrower to recognize cancellation of debt income ("COD Income") and affect the fungibility of interests in the debt instrument. This may be the case even if the amendment does not reduce the stated principal amount of the debt instrument, and even if there is no actual exchange of the debt instrument for a new debt instrument. While the potential for COD Income and fungibility concerns has existed in this context since the 1990's (when certain statutory and regulatory changes took effect), these issues are of particular concern in the current market environment because these adverse tax-related consequences generally result only where a debt instrument trades at a discount after the amendment occurs. On January 6, 2009, Senator John Ensign (the "Ensign Bill") introduced a bill that would, if enacted, provide borrowers with some relief from COD Income arising in 2009 or 2010.

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