Two-Midnight Rule Needs Tweaking, Says Federal Judge

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A Federal Judge found that the Department of Health and Human Services (DHHS) failed to comply with the **Administrative Procedure Act (APA)** when it cut hospital inpatient payments by 0.2% as part of its "two-midnight" rule. According to the DHHS Secretary, the pay cut was intended to offset the estimated $220 million it would cost to shift patients from outpatient to inpatient status under the rule, which allows Medicare to pay inpatient rates only if a patient stays in the hospital for two midnights.

The plaintiffs in the case, including hospital trade associations and hospital systems, argued that DHHS lacked the statutory authority to make the across-the-board 0.2% reduction, and even if it did, the process was replete with procedural errors since the notice of proposed rulemaking omitted information about the methodology used in determining the reduction. While the court rejected the argument that the Medicare Act does not authorize the DHHS Secretary to make across-the-board reductions in payment for inpatient services, it agreed with the plaintiffs that the process violated the APA since they were effectively prevented from offering meaningful comments on the agency's proposal.

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Although the court's decision does not change the rule or strike the payment reductions at this time, all parties were ordered to propose a timetable for reissuing the rule by October 1, 2015. If they fail to comply with that timetable the pay cut could be set aside in its entirety. More importantly, in re-opening the rule, the court creates the possibility for the rule to change in the future.

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