

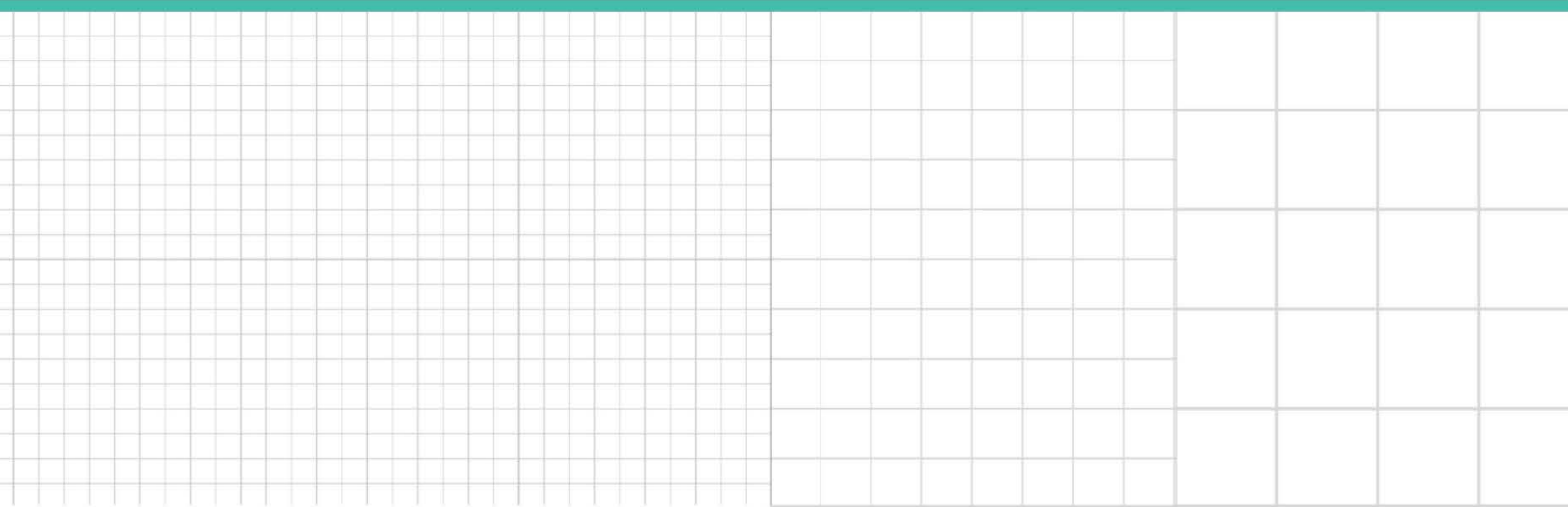


Professional Perspective

# Best Practices for CARES Act and PPPHCEA Compliance

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# Best Practices for CARES Act and PPPHCEA Compliance

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Oversight activities are ramping up across various bodies tasked with ensuring that Coronavirus Aid, Relief, and Economic Security Act and the Paycheck Protection Program and Health Care Enhancement Act funds are allocated and used appropriately. Providers will need to be flexible in responding to government inquiries while continuing to prudently manage their internal operations. Failure to adhere to the requirements and terms and conditions associated with CARES Act and PPPHCEA funds could expose recipients of loaned or granted funds to potential government audits, investigations, and False Claims Act (FCA) actions.

As with other federal programs implemented in connection with Covid-19, the three main programs under which providers will receive funds will continue to evolve—the Provider Relief Fund (PRF), the Paycheck Protection Program (PPP), and the Medicare Accelerated and Advance Payment Program (AAPP)—especially as oversight is conducted. This article elaborates on the most significant areas of potential recipient liability with a focus on detailed best practices and compliance tips that providers can employ to minimize the risk of such liability.

## Areas of Potential Liability

Of particular concern to recipient providers is the specter of FCA liability under [31 U.S.C. § 3729](#), et seq, which penalizes any person or entity that either “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”

Enforcement actions for violations of the FCA can take the form of audits, affirmative investigations, or qui tam suits on behalf of whistleblowing “relators” who have independent knowledge of inappropriate receipt or use of government funds.

### PRF

Oversight authorities are likely to focus enforcement actions on PRF compliance given the large amount of money distributed through the program and the numerous restrictions associated with such funds. Providers receiving PRF funds should be cognizant of the following key issues in making attestations, and receiving and using such funds:

**Submission of Incorrect Information:** The terms and conditions attached to each PRF grant mandate that the recipient certifies that “all information (including admission data)” provided in relation to the grant is now and in the future (if requested by the Health and Human Services Secretary or Inspector General) “true, accurate and complete, to the best of its knowledge.” Submission of incorrect, false, or misleading revenue information in order to obtain PRF grant funds and/or thereafter retain such funds without correcting submissions is grounds for FCA action. Recipients that submitted applications on behalf of subsidiaries or that have been, since 2018, or are currently subjects of transactions or changes of control must pay especially close attention to specific requirements concerning eligibility and information submission guidelines.

**Reimbursing Expenses or Lost Revenue:** PRF grant recipients may only use PRF grant funds to “prevent, prepare for, and respond to coronavirus” or to reimburse for “health care related expenses or lost revenues that are attributable to coronavirus.” Accordingly, recipients cannot use PRF grant funds to reimburse expenses or losses incurred from or obligated to be reimbursed by other sources, such as to satisfy other outstanding debt obligations, or for certain prohibited activities. The scope of permitted and forbidden uses remains subject to interpretation, although the government has indicated that permitted uses are those that relate to the day-to-day operational costs needed to keep a recipient provider’s “lights on” and maintain health-care delivery capacity.

**Paying Salaries Above the Executive Level II Cap:** PRF grant recipients are prohibited by the terms and conditions from using PRF grant funds to pay the salary of an individual in excess of the Executive Level II cap of \$197,300. However, the cap seems only to limit the maximum portion of an individual’s salary that can be paid from one grant (\$197,300 per grant), leading to uncertainty over how to pay an individual whose salary exceeds the cap using PRF funds.

**No Balance Billing:** PRF grant recipients must not bill “presumptive or actual” Covid-19 patients in excess of what the patient would ordinarily pay in-network. However, it is unclear if treatment unrelated to Covid-19 signs and symptoms for patients who are or become antibody positive prior to billing will be included in the government’s formulation of “presumptive or actual” Covid-19 patients. Additionally, it is not yet clear what period of claims are subject to the balance billing requirement (i.e. whether this applies only to patients seen after the CARES Act effective date, or to patients seen dating back to Jan. 31, 2020).

**Required Report Submission and Document Retention:** PRF grant recipients of \$150,000 or more from any Covid-19 related act must submit to the HHS Secretary and the Pandemic Response Accountability Committee a quarterly report starting June 30, 2020. Reports must be supported by accurate documentation of costs, PRF reimbursements, and financial management. Failure to adhere to these conditions of funding could create liability for recipients whose resources are already stretched thin in responding to the pandemic.

**Failure to Attest to Terms and Conditions:** The government deems a PRF grant recipient’s failure to affirmatively attest to the terms and conditions within the 90-day period following receipt of PRF grant as an attestation, and will treat retention of funds as such for the purposes of oversight and auditing. Each recipient of PRF grant funds must complete a separate attestation, and each round of PRF grant distribution requires a new attestation.

### **PPP**

Providers must submit a Paycheck Protection Program Borrower Application Form 2483 in order to receive loan proceeds through the PPP. Form 2483 includes a number of certifications and authorizations, including certifications that the provider is eligible to receive a PPP loan and that the proceeds from a loan will be used in accordance with the various PPP Interim Final Rules issued by the Small Business Administration and Treasury. Breach of the PPP rules can form the basis for potential FCA liability. For example, providers receiving PPP loans should consider the following issues in evaluating their compliance with PPP rules:

**Submission of Incorrect Information:** The government clarified that in determining whether a PPP loan request is “necessary” as required by law, providers must consider “their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” However, the bounds of this certification and the definitions of “liquidity” and “significantly detrimental” remain unclear. Given these ambiguities and the passage of time between Form 2483 submissions and the release of clarifying guidance, a knowing failure to correct inaccurate information as to necessity and eligibility as submitted in the initial application could create a basis for FCA liability.

**Misuse of Loan Proceeds:** The PPP rules specify that loan proceeds may be used to cover payroll costs (at least 60% of the loan must be used for this purpose), maintain employee benefits, mortgage interest (not principal), rent and utility payments, make interest payments on pre-Covid-19 debt obligations, and refinance any Economic Injury Disaster Loans taken out between Jan. 31 and April 3, 2020. Use of loan proceeds beyond the aforementioned examples could trigger FCA liability for breach of the PPP rules.

### **Medicare AAPP**

Medicare Part A providers and Medicare Part B suppliers could receive accelerated and advance payments from Medicare if they meet certain eligibility criteria for the AAPP. Providers/suppliers seeking accelerated and advanced Medicare payments must certify in their application to the Medicare Administrative Contractor servicing their region that the provider/supplier has no plans to file for bankruptcy, is not currently in bankruptcy, nor has it retained bankruptcy counsel; has no plans to cease doing business; and is not under fraud investigation. Similar to requesting funds from the PRF and loans through the PPP, providers/suppliers should take special care to confirm eligibility requirements, as making a false certification to the MAC could result in FCA liability.

## Best Practices

Recipients of any of Covid-19 related government funds should consider the following measures to help ensure compliance with requirements for receipt of such funds and avoid FCA exposure as enforcement actions ramp up in the coming months.

- Stay informed of any government clarifications, guidance documents, and new regulations to ensure that any inaccuracies in information previously submitted are identified and corrected immediately.
- Employ special accounting techniques for Covid-19 related funds and expenses, including:
- Documenting a relevant nexus between Covid-19, lost revenue or expenses, and each use of CARES Act and PPPHCEA funds (especially salary/payroll of retained employees)
- Clear tracking and detailed descriptions of Covid-19 expenses and losses with as close to real-time adjustments and updates as possible
- Separating incoming funding streams, including by using distinct bank accounts or special general ledgers, to avoid “double dipping” and document overlapping uses
- Tracking lost revenue and expenses by payor and provider type
- Being pro-active in self-auditing finances and revising policies and procedures (e.g. accounting methodologies or internal procedure that categorize the types of expenses) to account for new requirements
- Implementing internal controls, including “hard stop” protocols, which must be satisfied prior to internal release of Covid-19 related grant funds
- Thoroughly vet for compliance with applicable laws, regulations, terms and conditions, certifications, and attestations, all subcontractors to whom Covid-19 related funds are distributed. For example, prior to engaging a subcontractor for Covid-19-related work, the subcontractor must understand the purpose of the work being subcontracted, the work's relation to preventing, preparing for, or responding to Covid-19, and the procedures that must be utilized to monitor how funds are distributed and used (as well as the conditions attached thereto). This could take the form of distributing information to subcontractors and having them sign acknowledgments of the Covid-19-related purpose for their work, the relevant restrictions on funds, and the ongoing monitoring that is conducted in connection thereto.
- Educate both decision-makers and supporting staff on the relevant steps necessary to ensure organizational compliance, including recurring status checks and regular updates related to Covid-19 compliance. For instance, accounting department staff and any other senior staff responsible for reviewing and authorizing expenses must have a higher-level understanding of the conditions attached to funds than must junior or non-accounting staff, and should be educated appropriately on policies and procedures related to compliance.
- Regularly consult and document advice received from counsel and accounting firms to corroborate internal practices and lend credence to compliance measures taken.
- Report to the board of directors or managing members regularly on the receipt and use of Covid-19 funds, compliance progress, and potential risks.
- Integrate the above Covid-19 fund segregation, tracking, documentation, and reporting as general part of regular and ongoing organizational compliance duties and personnel reporting structures.

## **PRF Compliance**

In addition to the generally-applicable best practices above, recipients of PRF funds should implement the following additional measures to help ensure compliance with PRF terms and conditions and avoid FCA exposure related to PRF funds:

- Separate all bills that have been or will be charged to patients seen during the PHE (after Jan. 31, 2020), and review such bills for compliance with attestations and certifications regarding balance billing practices. This may include rendering a preliminary internal determination of whether any such patient is likely to be considered, based on clinical indicators, a “presumptive or actual” Covid-19 patient.
- Employ heightened record-keeping and support for staff whose salaries exceed \$197,300, and consider reviewing salary inputs for such staff, as applicable, to ensure that inputs from PRF grants are in line with a pro rata cap. One such protective measure could be instituting a payroll system back stop review of any staff salaries that exceed \$197,300 or of any staff salary categories for which PRF funds are used to pay a portion.
- Diligently track the number of jobs created or retained by project or activity supported by the use of PRF grants and other Covid-19 related funds, in addition to other relevant metrics required to be tracked by recipients of grants over \$150,000. This may include dedicating specific personnel to oversee compliance of certain projects supported by Covid-19 related grants.

The terms and conditions, attestations, and other requirements attached to the receipt of PRF funds are rife with ambiguity and impose substantial burdens on providers to ensure the proper application for funds, as well as compliant receipt, distribution, and use-tracking of such funds.

These requirements present potentially significant financial and reputational risk to recipients whose resources are already stretched thin in responding to Covid-19. Given the high potential for government inquiries into the usage of these funds, it is crucial that providers ensure they are complying with all the necessary requirements. In addition to the above best practices specific to PRF compliance, here are more specific compliance tips below.

**Compliance Tip #1:** To limit exposure, providers who received funds through either the general or targeted PRF distributions should carefully review, and if the amounts received are large enough, retain a third party accounting firm to review, the accuracy of information submitted to HHS and notify HHS immediately of any necessary corrections that should be made. This may require returning some, or in extreme cases, all of the funds received, depending on the severity of the submission error.

**Compliance Tip #2:** Providers receiving PRF funds should diligently track grant funds from the moment of receipt and document a nexus between Covid-19, the expense or loss of revenue, and the use of PRF funds to ensure that no such funds are directed to non-Covid-19 related uses. Providers should also consider tracking expenses by payor, provider type, and service line, as this information may become necessary in the management and distribution of PRF funds given forthcoming compliance and oversight activity.

**Compliance Tip #3:** Providers who receive funds from multiple sources to cover like expenses, such as from the PRF and the Federal Communications Commission to implement telehealth capacity, should meticulously document which funding stream is used to pay for each aspect of the relevant expense. This will help avoid concerns over “double dipping” and subsequent liability that may attach. Providers can employ accounting practices, such as those mentioned in the preceding Compliance Tip #2, to segregate and track funding streams.

**Compliance Tip #4:** To help ensure compliance with the PRF terms and conditions, recipients should be extremely careful in compensating providers and executives, in whole or in part, using grant funds and should ensure that if funds are used in such a manner, that payments from the PRF grant do not exceed \$197,300 divided by the likely lost revenue period. Any PRF grant payments in excess of the pro rata cap amount used to cover salaries are likely to be subject to increased scrutiny and are more likely to be targets of enforcement actions in the future.

**Compliance Tip #5:** PRF grant recipients should carefully separate patient accounts related to its or its employed providers' treatment of presumptive Covid-19 patients during the PHE. Segregation of such bills should extend back to Jan. 31, 2020 as is reasonably possible. Recipients might consider reviewing or auditing bills rendered during that period to help ensure compliance with the certification and the prompt return of payables collected in error. Recipients should also pay close attention to updated HHS guidance that further elaborates on who constitutes a "presumptive or actual" Covid-19 patient, as a narrower definition would limit the number of bills subject to the certification's requirements.

**Compliance Tip #6:** To minimize exposure, recipients of PRF grant funds and of funds from other CARES Act programs should regularly update monitoring systems with information on new funding streams, overlapping uses, and distributions to downstream subcontractors. These steps will enable recipients to aggregate information for accurate and timely report submission to the relevant oversight authorities. Recipients should see Compliance Tips 2 and 3 for related best practices.

**Compliance Tip #7:** PRF grant recipients should institute comprehensive Covid-19 documentation programs that remain beyond the end of the PHE, as the various oversight authorities will conduct future audits of PRF grant recipients, and an inability to provide accurate corroborating information could lead to more formal enforcement actions, recoupments, or civil, administrative, or criminal penalties.

These best practices and compliance tips will help ensure that providers are prepared for potential government enquiries. Providers should continue to monitor the evolving laws and guidelines for any additional compliance requirements.

*With assistance from [Daniel Weinstein](#), Proskauer*