

A horizontal collage of images related to law and finance, including a scale of justice, a computer keyboard, and a gavel.

JONES DAY COMMENTARY

ALERT: STATE TAX AMNESTY PROGRAMS

States need money. This is not news. We have seen headlines of shrinking tax revenues and state budget deficits for months now, and the numbers are only expected to get worse.¹ However, there is a silver lining to these budget cuts and deficits. A number of states have been forced to enact amnesty programs, hoping to bring in much-needed cash without having to raise tax rates or enact new taxes.² These programs have proved to be quite advantageous to taxpayers under the right circumstances. This article summarizes five general amnesty programs that are currently pending or soon to begin and lists several states to watch for possible future amnesty programs.

A tax amnesty program is a state-enacted program that generally allows a taxpayer or potential taxpayer who has failed to file a return or underreported tax to come forward and pay certain back taxes without being faced with penalties or, in some instances, interest. Alabama even goes so far as to limit the look-back period for past tax liabilities to three years. Although the particular provisions of each amnesty program vary by state, these programs can in some instances

result in significant cost savings for taxpayers who have known liabilities.

Taxpayers who have potential tax liabilities need to act quickly to determine whether their liabilities qualify for amnesty and whether it makes sense to file under the protective umbrella of amnesty. Most amnesty programs provide only a short window to submit returns and pay any liabilities; if these deadlines are missed, the opportunity for amnesty is gone. Notably, some states have proposed or adopted failure-to-participate penalties. Under these penalty provisions, a taxpayer who could have qualified for amnesty but did not come forward will be subject to additional penalties, sometimes up to 20 percent of the tax liability.

ENACTED AMNESTY PROGRAMS

Five states have enacted general amnesty programs that either are pending or will be pending in the near future. Alabama has adopted an amnesty program set to expire on May 15, 2009. Arizona, Connecticut, and

New Jersey have adopted amnesty programs that will begin in May and run for between 30 and 60 days. Virginia has not yet set a date for its amnesty program, but it must be concluded by June 30, 2010, so stay tuned.

Alabama: February 1, 2009, through May 15, 2009

Alabama announced an amnesty program referred to as "Operation Clean Slate," which began on February 1, 2009, and will run until May 15, 2009.³ During this period, the Department of Revenue will waive penalties and not seek criminal prosecution for taxpayers coming in under the amnesty. What is unique about the Alabama program is that the Department of Revenue will also limit the look-back period to three years and will not seek to collect tax, penalties, or interest prior to the look-back period.⁴ There is no waiver of interest.

Operation Clean Slate is available for taxpayers who: (1) did not file a tax return as required; (2) understated or omitted a tax liability on a filed return; or (3) erroneously claimed credits or deductions on a filed return. Virtually all taxes administered by the Department of Revenue are eligible for Operation Clean Slate, including corporate income tax; business privilege tax; and excise, severance, tobacco, gasoline, and consumer's use tax. Taxpayers who have not registered with the Department of Revenue are also eligible for amnesty on withholding and state-administered sales and use taxes. A taxpayer will not be entitled to amnesty if the taxpayer has an outstanding debt shown on the Department of Revenue's records; has been scheduled for audit; has entered into a voluntary disclosure agreement with the state; or has an existing sales, withholding, or motor fuel tax account.

Arizona: May 1, 2009, through June 1, 2009

Arizona has adopted a tax amnesty program that will run from May 1, 2009, to June 1, 2009.⁵ For taxpayers who pay back taxes pursuant to the program, all civil penalties will be waived and interest will be reduced to 3 percent per year.

The program applies to individual and corporate income tax, transaction privilege (sales tax), use tax, withholding tax, partnership tax, fiduciary tax, and luxury tax (tobacco and liquor) imposed for any taxable period beginning after January 2, 2002, and ending prior to January 1, 2008. The amnesty program is available to: (1) those who failed to file a tax return; (2) taxpayers who failed to report all income or all tax, interest, and penalties due; (3) taxpayers who claimed incorrect

credits or deductions; (4) taxpayers who misrepresented or omitted any tax due; (5) nonresidents or part-year residents who received income that may be taxable in Arizona; (6) out-of-state and multistate businesses; and (7) taxpayers who are under audit that has not become final. A taxpayer does not qualify for amnesty if an audit has become final with respect to the taxable period, the taxpayer is a party to a closing agreement with the Department of Revenue for the tax period, or the taxpayer is or has been a party to a criminal investigation for failure to file or pay tax, or for fraud.

Local Tax Amnesty. The City of Phoenix has also adopted an amnesty program applicable to the city's privilege license tax (sales tax). The terms of the city's amnesty program are virtually identical to those of the state's program.

Connecticut: May 1, 2009, through June 25, 2009

The 2009 Connecticut Tax Amnesty Program⁶ runs from May 1, 2009, to June 25, 2009. It provides a waiver of penalties and reduction of interest to 0.75 percent per month for any taxpayer owing Connecticut tax as a result of failing to file or underreporting tax for any taxable period ending on or before November 30, 2008.

The Connecticut Tax Amnesty Program applies to all taxes administered by the Connecticut Department of Revenue Services ("DRS"), including corporation business tax, sales and use tax, withholding tax, business entity tax, trust and estate income tax, composite income tax, personal income tax, gift tax, and cigarette tax, among others. The program does not apply to taxes and fees not administered or collected by the DRS, including local property taxes, motor carrier road tax, and payroll tax.

Taxpayers are ineligible to participate in the program if they: (1) are under audit; (2) have already been billed for a tax liability, to the extent of the amount billed; (3) are currently obligated under a payment plan with the DRS; (4) are subject to a criminal investigation by the DRS; or (5) are party to civil or criminal litigation involving the DRS, pending on November 25, 2008. The Connecticut Tax Amnesty Program also does not apply to taxes in dispute in the DRS appellate process. If a taxpayer is not eligible for amnesty for a particular tax or particular time period, the taxpayer may still be eligible to apply with respect to a different tax or tax period.

Local Tax Amnesty. Connecticut has also enacted legislation authorizing municipalities to offer a one-time amnesty program on or before December 31, 2009, for taxes, assessments, fees, or fines.⁷ At this time, we are unaware of any municipalities that have indicated any intention to enact an amnesty program.

New Jersey: May 4, 2009, through June 15, 2009

The New Jersey Division of Taxation (“DOT”) has established the 2009 New Jersey Tax Amnesty Program, which runs from May 4, 2009, to June 15, 2009.⁸ The program provides a waiver of all penalties and referral cost recovery fees,⁹ as well as an interest rate reduction for qualifying taxpayers. Interest due as of May 1, 2009, will be reduced by 50 percent, provided the taxpayer pays the tax and remaining interest in full during the amnesty period.

The New Jersey Tax Amnesty Program applies to all taxes administered or collected by the DOT, including corporation business tax, income tax, inheritance and estate taxes, public utility taxes, and sales and use tax due on or after January 1, 2002, and prior to February 1, 2009. Once the amnesty period ends on June 15, an additional 5 percent penalty, not subject to waiver or abatement, will be imposed on any tax amount not satisfied that was eligible for amnesty but not reported as part of the amnesty program. This penalty will be in addition to all other applicable penalties and costs.

New Jersey will be temporarily suspending its Voluntary Disclosure Program during the amnesty period; however, “on a case-by-case basis, the Division may be willing to discuss alternative agreements”¹⁰ A taxpayer who has filed an administrative or judicial appeal related to a tax assessment or has requested a hearing through the DOT’s Conference and Appeals Branch is eligible for tax amnesty only if the director of the DOT expressly approves the application and the taxpayer withdraws from the appeals process. Taxpayers are ineligible to participate in the program if they are under criminal investigation or have been charged with a crime, for any state tax matter in New Jersey.

Virginia: Dates to Be Determined

Virginia has enacted legislation establishing a tax amnesty program¹¹ that will run for a 60- to 75-day period during the fiscal year July 1, 2009, through June 30, 2010. The exact dates of

the program are to be established by the Tax Commissioner. The program will provide a full waiver of all civil or criminal penalties assessed or assessable, and a waiver of 50 percent of the interest assessed or assessable, resulting from nonpayment, underpayment, nonreporting, or underreporting of tax liabilities. The program will be open to any individual, corporation, estate, trust, or partnership that is required but has failed to file a return or to pay any tax administered by the Department of Taxation for taxable years beginning on or before January 1, 2008.

Any taxpayer eligible for amnesty who retains an outstanding balance after the close of the program because of the nonpayment, underpayment, nonreporting, or underreporting of any tax liability that qualified for amnesty but was not paid will be subject to a 20 percent penalty on the unpaid tax. This penalty is in addition to all other penalties that may apply.

STATES TO WATCH

In addition to those states discussed above, several states should be monitored for future tax amnesty legislation. Maryland is the most immediate of these states, as tax amnesty legislation passed both houses during the 2009 legislative session and is currently awaiting signature by Governor O’Malley. If enacted, the Maryland Tax Amnesty Program will run from September 1, 2009, through October 30, 2009. Next in line will likely be Louisiana, where Governor Jindal and local legislators pre-filed tax amnesty legislation for consideration in the 2009 legislative session beginning April 27, 2009. Although any possible programs are not likely to be imminent, other states to keep an eye on are Hawaii, New Mexico, and Vermont (which recently considered but did not adopt tax amnesty), and Delaware, where the governor has indicated that a tax amnesty is likely.

Delaware

Delaware governor Jack Markell, while campaigning for office, called for the state to enact a tax amnesty in his Plan for Fiscal Responsibility.¹² At this time, no such amnesty has been enacted. The Delaware legislature is in session until June 30, 2009.

Hawaii

During the 2009 legislative session, tax amnesty legislation was proposed in Hawaii;¹³ however, the legislation was not enacted.¹⁴ Under the proposed legislation, the tax amnesty program would have run from October 31, 2009, through December 31, 2009, and all penalties would be waived. The next regular legislative session will convene January 20, 2010.

Louisiana

For the Louisiana legislative session beginning April 27, 2009, the Louisiana Tax Delinquency Amnesty Act of 2009¹⁵ was pre-filed, with Governor Jindal expressing support for its enactment. The Louisiana Tax Delinquency Amnesty Act requires the Louisiana Department of Revenue ("LDR") to establish a two-month-long tax amnesty program during the fiscal year ending June 30, 2010. The specific amnesty dates are yet to be determined. The tax amnesty would be applicable to all periods since 2001, the date of Louisiana's last tax amnesty. As proposed, the state will waive all penalties and 50 percent of the interest due.

Taxpayers eligible for the proposed amnesty include those who have an existing tax liability, those who had not filed a required return or report, and those who understated or omitted any tax liability on a filed return. The proposed amnesty would apply to all taxes administered and collected by the LDR, except motor fuel taxes.

The Louisiana Tax Delinquency Amnesty Act provides that if, following the termination of the amnesty, the LDR issues a deficiency assessment for a period for which the taxpayer had claimed amnesty, the LDR will have the authority to impose penalties and institute civil or criminal proceedings, but only with respect to the difference between the amount shown on the amnesty application and the correct amount of tax due. However, there will be a presumption against the waiver of any penalty or the abatement or reduction of any interest for those taxpayers eligible to participate in the amnesty program that fail to participate. Further, the LDR is authorized to adopt a regulation imposing a 20 percent "cost of collection" penalty on any deficiency assessed after the amnesty period for any taxable period due on or after July 1, 2001, and ending before January 1, 2009. If adopted, this penalty will be in addition to all other applicable penalties, fees, or costs.

The bill was to be considered in the general session set to convene at noon on Monday, April 27, 2009.

Maryland

The Maryland General Assembly passed a bill¹⁶ requiring the Comptroller to declare an amnesty period for delinquent taxpayers from September 1, 2009, through October 30, 2009. This bill, adopting the Maryland Tax Amnesty Program, is awaiting Governor O'Malley's signature at this time. The governor's next bill signing will be May 7, 2009.

If signed into law, the bill will provide for an amnesty period applicable to individual income tax, corporate income tax, withholding taxes, sales and use taxes, and admissions and amusement taxes required to be paid on or before December 31, 2008. The Comptroller will waive all civil penalties and 50 percent of the interest imposed. The waiver will apply to the nonreporting of a tax liability, the underreporting of a tax liability, and the nonpayment of a tax liability.

Unlike most other states, the Maryland Tax Amnesty Program is limited to certain taxpayers. A taxpayer may not take advantage of the amnesty if: (1) the taxpayer has more than 500 employees in the United States or is a member of a corporate group that has more than 500 employees in the United States as of September 1, 2009;¹⁷ (2) the taxpayer was granted amnesty under the 2001 Maryland Tax Amnesty Program; or (3) the taxpayer was eligible for the July 1, 2004, through November 1, 2004, Settlement Period relating to intangible holding companies, whether or not the taxpayer participated in the Settlement Period.

Generally, to qualify for the amnesty, the taxpayer must file a return and pay the tax and interest due prior to October 30, 2009; however, the Comptroller may at the Comptroller's discretion enter into an agreement with any taxpayer who allows taxes to be paid over time (but in no event later than December 31, 2010).

New Mexico

The New Mexico tax amnesty legislation¹⁸ was introduced during the 2009 legislative session but not enacted.¹⁹ Under the proposed legislation, the Taxation and Revenue Department would have conducted a 90-day tax amnesty period during

fiscal year 2010 in which all penalties and interest would be waived, not to exceed a waiver of \$25,000. The next regular legislative session is set to begin January 19, 2010.

Vermont

In Vermont, tax amnesty legislation was also proposed²⁰ but not adopted.²¹ The legislation required the Tax Commissioner to establish a two-month-long tax amnesty that would expire no later than December 31, 2009. The amnesty would have been applicable to any tax type except fuel taxes and would have allowed for a waiver of all penalties, without the need to show reasonable cause or the absence of willful neglect. The next regular legislative session will begin in January 2010.

OTHER LIMITED AMNESTY PROGRAMS

In addition to the general amnesty programs, several states have adopted or considered limited programs that are more narrowly focused on specific taxes. Massachusetts is running an amnesty program through April 30 limited to individual income tax liabilities, personal use tax liabilities, and cigarette excise tax liabilities.²² Similarly, Oregon has a bill pending in the legislature that would adopt an amnesty program for personal income tax liabilities.²³ Indiana proposed property tax amnesty legislation during its 2009 legislative session, but this bill died in committee.²⁴

CONCLUSION

We can be certain of additional activity in this area as states tighten their belts during this challenging time. As a result, taxpayers with potential historic tax liabilities may have more opportunities to become compliant, without having the risk of civil or criminal penalties, and in some cases with significant savings on interest.

However, taxpayers will need to act quickly to determine whether they fall within the purview of these programs. And taxpayers who qualify for amnesty must keep in mind that several amnesty programs impose significant penalties later for taxpayers who fail to act now.

LAWYER CONTACTS

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ENDNOTES

- 1 Leslie Eaton, "More States Look to Raise Taxes," *Wall Street Journal*, Apr. 9, 2009, <http://online.wsj.com/article/SB123923448796803135.html>. (All web sites herein last visited Apr. 27, 2009.)
- 2 How much cash is generated by amnesty programs varies by state. According to *The Federation of Tax Administrators*, 43 states implemented in excess of 80 amnesty programs since November 1982, and the proceeds from those amnesty programs have varied greatly: from \$200,000 collected by North Dakota in 1983 to \$582 million collected by New York in 2003.
- 3 Details of the program are set forth on the Department of Revenue's web site at <http://www.ador.state.al.us/cleanslate.html>.
- 4 The three-year look-back period does not apply to trust fund taxes (e.g., sales taxes) that have been collected but not remitted to the state. However, a taxpayer who holds collected but unremitted taxes is eligible for the penalty waiver.
- 5 S.B. 1003, 49th Leg., 1st Spec. Sess. (Ariz. 2009).
- 6 2008 Conn. Pub. Acts 1, § 8 (Nov. 24, 2008, Spec. Sess.).
- 7 2008 Conn. Pub. Acts 2, § 5 (Nov. 24, 2008, Spec. Sess.).
- 8 Assem. B. 3819, 2009 Leg., 213th Sess. (N.J. 2009).
- 9 A "referral cost recovery fee" is a fee imposed when the DOT refers a taxpayer's account to an outside debt collection agency. The fee is 10 percent of the amount referred to the debt collection agency.
- 10 New Jersey Division of Taxation Home Page, http://www.state.nj.us/treasury/taxation/amnesty2009/amnesty_situation.shtml.
- 11 S.B. 1120, 2009 Gen. Assem., Reg. Sess. (Va. 2009).
- 12 *Jack Markell's Plan for Fiscal Responsibility*, March 21, 2008, http://www.markell.org/pdf/Jack_Markells_Plan_for_Fiscal_Responsibility.pdf.
- 13 H.B. 1710, 25th Leg., Reg. Sess. (Haw. 2009).
- 14 On March 4, 2009, the House Committee on Finance recommended that the measure be deferred.
- 15 H.B. 720, 2009 Leg., Reg. Sess. (L.A. 2009).
- 16 S.B. 552, 2009 Gen. Assem., Reg. Sess. (Md. 2009).
- 17 A "corporate group" for purposes of the tax amnesty is defined as an affiliated group or controlled group of corporations under § 1504 or § 1563 of the Internal Revenue Code.
- 18 H.B. 589, 49th Leg., 1st Reg. Sess. (N.M. 2009); S.B. 108, 49th Leg., 1st Reg. Sess. (N.M. 2009).
- 19 Both bills died in committee at the end of the 2009 legislative session.
- 20 H.B. 224, 2009–2010 Leg., Reg. Sess. (Vt. 2009).
- 21 The bill never made it out of committee.
- 22 Massachusetts Technical Information Release 09-3: Limited Amnesty Program For Individual Taxpayers With Existing Tax Liabilities (February 19, 2009).
- 23 S.B. 880, 75th Gen. Assem., Reg. Sess. (Or. 2009).
- 24 H.B. 1303, 2009 Gen. Assem., Reg. Sess. (Ind. 2009).