

## **PTC vs TCPA: Why the Added “A” Makes a World of Difference for Medicarians (Like Me!)**

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Queenie back again.

So I am speaking at [Medicarians](#) next week, huge conference for those of you in any way involved with Medicare. And with the FTC now back at full strength, the only thing I’m thinking about is compliance, compliance, compliance. (Big surprise, right?)

Well I figured this would be a good time to break down the difference between the Beneficiary Permission to Contact Rules (PTC), on the one hand, and the Telephone Consumer Protection Act Rules (TCPA), on the other.

Let me start by saying that there is ZERO literature out there on this subject, which is absolutely incredible to me. It’s like the CMS and the FCC are totally unaware of each other’s existence. I mean even the Czar hasn’t paused to break this down yet.

So let me be the first, and let me do it in authoritative Queenie fashion.

For the non-Medicarians out there, there’s this thing called the Centers for Medicare and Medicaid Services (CMS) which is a government agency that administers the entire Medicare program. It literally provides health coverage to more than 100 million people. It also sets rules and guidelines that must be followed for folks that provide Medicare-related services—including those that make outbound calls or generate leads for those who might benefit from Medicare (or various Medicare supplements.)

So in addition to about 25,000 other rules CMS has made (and that I now have mostly memorized since I am GC for Digital Thrive—a company very much in the thick of things in this space) CMS has issued a series of rules around what is known as “permission to contact” or PTC. The PTC rules—found at 42 CFR § 423.2264 for the super nerds out there—dictate how agents offering information about Medicare is permitted to go about it. In a nutshell the rules state that unsolicited direct contact by conventional mail and other print media (for example, advertisements and direct mail) or email (provided every email contains an opt-out option) is fine. But no door-to-door activity is permitted and no unsolicited phone calls are permitted.

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But

And this is a mighty big and confusing BUT...

But calls are not considered unsolicited if the consumer “provides consent or initiates contact with the plan. For example, returning phone calls or calling an individual who has completed a business reply card requesting contact is not considered unsolicited.”

Hold on to that for a second.

So now we turn to the TCPA.

The TCPA has two critical provisions. First, the DNC provisions. The second, the regulated technology provisions.

Under the DNC provisions a caller cannot make a telephone solicitation to a residential phone line. Under the definition of telephone solicitation—found at [47 CFR 64.1200\(f\)\(15\)](#), again for the super nerds— a call is not actionable if it is made with express written consent.

Similarly, under the regulated technology portions of the TCPA a call is exempt if made for marketing purposes with express written consent.

Importantly, however, unlike the rather loosey goose provisions of the PTC ([42 CFR § 423.2264](#)) the TCPA's express written consent rules are brutally specific and require the “Troutman Nine” to pass muster. See [47 CFR § 64.1200\(f\)\(9\)](#).

In other words, a consumer's consent may very easily constitute PTC under the CMS guidelines but absolutely NOT constitute consent under the TCPA's express written consent rules.

But there's another fascinating wrinkle here.

At least one Court has found that calls made to inform consumers about the availability of Medicare benefits is not marketing or a solicitation under the TCPA to begin with. See *Williams v. National Healthcare Review No. 2:15-CV-0054-RFB-PAL*, 2017 WL 4819097, at \*7 (D. Nev. Oct. 25, 2017)) (holding that informing recent hospital patients about their eligibility for Medicaid were not telemarketing because “Medicaid is not a ‘commercially available’ program.”)

So the bottom line is that callers seeking to encourage consumers to take advantage of their rights under Medicare need to be mindful of both the PTC and the TCPA. While the PTC provisions are fairly straightforward, they pale in comparison to the requirements of the TCPA. And while the TCPA is arguably inapplicable in this context, I would be VERY cautious about using regulated technology or calling consumers on the DNC without express written consent or an EBR of some kind.

All of which leaves callers to wonder—are the PTC rules simply superfluous in light of the TCPA? The answer is ultimately “no” because consumers who are not on the federal DNC registry and who are called manually are still protected by the PTC rules. In virtually every other instance you need to be thinking about getting PEWC to offer Medicare without an EBR.

Fun, right?

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