



OFFICE OF  
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

SEP 29 1999

CC:DOM:IT&A:4BTaylor  
SPR-112184-99

MEMORANDUM FOR PAULINE RIENDEAU, NATIONAL DIRECTOR OF OFFICE OF  
INTEREST AND PENALTY ADMINISTRATION  
OP:EX:ST:I&P

FROM: Acting Assistant Chief Counsel (Income Tax & Accounting)  
CC:DOM:IT&A

SUBJECT: RRA 3306 & 3308

This is in response to your request for advice regarding §§ 3306 and 3308 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, 112 Stat. 685 (1998), which added §§ 6751 and 6631 to the Internal Revenue Code, respectively. After receiving initial questions about implementation of these provisions from your office, our Branch and personnel from Branch 1 of IT&A met with you and your staff on July 21, 1999, and August 25, 1999. During these meetings, your staff raised some additional questions. This memorandum answers the questions your staff initially raised regarding penalty notices under § 3306 of RRA 98, as well as the additional questions on penalty notices that arose during these meetings. Branch 1 will provide you, in a separate response, answers to the questions you raised regarding interest notices under § 3308 of RRA 98.

Issues

1. What is a "notice of penalty" for purposes of § 6751(a) of the Code?
2. Whether in the case of notices issued and penalties assessed on or before December 31, 2000, the Service is required to issue a new notice after December 31, 2000, in order to meet the requirements of § 6751(a) of the Code.
3. Whether the required information under § 6751(a) of the Code must be shown on every notice stating that the penalty is due, or whether it is sufficient to show the required information only on the first notice imposing the penalty.
4. How detailed a computation of a penalty does § 6751(a) of the Code require?

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### Conclusions

1. A notice of penalty for purposes of § 6751(a) of the Code is any notice on which the Service asserts a penalty. Thus, a revenue agent's report, a thirty-day letter, a statutory notice of deficiency, a notice and demand, or a billing notice mailed subsequent to the notice and demand are all notices of penalty.

2. In the case of notices issued and penalties assessed on or before December 31, 2000, the Service is not required to issue a new notice after December 31, 2000, in order to meet the requirements of § 6751(a).

3. Under § 6751(a) of the Code, the required information generally must be shown only on the first notice imposing the penalty. However, for time sensitive penalties (e.g., penalties for failure to pay and failure to file under § 6651), the requirements of § 6751(a) must be met with regard to the first notice asserting the penalty and with regard to each subsequent notice, but only for the additional amount that has accrued since the prior notice.

4. Section 6751(a) of the Code requires that a computation of a penalty include the base number from which the penalty is calculated, the formula for the penalty, and the amount of the penalty. Additionally, § 6751 requires that the name and the code section of the penalty be included in the notice.

### Discussion

Section 6751(a) of the Code, added by § 3306 of RRA 98, provides that the Service must include with each notice of a penalty the following information: (1) the name of the penalty, (2) the section of the Code under which the penalty is imposed, and (3) a computation of the penalty. The legislative history explains that each notice "imposing" a penalty must include the name of the penalty, the Code section imposing the penalty, and a computation of the penalty. See H. R. Conf. Rep. No. 105-599, at 260 (1998); S. Rep. No. 105-174, at 65 (1998). Section 6751(a) is effective for notices issued and penalties assessed after December 31, 2000.

#### Issue 1:

The first issue is the definition of the term "notice of penalty" for purposes of § 6751(a) of the Code. Section 6751(a) requires that the Service provide certain information on each notice of penalty. Although the legislative history does not define a notice of penalty, it states that certain required information (the name of the penalty, the Code section imposing the penalty, and a computation of the penalty) must be provided on

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each notice "imposing" a penalty. Thus, a notice of penalty is any notice that imposes a penalty.

A penalty is imposed when the Service asserts the penalty. "It is not necessary that the [penalty] be determined or enforced, but only that it has been congressionally imposed and it may be determined or enforced by [the Service]." See Wasie v. Commissioner, 86 T.C. 962, 970 (1986). Thus, there is no requirement that the penalty be assessed, determined on a statutory notice of deficiency, or enforced before it is considered imposed by the Service. Based on this reasoning, any notice on which the Service asserts a penalty will be treated as a notice of penalty for purposes of § 6751(a) of the Code. Therefore, a revenue agent's report, a thirty-day letter, a statutory notice of deficiency, a notice and demand, or a billing notice mailed subsequent to the notice and demand are all notices of penalty.

Issue 2:

The second issue is whether a new notice must be sent after December 31, 2000, for notices issued and penalties assessed prior to the effective date of § 6751(a) of the Code. Neither the Code nor the legislative history provides that the provision is retroactive or that new notices are required to be sent after the effective date for notices issued or penalties assessed on or before December 31, 2000. In fact, RRA 98 and the legislative history state just the opposite. The effective date for § 6751(a), as provided under § 3306(c) of RRA 98, is for notices issued and penalties assessed after December 31, 2000. Thus, if a penalty is assessed on or before December 31, 2000, or if a penalty notice is issued on or before December 31, 2000, the Service is not required to issue a new notice after December 31, 2000, to meet the requirements of § 6751(a). However, it is within the Service's discretion to provide the information required by § 6751(a) on any penalty notice, regardless of when the notice is issued or when the penalty is assessed.

The following examples demonstrate these rules:

Example 1. In November 2000, a Revenue Agent asserts the § 6662(d) substantial understatement penalty with respect to A's 1997 federal corporate income tax return. The penalty is reflected on the revenue agent report dated December 21, 2000. The § 6662(d) penalty is a penalty imposed at a fixed rate; it does not increase over time. The revenue agent's report is a notice of penalty for purposes of § 6751(a). Because the penalty notice is issued before January 1, 2001, the Service is not required to issue a new notice meeting the requirements of § 6751(a) after December 31, 2000. Further, any subsequent notice restating that the § 6662(d) penalty is due issued after December 31, 2000, is not required to meet the requirements of § 6751(a) with regard to the § 6662(d) penalty. However, the Service may provide the information required by § 6751(a) in any notice of

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penalty if it so chooses. In addition, other penalties included in subsequent notices issued after December 31, 2000, may have to comply with the requirements of § 6751(a) with respect to those penalties. See Examples 4 and 5, below.

Example 2. The facts are the same as in Example 1, except the revenue agent report asserting the § 6662(d) penalty is issued in January 2001, rather than December 2000. The first notice issued in January 2001 must meet the requirements of § 6751(a) with regard to the § 6662(d) penalty because the § 6662(d) penalty was not assessed and a notice was not issued on or before December 31, 2000.

Example 3. In January 1999, the Service asserted the § 6662(d) substantial understatement penalty with respect to B's 1997 federal individual income tax return. In March 1999, the Service issued a statutory notice of deficiency, including the § 6662(d) penalty. B failed to timely petition the United States Tax Court, so in June 1999 the Service assessed the tax and the § 6662(d) penalty. Under the effective date for § 6751(a), both issuance and assessment of the notice must occur after December 31, 2000, for § 6751(a) to apply. In this case, the Service issued the notice of penalty and assessed the penalty before the effective date. Therefore, the Service is not required to issue a new penalty notice with regard to the § 6662(d) penalty after December 31, 2000. However, the Service may provide the information required by § 6751(a) in any notice of penalty if it so chooses.

### Issue 3:

The third issue, which is closely related to the first two issues, is whether the information required by § 6751(a) of the Code may be shown once on the first notice asserting the penalty. As previously stated, only a notice that "imposes" a penalty must meet the requirements of § 6751(a). In most cases, the first notice asserting the penalty is the notice that "imposes" the entire amount of the penalty. Subsequent notices merely restate the amount of the penalty that was previously imposed. Thus, in these cases, including the information required under § 6751(a) only on the first notice imposing the penalty satisfies the requirements of § 6751(a).

However, in the case of time sensitive penalties (e.g., penalties for failure to pay and failure to file under § 6651), the amount usually is not fixed at the time the penalty is first imposed. These penalties continue to accrue until some statutorily fixed time. Thus, a new penalty amount is imposed each time a notice of penalty is issued showing that an additional amount has accrued. In these cases, the requirements of § 6751(a) must be met with regard to the first notice asserting the penalty and with regard to each subsequent notice, but only for the additional amount that has accrued since the prior notice.

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The following examples demonstrate these rules:

Example 4. In 2000, the Service assesses the § 6651(a)(2) penalty with respect to E's 1997 third quarter employment tax return. The § 6651(a)(2) penalty is a time-sensitive penalty that continues to accrue for up to 50 months. The first notice imposing the penalty is a notice and demand for the penalty issued in December 2000. Because the penalty is assessed and the notice and demand are issued before January 1, 2001, the Service is not required to issue a new notice meeting the requirements of § 6751(a) with regard to the § 6651(a)(2) penalty after December 31, 2000. However, any subsequent notices, such as follow-up billing notices, including additional accruals of the § 6651(a)(2) penalty issued after December 31, 2000, must meet the requirements of § 6751(a) with regard to the additional amounts of the § 6651(a)(2) penalty that have accrued since the prior notice.

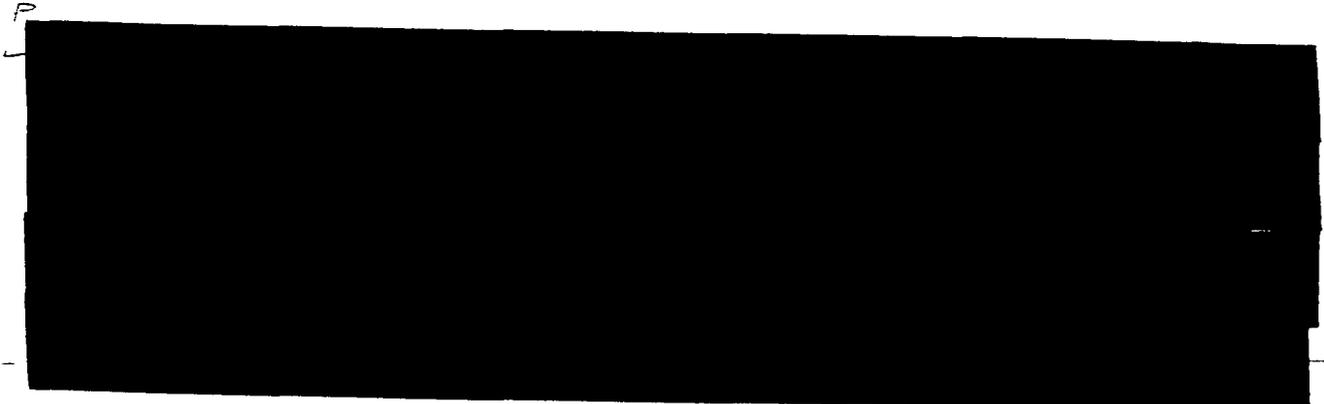
Example 5. The facts are the same as in Example 4, except the § 6651(a)(2) penalty is assessed in January 2001 and the first notice imposing the penalty is a notice and demand issued in January 2001. Because the penalty is assessed and the notice is issued after December 31, 2000, the notice issued in January 2001 must meet the requirements of § 6751(a). Further, any subsequent notices, such as follow-up billing notices, including additional accruals of the § 6651(a)(2) penalty must also meet the requirements of § 6751(a), but only with regard to the additional accruals imposed on each notice.

Issue 4:

The fourth issue is how detailed a computation of the penalty is needed to meet the requirements of § 6751(a) of the Code. In addition to the name of the penalty and the Code section imposing the penalty, § 6751(a) requires that a penalty notice include a computation of the penalty. Compute means to determine by mathematical means. See Merriam Webster Collegiate Dictionary 10<sup>th</sup> Edition. Thus, only providing a formula would not provide the information required for a computation. We believe that providing the base amount for the calculation of the penalty, the formula for the penalty, and the bottom-line amount of the penalty, are required to satisfy the computation requirement under § 6751(a).



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If you have any questions or concerns regarding this memorandum, please contact Brad Taylor at (202)622-4940.

HEATHER C. MALOY

By:

ROCHELLE L. HODES  
Senior Technician Reviewer  
Branch 4