

## Report on Medicare Compliance Volume 28, Number 21. June 10, 2019 In Ruling That Will Shake Up How CMS Issues Guidance, Supreme Court Rejects DSH Formula

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By Nina Youngstrom

In a ruling that may forever change the way the health care industry gets guidance from CMS, the Supreme Court threw out a Medicare formula for calculating disproportionate share hospital (DSH) payments because it never went through formal rulemaking. CMS is required to use the rulemaking process, with its notice and comment period, to make “substantive” changes to policies that affect payment, although the same isn’t true for “procedural” changes, the court ruled. The distinction is expected to set off a new generation of court cases, and may cause CMS to pull back from releasing some guidance, including Medicare transmittals and manual provisions, without notice and comment, attorneys say.

The ruling in the case, *Azar v. Allina Health Services, et al.*, was a victory for hospitals seeking to recover millions of dollars in DSH payments they lost when CMS changed the DSH payment formula to include Medicare Advantage and applied it retroactively. They will get back a lot of money, says attorney Andy Ruskin, with Morgan Lewis in Washington, D.C. But it also will force rethinking of some moves they make.

“From this point forward, any time a compliance officer or lawyer representing recipients of Medicare payments is seeking to decide what the law is, they have to decide whether the rule was promulgated by notice and comment rulemaking, and if not, whether it is a valid ‘procedural’ rule, or an invalid ‘substantive’ rule. Nothing can be taken at face value just because it’s in a manual,” Ruskin says. “CMS itself may start to disavow provisions in its manuals that are helpful to providers because they haven’t gone through notice and comment rulemaking.”

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