§ 160.534 The hearing.

(a) The ALJ must conduct a hearing on the record in order to determine whether the respondent should be found liable under this part.

(b) (1) The respondent has the burden of going forward and the burden of persuasion with respect to any:
   (i) Affirmative defense pursuant to §160.410 of this part;
   (ii) Challenge to the amount of a proposed penalty pursuant to §§160.404–160.408 of this part, including any factors raised as mitigating factors; or
   (iii) Claim that a proposed penalty should be reduced or waived pursuant to §160.412 of this part.

(2) The Secretary has the burden of going forward and the burden of persuasion with respect to all other issues, including issues of liability other than with respect to subpart D of part 164, and the existence of any factors considered aggravating factors in determining the amount of the proposed penalty.

(c) The burden of persuasion will be judged by a preponderance of the evidence.

(d)(1) Subject to the 15-day rule under §160.518(a) and the admissibility of evidence under §160.540, either party may introduce, during its case in chief, items or information that arose or became known after the date of the issuance of the notice of proposed determination or the request for hearing, as applicable. Such items and information may not be admitted into evidence, if introduced—
   (i) By the Secretary, unless they are material and relevant to the acts or omissions with respect to which the penalty is proposed in the notice of proposed determination pursuant to §160.420 of this part, including circumstances that may increase penalties; or
   (ii) By the respondent, unless they are material and relevant to an admission, denial or explanation of a finding of fact in the notice of proposed determination under §160.420 of this part, or to a specific circumstance or argument expressly stated in the request for hearing under §160.504, including circumstances that may reduce penalties.

(2) After both parties have presented their cases, evidence may be admitted in rebuttal even if not previously exchanged in accordance with §160.518.


§ 160.536 Statistical sampling.

(a) In meeting the burden of proof set forth in §160.534, the Secretary may introduce the results of a statistical sampling study as evidence of the number of violations under §160.406 of this part, or the factors considered in determining the amount of the civil money penalty under §160.408 of this part. Such statistical sampling study, if based upon an appropriate sampling and computed by valid statistical methods, constitutes prima facie evidence of the number of violations and the existence of factors material to the proposed civil money penalty as described in §§160.406 and 160.408.

(b) Once the Secretary has made a prima facie case, as described in paragraph (a) of this section, the burden of going forward shifts to the respondent to produce evidence reasonably calculated to rebut the findings of the statistical sampling study. The Secretary will then be given the opportunity to rebut this evidence.

§ 160.538 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing must be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony of witnesses other than the testimony of expert witnesses may be admitted in the form of a written statement. The ALJ may, at his or her discretion, admit prior sworn testimony of experts that has been subject to adverse examination, such as a deposition or trial testimony. Any such written statement must be provided to the other party, along with the last known address of the witness, in a manner that allows sufficient time for the other party to subpoena the witness for