Amnesty 101 — Grading the Landscape

by Stephen P. Kranz and Jessica L. Kerner

Introduction

With seven amnesty programs announced so far this calendar year, and at least three more pending before state legislatures, we ask: What makes an amnesty program successful? What attributes will entice taxpayers to come forward rather than await the results of the audit process or choose another option available to them? In an era in which financial statement implications can be a tremendous motivating factor, have states changed their approach to amnesty to become more attractive to corporations?

Although many states offer amnesties, not all state tax amnesty programs are created equal. Since the first amnesty program was held by Arizona in November 1982, more than 40 states have implemented at least one amnesty program with widely varying degrees of success. This Pinch of SALT sets out criteria that may be used to evaluate amnesty offerings and proposes a set of standards for a successful state amnesty offering. Although an individual taxpayer’s circumstances will ultimately determine whether the taxpayer should pursue participating in an amnesty program, some characteristics are likely to lead more taxpayers to take advantage of those programs and provide a greater influx of needed revenue to the state.

Not all state tax amnesty programs are created equal.

To spur discussion, we grade the programs on whether they meet the factors identified. Of the current and recently concluded programs, only one state, Alabama, is awarded an A; Arizona receives a grade of B; Connecticut a C; Massachusetts and New Jersey each receive a grade of D; and Maryland and Virginia each receive a failing grade. The chart (p. 752) summarizes the grade awarded to each state for its amnesty program and the key factors relevant to the ranking. The details of each state’s program are included in an appendix (p. 753).

Recommendations for an Effective Amnesty Program

State amnesty programs must be well designed to attract taxpayers to resolve unpaid tax liabilities rather than to wait to see if they are selected for audit, or to encourage them to participate in an existing voluntary disclosure program. The cash influx to the state from a program will depend on the attractiveness of the program to the broadest array of taxpayers. Given that many programs offer to eliminate even criminal sanctions for past violations, states would be best served to offer programs targeted to generate the maximum revenue. With that in mind, the recommendations below are offered to help design amnesty programs most likely to provide the greatest benefit to the states and taxpayers alike.

We assign a point value to each of the recommendations for an effective amnesty program and grade each state’s program based on the total number of points received. As set out below, states are eligible for 24 total points based on whether they meet the factors identified. Grades were awarded based on the following curved scale: F = 5 or below; D = 6 to 8; C = 9 to 12; B = 13 to 15; A = 16 or higher.

Waiver of Penalties\(^3\)

Although a waiver of penalties seems to be implied by the term “amnesty,” it must be said that a successful amnesty program should include a waiver of all penalties (civil and criminal) that could apply to the taxpayer’s past failures. Without a penalty waiver, taxpayers have little or no incentive to come forward unless already under audit — in other words, penalty waiver is a bare minimum requirement and is unlikely on its own to generate significant participation by taxpayers (other than those whose behavior is clearly criminal). Although most states offer to waive penalties for taxpayers’ participation in amnesty programs, a disturbing recent trend has been that of states imposing additional penalties on taxpayers who do not participate, for whatever reason, in the amnesty offering.\(^4\) This type of threat is likely a violation of the U.S. Constitution, specifically the due process clause, in that it applies retroactively for an extended period of time.\(^5\) This type of penalty does not engender the good-faith amnesty participation sought by those in the legislature. Although the threat of additional penal imposition may bring some additional taxpayers into the program, the jury is still out on whether this approach welcomes more taxpayers under the tent or drives them further into the shadows to await the results of the audit lottery. In particular, nonfilers who are concerned about making an appearance on the state’s radar may be hesitant to participate in the program because of the state’s hammerlike approach.

Qualification for Amnesty

The waiver of penalties will not be of any value if a taxpayer or potential taxpayer does not qualify for the state amnesty program. Therefore, the next factor in evaluating state programs is who qualifies for the amnesty. One distinguishing factor between the various state programs is whether taxpayers who are already under audit can participate in amnesty. In some states, taxpayers can qualify for amnesty once an audit letter has been issued notifying them of the audit. Allowing taxpayers who are currently under audit to participate in amnesty not only broadens the number of potential participants able to pay the state much-needed revenue in the short term but also has the benefit of reducing the audit burden on the state revenue department.\(^6\)

Limited Lookback Period

Another factor that may affect whether a taxpayer applies for amnesty will be whether the amnesty program for a limited lookback period. Amnesty programs are sometimes limited to registered taxpayers who have been regularly filing required returns. Those amnesty programs are intended to resolve often subtle tax return positions that may not be discovered even on audit. The reality is that those taxpayers already have the benefit of a running statute of limitations and are simply choosing between resolving their tax liability with immediate certainty or allowing the statute to continue to run in hopes that it will expire. Entities that have never filed in the state don’t have the protection of a running statute of limitations, and without a limited lookback, they would not have the same incentive to participate in an amnesty program. For example, a taxpayer with a questionable nexus position that stemmed back 15 years would never have filed in the state and thus would generally be interested in amnesty only if the program limited the state’s lookback period to the same number of years that would typically apply were the statute of limitations running. If an amnesty lacks a limited lookback, the taxpayer’s liability, even assuming a penalty waiver, would likely outweigh the benefits of participation in the program. Failure to include a limited lookback period will force those potential taxpayers to continue playing the audit lottery, hoping to remain under the radar, and will deprive the state of much-needed potential revenue.

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\(^3\)Because the waiver of penalties is a bare minimum requirement for an amnesty program, we award it a value of one point.

\(^4\)See, e.g., California penalty provisions. California Revenue and Taxation Code section 19164. California imposes a 20 percent substantial understatement penalty. California Revenue and Taxation Code section 19164(a)(1)(A). For understatements determined after the close of the last amnesty period, which was for periods beginning before January 1, 2003, the penalty is doubled to 40 percent of the underpayment of the tax. California Revenue and Taxation Code section 19164(a)(1)(B). And the California Legislature recently passed another 20 percent required penalty on corporations that underreport their corporate income tax liability by more than $1 million for any tax periods after the last amnesty. California Revenue and Taxation Code section 19138(c). This penalty does not provide for the usual penalty defenses.


\(^6\)To the extent a state program allows taxpayers to participate in the amnesty program for a specific type of tax even if they are undergoing an audit for that tax, we award it three points.
If an amnesty lacks a limited lookback, some taxpayers’ liabilities, even assuming a penalty waiver, would likely outweigh the benefits of participation in the program.

A limited lookback period may also attract companies interested in resolving financial statement reserve issues. A company that booked a reserve liability for a particular tax position would be able to release the reserve and could afford to make payment of the liability to the state for a set number of tax years while at the same time releasing the reserve. The ability for companies to release unrecognized tax benefits is a major financial statement issue that is often ignored as states consider and design their amnesty programs. With a limited lookback period, an amnesty program’s overall benefit to a company’s financial statement is much more likely to outweigh the required cash payment. To maximize the attractiveness of an amnesty program, the states should limit the lookback period to the number of years that would be open for audit were the taxpayer an existing filer.7

Reduced Interest Rate

Even if a state amnesty program waives penalties and limits the lookback period, that may still not be enough to attract taxpayers, particularly if the state also has a voluntary disclosure program that offers those same benefits. To make amnesty more attractive — and thus obtain more revenue in the short term — the state should offer a reduced interest rate for past liabilities that are reported under the amnesty program. As discussed previously, unless taxpayers are sufficiently motivated to participate in the amnesty offering, they are likely to continue playing the audit lottery if they have not already participated in an existing voluntary disclosure program. Because voluntary disclosure programs do not typically offer any significant interest rate reduction, designing an amnesty program to include a reduced interest rate would significantly improve the program’s attractiveness.8

Admission of Liability/Waiver of Rights

Many state amnesty programs offer one or several of the benefits described above, but those benefits may lose some of their appeal if the taxpayer is required to make other concessions. For example, some states require taxpayers who participate in the amnesty program to sign a waiver that they are admitting to the liability disclosed. And some states also require taxpayers to waive their appeal rights as a condition of receiving amnesty. Those requirements may prevent taxpayers who are unsure of their liability from coming forward, ultimately reducing the revenue produced by the program. Designing a tax amnesty program to bring in the maximum revenue would dictate that taxpayers be encouraged to pay now even if they have the right to claim a refund or otherwise dispute their liability later. Those payments would presumably take place in future years after the immediate revenue crisis subsided. Further, forcing taxpayers to concede their appeal rights will discourage the disclosure of questionable or close-call liabilities. To maximize the revenue generated by an amnesty program, states should not impose any limitation on a taxpayer’s right to appeal or contest a liability once it is paid.9

Comparison With Other Programs

The final factor in our evaluation of the existing amnesty programs is whether the state’s amnesty is better than other programs offered by the state, particularly voluntary disclosure programs otherwise generally available to taxpayers. It is important to consider whether the state has a voluntary disclosure program — and if so, what benefits it offers — in evaluating whether taxpayers will be incentivized by an amnesty offering. When different benefits are offered in each program, the better option may vary depending on the taxpayer’s circumstances. Again using nexus as an example, if a company has had nexus with a state for more than the usual three-year statute of limitations but never registered for tax purposes, a voluntary disclosure program that offers a penalty waiver and limited lookback period may be better than an amnesty program that offers a penalty waiver and an interest rate reduction. Ultimately, it becomes necessary to weigh the amnesty terms against the terms available under a state’s ongoing voluntary disclosure program, including consideration of the amount of tax at issue for each year, the possible penalty structure, and the state’s interest rate. Unlike a company that has not previously filed in a state, an existing taxpayer that has been filing and paying

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7If an amnesty program offers a lookback period that does not exceed the statute of limitations for the tax at issue, we award it five points. If a state’s amnesty program requires returns to be filed back to the taxpayer’s first entry in the state, we award it zero points.

8Because taxpayers are unlikely to obtain an interest rate reduction outside of amnesty, we award states that offer an interest rate reduction five points.

9We award five points to programs that do not consider amnesty an admission of liability or require taxpayers to relinquish their right to appeal.
taxes and owes additional tax for only a period of three years or less may be better off choosing to participate in amnesty.10

Table 1.

<table>
<thead>
<tr>
<th>State</th>
<th>Grade</th>
<th>Penalties Abated</th>
<th>Qualification — Under Audit Can Participate</th>
<th>Limited Lookback Period</th>
<th>Reduced Interest Rate</th>
<th>Taxpayers Required to Admit Liability/ WAive Rights</th>
<th>Better Than Other Programs Offered by State</th>
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The Alabama tax amnesty program scored a total of 16 points: one point for penalty waiver, five points for limited lookback, five points for no requirements to admit liability or relinquish appeal rights, and five points for being broader than the state’s voluntary disclosure program. Although amnesty does not provide additional benefits when compared with the voluntary disclosure program, it allows a broader range of taxpayers to participate.

The Arizona tax amnesty program scored a total of 14 points: one point for penalty waiver, three points for allowing taxpayers currently under audit to participate, five points for offering a reduced interest rate, and five points for offering additional benefits compared to the voluntary disclosure program.

The Connecticut tax amnesty program scored a total of nine points: one point for penalty waiver, five points for an interest rate reduction, and three points for offering at least one benefit (interest rate reduction) over the voluntary disclosure program, making it a better choice for many registered taxpayers.

The Maryland tax amnesty program scored a total of three points: one point for penalty waiver and five points for offering a reduced interest rate; three points were subtracted for limiting the program to taxpayers having under 500 employees.

The Massachusetts tax amnesty program scored a total of six points: one point for penalty waiver and five points for no requirement to admit liability or relinquish appeal rights. While we would normally have awarded three points for allowing taxpayers currently under audit to participate, the fact that the program only applies to taxpayers who are contacted by the department leaves the program entirely in the control of the department and not open to the public — and specifically not open to nonfilers who presumably are not on the department’s mailing list.

The New Jersey tax amnesty program scored a total of seven points: five points for an interest rate reduction and three points for allowing taxpayers under audit to participate; one point was subtracted for penalty waiver because while certain penalties are waived, a 5 percent penalty is imposed on taxpayers who fail to participate in the amnesty program. We awarded the state zero points for the category of whether the amnesty is better than other options offered by the state, including a voluntary disclosure program, because the state has expressly eliminated the voluntary disclosure program during amnesty.

The Virginia tax amnesty program scored a total of four points: five points for offering an interest rate reduction; one point was subtracted for penalty waiver because while certain penalties are waived, an additional 20 percent penalty is imposed on taxpayers who fail to participate in the amnesty program.

The Pinch of SALT

Conclusion

Many states are desperately seeking cash as they struggle to balance their budgets. The Center on Budget and Policy Priorities reported in March that approximately 47 states have or will face budget shortfalls for this year and next.11 As states consider whether to run a tax amnesty program to address their budget shortfalls, we recommend the following components to create a successful amnesty program to maximize participation and reduce administrative collection costs:

- waive all penalties;
- reduce the interest rate by at least one-half the generally applicable rate;
- limit the lookback period to attract nonfilers;
- do not require taxpayers to admit liability or relinquish appeal rights;
- offer additional benefits not offered in ongoing voluntary disclosure programs; and
- allow taxpayers currently under audit to participate in amnesty.

Adoption of the recommendations would improve the ranking of a state’s program and, more importantly, would increase the likelihood that the program would produce the significant revenue that states are so desperately seeking in these tough budget times.

10If the amnesty is generally the best or only option in the state, we award the program five points.

Appendix — Individual State Tax Amnesty Programs

The following states have current or recently concluded amnesty programs: Alabama, Arizona, Connecticut, Maryland, Massachusetts, New Jersey, and Virginia. The details of each state’s amnesty program are described below as they relate to the factors discussed in this Pinch of SALT.

Alabama: Operation Clean Slate, the current Alabama amnesty program, applies to almost all taxes administered by the Alabama Department of Revenue. Generally, eligible taxpayers include those who did not file a required return or report, who understated or omitted any tax liability on a filed return, or who erroneously claimed credits or deductions. The program has many exclusions, including taxpayers with an outstanding debt in the department’s records in the form of a bill, assessment, or civil collection action; taxpayers who have entered into a voluntary disclosure agreement with the department before February 1, 2009; taxpayers who are already registered with the department for sales, withholding, or motor fuels taxes; and taxpayers who have been scheduled for audit or are currently under investigation.

Alabama offers several concessions as part of its amnesty program. The state offers the waiver of all penalties and a limited three-year lookback period in most cases. The state will not collect tax, penalties, or interest for periods preceding the lookback period. Alabama is the only state among the seven programs currently being offered to provide a limited lookback. Another benefit offered by the state is that it will not seek criminal prosecution for amounts remitted under amnesty. The state does not appear to be requiring taxpayers to waive their right to appeal or seek refund of amounts paid under the amnesty.

Although Alabama’s amnesty program provides numerous benefits, one benefit that Alabama is not offering is a reduced rate of interest. All interest must be paid with the return filed as part of the amnesty or within 90 days of the taxpayer’s first notice. This amnesty program provides similar benefits to the state’s ongoing voluntary disclosure program but is available to a broader set of taxpayers. The state’s ongoing voluntary disclosure program is available only to applicants who have not been contacted by the department, or an agent thereof, or who have filed a tax return for seven years before the initial written request for voluntary disclosure. The amnesty program ran from February 1 to May 15.

Arizona: The Arizona amnesty program applies to the following taxes: individual, corporate, and fiduciary income tax; withholding tax; luxury tax (liquor and tobacco); transaction privilege (sales) tax; and use tax. Eligible taxpayers include those who have failed to file a tax return, those who failed to report all income or tax and associated penalties and interest, and those who are under audit as long as the audit has not been finalized. There are also several exclusions, including taxpayers who filed returns before May 1, 2009, and are not amending the returns for additional tax due; taxpayers who have an existing tax liability or who have received a billing or tax notice from the department, and taxpayers who have a payment arrangement with the department. Also excluded are taxpayers who are a party to any criminal proceeding related to a tax collected by the department that is pending on January 1, 2009. Also, taxpayers who have previously been the subject of a tax-related criminal proceeding that resulted in a conviction, guilty plea, or plea of no contest cannot participate in amnesty.

The benefits are that civil penalties will be waived and interest will be reduced to 3 percent per year. The state does not appear to waive criminal penalties, nor does it appear to be prohibited from seeking criminal prosecution of returns filed as part of the amnesty. There is a threat of criminal penalties or penalties or prosecution, and the amnesty does not offer a limited lookback period. The amnesty applies to annual taxes due for tax years beginning on or after January 1, 2002, and ending before January 1, 2008. For all other taxes, the amnesty applies to tax periods beginning on or after January 1, 2003, and ending before January 1, 2008. Also, taxpayers who participate in the amnesty are required to waive their right to appeal.

13Id.
14Id. The three-year lookback period does not apply to “trust fund,” sales, withholding, and motor fuel taxes. For those taxes, all amounts previously collected must be remitted.
15Alabama Voluntary Disclosure Guidelines, Alabama Department of Revenue (July 2008), available at http://www.adepartment.state.al.us/voluntarydisclosure.html. If there has been previous contact of any kind with the department within seven years before the initial request for voluntary disclosure, the applicant will be disqualified. Any type of contact, including a telephone call or receipt of a nexus questionnaire, will disqualify the taxpayer.
17Id.
18Id.
19Id.
20Id.
21Id.
They may not seek a credit or refund of any tax liabilities included in the amnesty.22

Generally, the amnesty program is more beneficial to taxpayers than the state’s voluntary disclosure program. The state does not provide blanket concessions for taxpayers who come forward through the voluntary disclosure program rather, each taxpayer must negotiate an agreement individually. The state does not limit the lookback period and evaluates each case individually.23 Because the amnesty automatically offers both a waiver of penalties and a waiver of interest, it is an attractive option compared with the voluntary disclosure program in which any benefit must be negotiated. The amnesty program ran from May 1 to June 1.

**Connecticut:** The Connecticut amnesty program applies to almost all taxes administered by the Department of Revenue Services.24 Eligible taxpayers include both nonfilers (taxpayers who did not file a required return during the period covered by the amnesty) and underreporters (taxpayers who filed a return during the period covered by the amnesty but failed to report the full amount of the tax due). Taxpayers who are not eligible for amnesty include those who are currently under audit by the department for an eligible period. That exclusion is limited to the tax type or types under audit.25 The amnesty program also does not include taxpayers who are under criminal investigation by the department and taxpayers who are a party to any litigation, either civil or criminal, that is pending with the taxpayers. Taxpayers who are under criminal investigation by the department for an eligible period. That exclusion is limited to the tax type or types under audit.25 The amnesty program also does not include taxpayers who are under criminal investigation by the department and taxpayers who are a party to any litigation, either civil or criminal, that is pending with the department on November 25, 2008.26

The Connecticut amnesty program offers many benefits to taxpayers. Taxpayers who come forward under amnesty will not be subject to penalty or criminal prosecution on eligible taxes that are paid under amnesty.27 The amnesty program also offers a 25 percent reduction in the interest rate from 1 percent per month or fraction thereof to 0.75 percent per month or fraction of a month. The program does not offer a limited lookback period, but the amnesty covers all tax periods ending on or before November 30, 2008.28 Finally, another limitation of the program is that taxpayers must give up all appeal rights, both administrative and judicial, of all taxable periods under amnesty.29 Whether this amnesty will be more attractive than the state’s ongoing voluntary disclosure program will depend on the taxpayer’s circumstances. The voluntary disclosure program offers a waiver of penalties and a reduced lookback period, but it does not offer an interest rate reduction. The amnesty program runs from May 1 through June 30.

**Maryland:** Legislation was recently enacted in Maryland that provides for a limited amnesty program that will take place in the autumn.30 The amnesty program applies to a wide range of Maryland state and local taxes: income tax, withholding taxes, sales and use taxes, and admissions and amusement taxes.31 Further, it applies to taxpayers who failed to report a tax liability, underreported a tax liability, and who failed to pay a tax liability. The program includes all returns and taxes due on or before December 31, 2008.32 Despite the broad application in terms of applicable tax liabilities, it is a limited program in that it is not available to any taxpayer that as of September 1, 2009, has more than 500 employees in the United States or that is a member of a corporate group that has more than 500 employees in the United States.33 This exclusion swallow the rule by eliminating all large and mid-size taxpayers from eligibility in the program, thus undermining the chance of any significant revenue generation. There is also an exclusion for any taxpayer that was granted amnesty under the 2001 Maryland tax amnesty program for the taxes for which the taxpayer received amnesty under the 2001 program.34 And finally, taxpayers eligible for the July 1, 2004, through November 1, 2004, settlement period, held in connection with the Delaware holding company litigation in *Comptroller of the Treasury v. SYL, Inc.*,35 are not eligible to participate in this new amnesty regardless of whether the taxpayer participated in the settlement period.

For eligible taxpayers, the amnesty provides several benefits. The Maryland comptroller will waive all civil penalties (except previously assessed fraud penalties) and half the interest that would normally be due on the tax liability.36 A taxpayer will not be subject to criminal tax charges arising from any return filed or tax paid during amnesty unless charges were already pending or under investigation.37 Although the program offers the benefits of a reduced rate of interest and the waiver of civil penalties, it is limited to the tax type or types under audit.25 Taxpayers who are not eligible for amnesty include those who are currently under audit by the department for an eligible period. That exclusion is limited to the tax type or types under audit.25

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22Id.
23For information on the Arizona voluntary disclosure program, see http://www.azdepartment.gov/Audit/Disclosure.asp.
25Id.
26Id.
27Id.
28Id.
30Maryland SB 552 (effective June 1, 2009).
31Id.
32Id. at section 2(a)(1)(i).
33Id. at section 2(a)(3)(ii)(1).
34Id. at section 2(a)(3)(ii)(2).
35This case was consolidated with *Treasury v. Crown Cork & Seal Co. (Delaware), Inc.*, 375 Md. 78 (2003).
36Maryland SB 552 (effective June 1, 2009), section 2(a)(1).
37Id. at section 2(b)(1).
penalties and protection from criminal prosecution, it does not offer a limited lookback period. It is unclear whether a taxpayer will be required to relinquish appeal rights in order to participate in the amnesty. The legislation authorizing the amnesty provides the comptroller discretion regarding the required terms and schedule for payment under the amnesty agreement. The comptroller has not yet announced these terms. The state offers an ongoing voluntary disclosure program, in which the comptroller may negotiate interest and penalties, but the state does not offer any specific terms that will be available to all qualified applicants. The amnesty program was further limited in that only taxpayers who had been issued a tax amnesty notice by the Department of Revenue were eligible to participate. And amnesty was not an option for a taxpayer who was the subject of a tax-related criminal prosecution or investigation. The amnesty program did allow participation by taxpayers who had previously been assessed a liability for one of the taxes included in the program and taxpayers who were disputing the assessment through the proper channels or were late in paying the liability.

Not only did the program limit the types of taxes and taxpayers to which it applied, it also offered limited benefits only to those taxpayers who did qualify. The primary benefit was that penalties were waived on amounts paid under the amnesty. Also, taxpayers who participated in the amnesty were not required to admit liability for the amount paid, and they were also not forced to forfeit their statutory rights of appeal, which is required by several other state programs. However, those benefits were tempered by the taxpayer having had to pay the full amount of interest, and there was no limited lookback period. The program lacked a limited lookback period despite the inclusion of the option in the legislation directing the department to establish an amnesty program. Massachusetts maintains an ongoing voluntary disclosure program, but the state allows taxpayers to participate only if they have not had any previous communication with the department regarding the issues involved and if the taxpayer has not registered for the tax type involved. The amnesty program ran from September 1 through October 30.

**Massachusetts:** Massachusetts recently offered a limited amnesty for individual taxpayers with existing tax liabilities. The amnesty program was limited to existing personal income tax liabilities, existing personal use tax liabilities, and existing cigarette excise liabilities incurred in connection with purchases for individual consumption. The program was further limited in that only taxpayers who had been issued a tax amnesty notice by the Department of Revenue were eligible to participate. And amnesty was not an option for a taxpayer who was the subject of a tax-related criminal prosecution or investigation. The amnesty program did allow participation by taxpayers who had previously been assessed a liability for one of the taxes included in the program and taxpayers who were disputing the assessment through the proper channels or were late in paying the liability.

Not only did the program limit the types of taxes and taxpayers to which it applied, it also offered limited benefits only to those taxpayers who did qualify. The primary benefit was that penalties were waived on amounts paid under the amnesty. Also, taxpayers who participated in the amnesty were not required to admit liability for the amount paid, and they were also not forced to forfeit their statutory rights of appeal, which is required by several other state programs. However, those benefits were tempered by the taxpayer having had to pay the full amount of interest, and there was no limited lookback period. The program lacked a limited lookback period despite the inclusion of the option in the legislation directing the department to establish an amnesty program. Massachusetts maintains an ongoing voluntary disclosure program, but the state allows taxpayers to participate only if they have not had any previous communication with the department regarding the issues involved and if the taxpayer has not registered for the tax type involved. The amnesty program ran from September 1 through October 30.

**New Jersey:** New Jersey is running an amnesty program that generally applies to all taxes administered by the Division of Taxation. The program includes any returns for tax liabilities due on or after January 1, 2002, and before February 1, 2009. All taxpayers who owe taxes to the state for this period may receive tax amnesty unless they are the subject of a criminal investigation or charge for a state tax matter. Taxpayers who have filed an administrative or judicial appeal of a tax eligible for amnesty may submit a written request to the division. New Jersey will impose an additional penalty on taxpayers who are eligible to participate in the amnesty but choose not to do so. After the conclusion of the amnesty program, a 5 percent penalty will be imposed on any tax amount that was eligible for amnesty but that the taxpayer did not pay under amnesty. That penalty, which will not be subject to waiver or abatement, will be in addition to all other existing penalties, interest, and other costs.

The amnesty program provides several benefits. Eligible taxpayers who participate in the state amnesty program will receive a waiver of half the interest that would otherwise be due, as well as waivers of penalties and recovery fees. The administrative regulation that explains the scope of the amnesty provides that eligible taxpayers who come

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38 Id. at section 2(a)(2)(ii).
41 Id.
42 Id.
43 Id.
44 Id.
46 See “Voluntary Disclosure Program Guidelines,” Mass. Department of Rev., Voluntary Disclosure Unit, available at http://www.mass.gov/department. The voluntary disclosure and amnesty programs were mutually exclusive because only taxpayers who were contacted by the department were able to participate in amnesty, and only taxpayers who have not registered for the tax type and have not previously been contacted by the department regarding the issue involved may participate in voluntary disclosure. Therefore, we awarded zero points in that category.
48 N.J. Admin. Code tit. 18, section 39-1.1(a). The division has also indicated that it will consider reducing the interest and penalties on tax liabilities for prior periods that are not eligible for amnesty.
49 Id. at (d).
50 Id. at (e).
forward under amnesty will not be subject to prosecution for amounts for which amnesty is granted.52 In exchange for those benefits, taxpayers will be treated as admitting they owe any amounts paid under amnesty. And they will not be able to seek a refund for any amounts paid under amnesty.53 In addition, the amnesty program does not provide for a limited lookback period.

During the amnesty period, the division will suspend its existing voluntary disclosure program.54 However, the division has indicated it will discuss alternative arrangements on a case-by-case basis during the amnesty period.55 Generally, when the voluntary disclosure program is available, the state will waive all penalties except the 5 percent penalty for failure to take advantage of the tax amnesty program that ended on June 10, 2002, for taxpayers owing taxes during that period.56 And although the voluntary disclosure program does not offer a reduced interest rate, it does provide for a limited four-year lookback period.57 The division has indicated that this reduced lookback period will not be available during amnesty and a taxpayer cannot proceed anonymously during amnesty.58 Also, the division has published special amnesty guidelines regarding Lanco agreements and intangible holding companies.59 The amnesty program runs from May 1, 2004, until June 15, 2009.60

Virginia: Legislation was passed in Virginia in late March authorizing a state tax amnesty for a 60- to 75-day period during fiscal 2010.61 The Virginia Department of Taxation has not yet announced the details of this program, but the statute outlines several of the features discussed here, including that the program would generally be available to any taxpayer required to file a return or pay any tax administered or collected by the department.62 Any individual or entity currently under investigation or who is being prosecuted for filing a fraudulent return or failing to file a return with the intent to evade tax would not be eligible to participate. There is also an exclusion for any outstanding assessment that is dated less than 90 days before the start date of the program, as well as any liability that is the result of a failure to file a return that was due less than 90 days before the program's start date, thus excluding nonfilers from participation. Finally, the legislation also contains an additional penalty provision that would apply to taxpayers who are eligible but fail to participate in the amnesty program. Any tax liability for which a taxpayer would have been eligible to pay through amnesty will be subject to a 20 percent penalty, in addition to all other penalties provided by statute, on the unpaid tax after the close of the amnesty.63

The legislation authorizing the amnesty provides several benefits. All civil and criminal penalties are waived, as is half the interest that would otherwise be due.64 The legislation is silent as to any limitations on lookback, but it expressly excludes all nonfilers. The legislation does not discuss whether a taxpayer will have to admit liability or waive rights to appeal in order to receive the benefits provided under amnesty.65 The legislation requires the department to publish guidelines and rules for the amnesty, which may contain additional benefits. This amnesty program will take place for a period of 60 days to 75 days between July 1, 2009, and June 30, 2010.

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Sutherland’s SALT Practice is composed of 17 attorneys who focus on planning and controversy associated with income, franchise, sales and use, unclaimed property, and property tax matters. Sutherland’s SALT Practice also monitors and comments on state tax legislative and policy efforts.

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52N.J. Admin. Code tit. 18, section 39-1.2(b).
57Id.
58Supra note 54.
59For a discussion of these issues, see supra note 54.
60Id. at (b).
61Virginia SB 1120 (2009 session).