IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CITY OF COLUMBUS, *et al.*, *Plaintiffs,* v. DONALD J. TRUMP, *et al.*, *Defendants.*	Civil Action No. 1:18-CV-02364-DKC

BRIEF OF *AMICUS CURIAE* JOSHUA PECK IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Joshua Peck is an expert in health insurance enrollment and the development and use of data-driven marketing strategies, with particular expertise concerning optimal promotion of and outreach for the federal government's health insurance exchange, HealthCare.gov. Between May 2016 and January 2017, Mr. Peck served as Chief Marketing Officer for Health Insurance Marketplaces at the Centers for Medicare and Medicaid Services ("CMS") within the U.S. Department of Health and Human Services ("HHS"). In that role, he was responsible for increasing the enrollment and retention of consumers seeking health insurance through HealthCare.gov through advertising, education, and outreach during the open enrollment period ("OEP") for coverage in 2017 (the "2017 OEP"). Mr. Peck previously served as a Senior Advisor responsible for marketing to the Director of Communications in CMS' Office of Communications from October 2014 to May 2016. He came to CMS after spending over eight years advising businesses and nonprofits on marketing strategy and now runs a nonprofit devoted to helping consumers enroll in insurance under the Patient Protection and Affordable Care Act ("ACA"). Mr. Peck's professional expertise in and ongoing advocacy for promoting enrollment in health insurance under the ACA gives him a unique vantage point from which to provide information to the Court concerning the defendants' actions to undermine the ACA. He respectfully submits this *amicus* brief in support of the plaintiffs to provide this Court with a comprehensive understanding of the negative impact of the defendants' near elimination of marketing and outreach funds on the new enrollment and retention of consumers seeking health insurance through HealthCare.gov.

SUMMARY OF ARGUMENT

Under the ACA, CMS is responsible for outreach and marketing to encourage eligible consumers to enroll in health insurance through HealthCare.gov, the federal health insurance

exchange on which states that did not set up an independent exchange also rely. Extensive multi-year research studies conducted by CMS itself, as well as external researchers, have concluded that outreach is critical to ensuring that consumers enroll in marketplace insurance plans. Those same studies establish that television advertising is among the most effective methods of reaching consumers. CMS' studies showed that nearly 40% of marketing-driven enrollments resulted from television advertisements – more than any other method alone.

CMS' studies created a roadmap for maximizing the efficacy of advertising (in particular, television and search advertising[1]) to increase enrollment, which CMS used to create its $100 million marketing plan to promote enrollment for coverage in 2017. Halfway through the enrollment period, CMS' strategy was succeeding. Advertising was driving roughly 37% of enrollments (up from 21% the year before), new enrollments had increased over the prior year, and overall enrollments were on track to grow as well. Notwithstanding this record of growth founded on CMS' own research, the defendants flipped CMS' roadmap on its head starting in the critical final week of the 2017 OEP.

In particular, the defendants caused CMS to eliminate most paid outreach, including television and search advertising, for the remainder of the 2017 OEP. It then cut all outreach funding for the 2018 OEP by 90% – from $100 million to $10 million – and eliminated television advertising, despite CMS' own evidence of its effectiveness. The defendants maintained this drastically reduced budget for outreach in the 2019 OEP.

[1] Search advertising refers to the appearance of a link to HealthCare.gov by Internet search engines when individuals use relevant search terms. U.S. Gov't Accountability Off., GAO-18-565, *Health Insurance Exchanges: HHS Should Enhance Its Management of Open Enrollment Performance* 50 n.a (2018) (hereinafter "GAO Report"), https://www.gao.gov/assets/700/693362.pdf.

CMS' actions took the toll predicted by its studies. Enrollment through HealthCare.gov has steadily declined from its peak in 2016 of 9.6 million consumers to 9.2 million in 2017, 8.7 million in 2018, and only 8.4 million in 2019, while state exchanges have slightly increased enrollment from 2.9 million in 2016 to 3 million in 2019. These figures, however, only partially account for the total enrollment loss caused by advertising cuts because they do not account for new enrollments that did not occur. New enrollment dropped 31.2% over that period, and thus the true loss conservatively amounts to roughly 2.3 million enrollments between January 2017 and the 2019 OEP. Contrary to the ACA's goal and CMS' regulatory mandate, the defendants' actions substantially depressed enrollment. This can only be viewed as having been knowing and intentional, since CMS' own studies showed the effectiveness of paid advertising. In fact defendants went so far as to deny the existence of CMS' studies when trying to justify their harmful conduct, claiming that "[n]o correlation has been seen between Obamacare advertising and either new enrollment or effectuated enrollment."[2] That statement is wrong, as demonstrated below.

ARGUMENT

I. THE ROLE OF CMS IN OUTREACH AND MARKETING UNDER THE ACA

In order to improve access to health insurance among uninsured consumers,[3] the ACA mandated the creation of new health benefit exchanges in each state by 2014.[4] The exchanges function as online marketplaces where consumers can compare and purchase qualifying health

[2] Jonathan Cohn & Jeffrey Young, *Emails Show Trump Administration Was Told Obamacare Ad Cuts Could Hurt Enrollment*, HuffPost (Dec. 14, 2018), https://www.huffpost.com/entry/trump-verma-obamacare-advertising-cut_n_5c115061e4b084b082ff8dba.
[3] Nat'l Ctr. for Health Statistics, CDC, Trends in Health Care Coverage and Insurance for 1968–2011 (Nov. 6, 2015), http://www.cdc.gov/nchs/health_policy/trends_hc_1968_2011.htm.
[4] 42 U.S.C.A. § 18031(b)(1).

insurance plans.[5] Under the ACA, states may elect to operate their own independent exchange or they may utilize an exchange with varying levels of federal involvement.[6] HealthCare.gov is an exchange that the federal government runs on behalf of states that do not set up an independent exchange. It is managed and implemented by CMS.[7]

As the administrator of HealthCare.gov, CMS is required to "conduct outreach and education activities . . . to educate consumers about the Exchange and insurance affordability programs to encourage participation."[8] Under its mandate, CMS' outreach and marketing efforts should include, among other things, informing consumers about the time periods in which they may purchase insurance (OEPs) for the following year through state or federal exchanges and providing information about the available ACA-qualified insurance plans.[9] As a result, CMS' outreach and marketing efforts largely target the period leading up to and through the end of an OEP to encourage enrollment during the OEP. CMS' outreach and marketing work was led by Mr. Peck, as Chief Marketing Officer for HealthCare.gov, during the 2017 OEP. Because as many as thirty-nine states (including states in which the plaintiff cities are located) rely on

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[5] Vanessa C. Forsberg, Cong. Research Serv., R44065, Overview of Health Insurance Exchanges 1 (2018) (hereinafter "CRS Exchange Overview"); *see also* 42 U.S.C.A. § 18031(d)(4).
[6] CRS Exchange Overview, *supra* note 5, at 6.
[7] Statement of Organization, Functions, and Delegations of Authority for CMS, 76 Fed. Reg. 4703 (Jan. 26, 2011). *See also* Daniel R. Levinson, Inspector General, HHS, OEI-06-14-0035, HealthCare.gov CMS Management of the Federal Marketplace 1, 50 (Feb. 2016), https://oig.hhs.gov/oei/reports/oei-06-14-00350.pdf.
[8] 45 C.F.R. § 155.205(e) (2018); 42 U.S.C.A. § 18031(b)(1)(A).
[9] 45 C.F.R. § 155.205(e) (2018). OEPs typically begin in the fall preceding the year for which insurance coverage is purchased. For example, the OEP for coverage in 2017 took place from November 1, 2016 to December 15, 2016 for coverage beginning on January 1, 2017, or to January 31, 2017 for coverage that would begin after January 1. *See Open Enrollment Deadlines: Enrollment Starts November 1!*, HealthCare.gov Blog (Oct. 13, 2016), https://www.HealthCare.gov/blog/key-health-insurance-deadlines/. For convenience, we will refer to each OEP based on the year in which the coverage will be provided, and not based on the actual dates of the enrollment period. For example, the OEP for insurance coverage for calendar year 2017 will be referred to as the "2017 OEP" even though the OEP began in November 2016.

HealthCare.gov as their exchange,[10] CMS' consumer outreach and advertising efforts impact insurance enrollment nationwide.

II. CMS' PAID MARKETING, PARTICULARLY TELEVISION AND SEARCH ADVERTISING, IS CRITICAL TO ENCOURAGING ENROLLMENT

It is both intuitive and logical that providing information to the public about the availability of health insurance through exchanges would positively impact enrollment. While certain consumers (such as people with chronic illnesses) may be highly motivated to sign up for health insurance without prompting, many need exposure to basic information about available plans and enrollment deadlines before they will enroll.[11] Rather than rely on intuition to guide its marketing efforts, beginning in the 2015 OEP and continuing through the 2017 OEP, CMS conducted hundreds of targeted studies to measure the efficacy of marketing on ACA enrollment and the impact of various forms of advertising. The results of these studies – conducted using randomized control trials and econometric modeling – show both the critical role that CMS' advertising plays in attracting new and renewal enrollments, and that paid advertising (like television and search advertising) is key to the success of marketing efforts to drive new enrollments. When enrollments increase, the risk pool for insurers improves as younger and healthier people enroll, which lowers prices for governments and insured consumers.[12]

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[10] *See State Health Insurance Marketplace Types, 2018*, Henry J Kaiser Family Found. ("KFF") (2019), https://www.kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/.

[11] According to consumer polling, only 25% of uninsured or self-insured people knew about the 2019 OEP for health insurance under the ACA. Ashley Kirzinger et al., *KFF Health Tracking Poll – November 2018: Priorities for New Congress and the Future of the ACA and Medicaid Expansion*, KFF (Nov. 28, 2018), https://www.kff.org/health-reform/poll-finding/kff-health-tracking-poll-november-2018-priorities-congress-future-aca-medicaid-expansion/.

[12] *Oversight Hrg. on the Impact of the Administration's Policies Affecting the Affordable Care Act Before the Subcomm. on the Dep'ts of Labor, Health &Human Servs., Educ. & Related Agencies of the H. Comm. on Appropriations*, 116th Cong. 2 (2019) (Testimony of Joshua Peck, Co-Founder, Get America Covered) (hereinafter "Peck Testimony").

A. Marketing and Outreach Is Vital to ACA Enrollment

CMS' studies confirmed that marketing increases consumer enrollment in marketplace insurance plans. Additionally, CMS found that young and healthy people were more likely to respond to marketing, demonstrating that marketing may play a unique role in improving the risk pool.[13] For example, during the 2016 OEP, CMS determined that over 1.8 million enrollments out of 9.6 million enrolled in coverage due to advertising, 821,000 of which were new enrollments that would have been lost absent advertising.[14] New enrollment driven by advertising increased to 37% (751,000 enrollments) during the 2017 OEP through December 19, 2016, a month before the defendants eliminated most paid advertising.[15] Thus, advertising proved even more effective for the 2017 plan year, driving 2.3 million enrollments during the first half of the 2017 OEP (751,000 new and 1.5 million renewal enrollments).[16]

CMS' conclusion regarding the impact of advertising has been corroborated by an independent study of California's exchange, called Covered California, which found a significant positive correlation between marketing and enrollment.[17] Covered California's experience is a good comparison to HealthCare.gov because California is one of the most geographically diverse and populous states in the country and its exchange's annual budget for marketing and outreach have largely matched CMS' $100 million marketing budget for the 2017 OEP.[18] Covered California estimated that marketing has "delivered . . . a better than three-to-one return on

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[13] *Id.* at 2-4.
[14] Memorandum from HHS, *Preliminary OE4 Lessons Learned* 1 (Jan. 2017), https://www.scribd.com/document/359411146/Preliminary-OE4-Lessons-Learned.
[15] *Id.*
[16] *Id.*
[17] Peter V. Lee et al., *Marketing Matters: Lessons from California to Promote Stability and Lower Costs in National and State Individual Insurance Markets* (2017) (hereinafter"California Study"), https://hbex.coveredca.com/data-research/library/CoveredCA_Marketing_Matters_9-17.pdf.
[18] *Id*. at 4.

investment" since 2016.[19] According to the study, California's focus on marketing not only increased enrollment in the years studied, but also encouraged healthy consumers to enter the insurance market and thus reduced premiums overall, saving consumers and the federal government between "$853 million to a high of $1.3 billion" in 2015 and 2016.[20]

B. Paid Advertising, Particularly Television and Search Advertising, Is a Significant Driver of Enrollment

The experiments conducted by CMS also determined the effectiveness of specific advertising tactics on specific populations. CMS was able to establish the number of people who newly enrolled or renewed coverage because they saw a television commercial or an ad on the internet or social media, or received individualized outreach such as a phone call or email.[21] CMS' results showed that national television advertising was one of the largest drivers of enrollment by volume for the 2016 and 2017 OEPs.[22] Overall, it accounted for nearly 40% of enrollments directly attributable to outreach.[23] Combined with radio, television was responsible for approximately 896,000 enrollments out of the 2.3 million marketing-driven enrollments in the 2017 OEP.[24] Of the 751,000 new enrollments driven by advertising during the first half of the 2017 OEP, 56.6% were attributable to television/radio and search advertising.[25] Moreover, the television ads cost just $29 per enrollment, many times less than the $250-$1,000 per enrollment spent by private sector companies.[26]

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[19] *Id.* at 17.
[20] *Id.* at 17, 19.
[21] Peck Testimony, *supra* note 12, at 5.
[22] *See* GAO Report, *supra* note 1, at 24.
[23] Joshua Peck, *Trump's Ad Cuts Will Cost a Minimum of 1.1 Million Obamacare Enrollments*, Medium (Oct. 23, 2017) (hereinafter "Peck Oct. 23, 2017 Article"), https://medium.com/get-america-covered/trumps-ad-cuts-will-cost-a-minimum-of-1-1-million-obamacare-enrollments-9334f35c1626.
[24] *Preliminary OE4 Lessons Learned*, *supra* note 14, at 1-2.
[25] *Id.*
[26] Peck Testimony, *supra* note 12, at 5.

While email and other nonpaid advertising also are important, research found that the broader reach of television and search advertising make them particularly effective in driving new enrollments by consumers who lack a relationship to an insurer or insurance exchange.[27] Of the two, however, television is more effective. According to a study of the impact of television advertising on enrollments on Kynect, the Kentucky state exchange: "Television is still the dominant news source and advertising medium, despite the growth of digital advertising in recent years."[28] In addition to driving enrollments, television also enhances the effectiveness of other tactics, for example by spurring people to search online where they may see a HealthCare.gov digital advertisement.[29] The Kentucky study is particularly instructive because the course of events in Kentucky created a natural experiment on what happens when television advertising is eliminated.[30] Between 2013 and 2016, Kentucky sponsored an advertising campaign for its exchange and experienced the largest decline in the adult uninsured rate in the country.[31] However, in 2015, the state cancelled all pending television ads with over a month remaining in the 2016 OEP and used no television advertising in the 2017 OEP.[32] Researchers examined this stark change of course and found that the television advertising campaign was associated with nearly 40% of unique visitors to the Kynect website and other web-based applications.[33] Unsurprisingly, after the state's cuts, annual enrollment through Kynect steadily fell from a peak of 106,330 enrollments in 2015 to 93,666 enrollments in 2016 and then to

[27] *See* California Study, *supra* note 17, at 3, 43-45; Peck Testimony, *supra* note 12, at 7.
[28] Paul R. Shafer et al., *Television Advertising and Health Insurance Marketplace Consumer Engagement in Kentucky: A Natural Experiment*, 2010 J. Med. Internet Res. e10872, at 10 (2018) (hereinafter "Kentucky Study").
[29] Peck Oct. 23, 2017 Article, supra note 23.
[30] Kentucky Study, *supra* note 28, at 9.
[31] *Id*. at 3.
[32] *Id*.
[33] *Id*. at 11.

81,155 enrollments in 2017.[34] This trend of declining enrollment is being replicated at the national level through the dramatic cuts to paid advertising of HealthCare.gov, while enrollment in state-based exchanges (which have their own marketing budgets) remains steady.[35]

III. THE DEFENDANTS' MARKETING CUTS LED TO AN IMMEDIATE AND SIGNIFICANT DECLINE IN ACA ENROLLMENT

When ACA-qualified plans were first made available through HealthCare.gov in 2014, CMS had 5.4 million enrollments.[36] This grew to over 9.6 million enrollments during the 2016 OEP, 1.8 million (21%) of which were a result of CMS' $51 million outreach campaign.[37] Largely based on the results of its own studies, CMS increased its advertising budget for the 2017 OEP to $100 million and reallocated its funds to try to optimize the efficiency of its spending and further expand enrollment. Television advertising accounted for more than a quarter of the total budget, followed closely by search advertising.[38] Up until early January 2017, CMS appeared to be on track to increase enrollment and its marketing was even more effective than the year before.[39] As of December 19, 2016, CMS' advertising had generated over 2.3 million enrollments, an increase of 27% of the marketing-driven enrollment yield over the 2016 OEP in half the time. That progress, however, was halted by the defendants' actions.

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[34] *Marketplace Enrollment 2014-2019*, KFF (2019), https://www.kff.org/health-reform/state-indicator/marketplace-enrollment/.
[35] *See* Fact Sheet, CMS, Health Insurance Exchanges 2019 Open Enrollment Report (Mar. 25, 2019), https://www.cms.gov/newsroom/fact-sheets/health-insurance-exchanges-2019-open-enrollment-report.
[36] GAO Report, *supra* note 1, at 11-13, 23 n. 45.
[37] *Id.* at 12.
[38] *Id.* at 50.
[39] Joshua Peck, *Trump blocked nearly 500,000 people from getting coverage*, Medium (Feb. 2, 2017) (hereinafter "Peck Feb. 2, 2017 Article"), https://medium.com/get-america-covered/trumped-blocked-nearly-500-000-people-from-getting-coverage-70317eedaaa4.

A. Up to 500,000 New Enrollments Were Lost When CMS Cancelled All Paid Outreach in the Final Week of the 2017 OEP

In January 2017, the defendants took a number of steps that discouraged enrollment through HealthCare.gov. Most critically, on January 26, 2017, defendant CMS cut all outreach and advertising – both paid and unpaid – for the final days of the 2017 OEP.[40] The last week of an OEP is a critical time for enrollment since the number of enrollments typically surges as new enrollees seek to beat the deadline.[41] Although CMS resumed certain low-cost and non-paid outreach the next day, paid outreach such as television and search advertising remained cancelled.[42] Around the same time, the President made numerous statements about repealing the ACA and issued an Executive Order that called on agencies to "ease the fiscal burden" of the ACA, after which CMS stripped references to the monetary penalty for not having insurance coverage from the HealthCare.gov website and outreach emails.[43] These actions together diminished enrollments because they created uncertainty about the ongoing viability of the ACA and implied that the monetary penalty – a key motivator for consumers, particularly young and healthy people, to seek coverage – would not be enforced.[44] As a result of all these actions, nearly 500,000 new enrollments were lost.[45] Whereas the final week of the 2016 OEP, during

[40] Office of the Inspector General, HHS, OEI-12-17-00290 Review of The Department of Health and Human Services Cancellation of Marketplace Enrollment Outreach Efforts 3 (hereinafter "HHS Cancellation Review"), https://oig.hhs.gov/oei/reports/oei-12-17-00290.pdf.
[41] Peck Feb. 2, 2017 Article, *supra* note 39. For example, approximately 700,000 enrollments (7% of total enrollments) occurred during the final week of the 2016 OEP. *Id.*
[42] HHS Cancellation Review, *supra* note 40, at 3-4.
[43] Peck Feb. 2, 2017 Article, *supra* note 39.
[44] *Id.*
[45] *See* David Anderson, *4.29% Enrollment Loss is the Cost of Trump's First Day EO*, Balloon-Juice (Feb. 7, 2017), https://www.balloon-juice.com/2017/02/07/4-25-enrollment-loss-is-the-cost-of-trumps-first-day-eo/ (Duke University researcher estimating 400,000 lost enrollments); Peck Feb. 2, 2017 Article, *supra* note 39 (estimating as many as 480,000 fewer enrollments).

which there was robust advertising, saw over 680,000 new enrollments,[46] only 376,260 new enrollments occurred in the final *two weeks* of the 2017 OEP.[47] Overall, enrollments through HealthCare.gov in the final week of January 2017 fell by 5.3% compared to 2016, even while enrollments on state-based exchanges grew by 1.8% to just over 3 million.[48]

B. The Defendants' Sharp Cuts to Advertising for the 2018 and 2019 OEPs Reduced Enrollments Even Further

In the lead-up to the 2018 OEP, the defendants again took steps that would result in a significant decline in enrollments through HealthCare.gov. The defendants shortened the 2018 OEP by nearly seven weeks and cut CMS' advertising and outreach budget by 90% from $100 million to $10 million.[49] CMS eliminated television advertising in favor of using only "digital media, email, and text messages," and cut search advertising by 85% to $2.7 million.[50] Based on CMS' own research, however, this strategy removed one of the most potent outreach tools in CMS' arsenal – television advertising.[51] As the researchers who studied the impact of a similar change in Kentucky concluded, while a "shift to a heavier focus on digital advertising may allow for reaching a sizeable population at a fraction of the cost, [it] should not be expected to provide the same impact as a television campaign, as TV still garners a majority of viewing time."[52]

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[46] Issue Brief, Office of the Assistant Sec'y for Planning & Evaluation, HHS, *Health Insurance Marketplaces 2016 Open Enrollment Period, Final Enrollment Report* 7-8 (2016), https://aspe.hhs.gov/system/files/pdf/187866/Finalenrollment2016.pdf.
[47] Fact Sheet, CMS, *Biweekly Enrollment Snapshot: Weeks 12 Through 14, Jan. 15 – Jan 31, 2017*, CMS.gov (Feb. 3, 2017), https://www.cms.gov/newsroom/fact-sheets/biweekly-enrollment-snapshot-4.
[48] Peck Oct. 23, 2017 Article, *supra* note 23.
[49] GAO Report, *supra* note 1, at 2, 23.
[50] Randy Pate, CMS, *Agency Bulletin, Policies Related to the Navigator Program and Enrollment Education for Upcoming Enrollment Period* (Aug. 31, 2017), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/Policies-Related-Navigator-Program-Enrollment-Education-8-31-2017pdf.pdf; GAO Report, *supra* note 1, at 50.
[51] *See generally supra*, Section I.B. *See also* GAO Report, *supra* note 1, at 24.
[52] Kentucky Study, *supra* note 28, at 10-11.

As a result of CMS' actions, enrollment through HealthCare.gov again declined by 5% from 9.2 million in 2017 to only 8.7 million in 2018, while during the same period enrollment on state exchanges remained stable.[53] Notably, new enrollments were as much as 29% lower in 2018 than in 2017.[54] The enrollment numbers for the 2018 OEP would have been even lower but for countervailing factors that increased enrollment such as lower subsidized insurance premium prices. Mr. Peck estimates that cutting the budget by 90% actually led to a loss of about 900,000 new enrollments in the 2018 OEP.[55] But these lost enrollments were partially offset by up to 500,000 additional enrollments that the Congressional Budget Office estimated resulted from lower premiums in 2018,[56] resulting in a numerical drop of 458,163 enrollments.[57] Thus, after accounting for the estimated 500,000 enrollments lost due to advertising cuts in the final week of the 2017 OEP, the true loss from 2017 and 2018 amounts to roughly 1.4 million enrollments, with new enrollment down by an estimated 29%.[58] For the 2019 OEP, the defendants again allocated only $10 million to outreach, and did not fund any television advertising.[59] Just as in 2018, total enrollment on HealthCare.gov again declined in 2019 – from

[53] GAO Report, *supra* note 1, at 11 (2018).
[54] Joshua Peck, *Why Marketing Matters for HealthCare.gov*, Medium (Feb. 7, 2018) (hereinafter "Peck Feb. 7, 2018 Article"), https://medium.com/get-america-covered/why-marketing-matters-for-healthcare-gov-46d19534a287.
[55] Peck Testimony, *supra* note 12, at 8; Peck Feb. 7, 2018 Article, *supra* note 54
[56] Letter from Keith Hall, Director, Cong. Budget Off., to the Hon. Lamar Alexander, Chairman S. Comm. on Health, Educ., Labor & Pensions, Re: Appropriation of Cost-Sharing Reduction Subsidies at 7 (Mar. 19, 2018), https://www.cbo.gov/system/files?file=115th-congress-2017-2018/reports/53664-costsharingreduction.pdf.
[57] Peck Testimony, *supra* note 12, at 9; GAO Report, *supra* note 1, at 11-12. The exact numbers for the 2017 and 2018 OEPs were 9,201,805 (2017 OEP) and 8,743,642 (2018 OEP).
[58] GAO Report, *supra* note 1, at 13. *See* Peck Feb. 7, 2018 Article, *supra* note 54; Peck Testimony, *supra* note 12, at 8.
[59] Inside Health Policy, CMS Not Increasing ACA Marketing and Outreach Budget for 2019 (Sept. 21 2018), https://insidehealthpolicy.com/daily-news/cms-not-increasing-aca-marketing-and-outreach-budget-2019.

8.7 million in 2018 to 8.4 million in 2019 – while enrollment in state-based exchanges held steady.[60] New enrollment declined again by roughly 19%, from 2.46 million consumers in 2018 to 2 million in 2019.[61] For the same reasons as in 2018, the 2019 OEP enrollment data does not reflect the true loss, estimated at 900,000 new enrollments.[62] Thus, the defendants' actions over the past three years have resulted in an estimated total loss of 2.3 million new enrollments.[63]

C. The Defendants Must Have Known That Their Actions Would Likely Decrease Enrollment

At the time the defendants decided to eliminate paid advertising and chop the budget for the 2018 OEP, CMS possessed ample information showing that their actions would likely cause a decline in enrollment through HealthCare.gov. As explained above, the results of CMS' own studies predicted that result. Moreover, HHS documents obtained through a Freedom of Information Act request suggest that CMS officials had discussed those studies and other research internally before the agency announced its decisions.

For example, one month before announcing the 2018 OEP budget cut, a marketing firm hired by CMS to analyze the efficacy of various advertising methods provided CMS with a self-identified "very conservative" estimate predicting that eliminating television advertising would reduce enrollments by over 102,000, even if the funds budgeted for television were redistributed among other advertising tactics.[64] The analysts cautioned that the impact "could be much more

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[60] Fact Sheet, CMS, Health Insurance Exchanges 2019 Open Enrollment Report (Mar. 25, 2019), https://www.cms.gov/newsroom/fact-sheets/health-insurance-exchanges-2019-open-enrollment-report.

[61] Fact Sheet, CMS, Final Weekly Enrollment Snapshot for the 2019 Enrollment Period (Jan. 3, 2019), https://www.cms.gov/newsroom/fact-sheets/final-weekly-enrollment-snapshot-2019-enrollment-period; GAO Report, *supra* note 1, at 13.

[62] Peck Testimony, *supra* note 12, at 8.

[63] *Id.*

[64] Email from Seth Levin, Head of the HealthCare.gov Account at Weber Shandwick, to Christopher Koepke, Dir. of the Office of Commc'ns at CMS (July 27, 2017, 7:13 PM) ("Exh. 1"); Cohn & Young, *supra* note 2.

significant" both because television advertising enhances the effectiveness of digital and radio advertising through a "halo effect" and digital advertising itself becomes less efficient as more money is spent on it.[65] Earlier in 2017, CMS was advised that radio advertisements were associated with increased enrollment rates among first time consumers by 8% and among "prior experience consumers" by 16%.[66] In the face of this evidence of the negative impact of its contemplated actions, CMS nonetheless proceeded to eliminate television and radio advertisements and dramatically cut the 2018 OEP budget.[67]

To justify the budget cuts, officials made statements that both contradicted and effectively denied the existence of CMS' own studies. On the day that the 2018 OEP budget cut was announced, CMS published a "fact sheet" stating that "[n]o correlation has been seen between Obamacare advertising and either new enrollment or effectuated enrollment," even though just six months before, CMS officials had received a memorandum from analysts specifically describing the impact of paid and nonpaid advertising on 2017 OEP enrollment.[68] Likewise, when pressed by reporters about whether HHS had studied the efficacy of advertising, an official said "We haven't done a specific study related to the public awareness of the program,"[69] despite the existence of 2016 and 2017 HHS studies showing most forms of paid advertising were effective.[70] In fact, HHS officials credited these studies for their decision to

[65] *See* Exh. 1; *see also* Peck Oct. 23, 2017 Article, *supra* note 23.
[66] Memorandum from BlueLabs and Weber Shandwick to CMS, Preliminary Memorandum on Direct Response and Paid Media Impact in OE4 at CMS0706 (Feb. 7, 2016) ("Exh. 2"); s*ee also* Cohn & Young, *supra* note 2. "Prior experience consumers" are consumers who had previously engaged with the marketplace, *e.g.*, signed up for the email list, but did not necessarily purchase coverage.
[67] GAO Report, *supra* note 1, at 50.
[68] *See* Cohn & Young, *supra* note 2; Exh. 2.
[69] Sarah Kliff, *Trump is Slashing Obamacare's Advertising Budget by 90%*, Vox (Aug. 31, 2017), https://www.vox.com/2017/8/31/16236280/trump-obamacare-outreach-ads.
[70] GAO Report, *supra* note 1, at 23-24.

utilize digital and search advertising (which they nonetheless cut by over 80% in the 2018 budget), while simultaneously denying the effectiveness of television advertising that the same studies found to be one of the most effective forms of paid advertising.[71]

CONCLUSION

There is abundant evidence establishing that marketing, particularly paid television advertisements, plays a critical role in maintaining and increasing ACA enrollment. By drastically cutting CMS' marketing budget and eliminating the use of paid advertising, the defendants acted contrary to the findings of CMS' own studies. Far from "encourag[ing] participation" as required by CMS' regulatory mandate, the defendants' decisions spurred a significant drop in enrollments on Healthcare.gov, a result that they knew was likely to occur.

Dated: June 7, 2019

Respectfully Submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: */s/ Matthew D. Slater*

Matthew D. Slater (Bar No. 05582)
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Alexander G. Galicki (*pro hac vice pending*)
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Counsel for Amicus Curiae Joshua Peck

[71] *Id.* at 23-24, 50.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CITY OF COLUMBUS, *et al.*, *Plaintiffs,* v. DONALD J. TRUMP, *et al.*, *Defendants.*	Civil Action No. 1:18-CV-02364-DKC

INDEX OF EXHIBITS TO BRIEF OF AMICUS CURIAE JOSHUA PECK IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Exhibit 1. Email from Seth Levin, Head of the HealthCare.gov Account at Weber Shandwick, to Christopher Koepke, Dir. of the Office of Commc'ns at CMS (July 27, 2017, 7:13 PM) (CMS0100-CMS0111 at CMS0105-CMS106).

Exhibit 2. Memorandum from BlueLabs and Weber Shandwick to CMS, Preliminary Memorandum on Direct Response and Paid Media Impact in OE4 (Feb. 7, 2016) (CMS0704-CMS0709).

EXHIBIT 1

From:	Levin, Seth (WAS-WSW)
To:	Koepke, Christopher P. (CMS/OC)
Cc:	Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC); Manalo, Jonathan (WAS-PWT); Bramlett, Antoinette (NYC-WSW)
Subject:	RE: RE: Updated Econometric Modeling Deck -- DRAFT
Date:	Tuesday, August 1, 2017 3:26:00 PM

Ok, just call my office if you want to chat more.

Seth Levin
(W) 202-585-2825
(M) (b)(6)

From: Koepke, Christopher P. (CMS/OC) [mailto:Christopher.Koepke@cms.hhs.gov]
Sent: Tuesday, August 01, 2017 2:59 PM
To: Levin, Seth (WAS-WSW)
Cc: Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC); Manalo, Jonathan (WAS-PWT); Bramlett, Antoinette (NYC-WSW)
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

I explained how I made the table with Jonathan. You guys get together at 3:30. I'll join if I can. The

(b)(5)

From: Levin, Seth (WAS-WSW) [mailto:SLevin@webershandwick.com]
Sent: Tuesday, August 1, 2017 2:44 PM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>
Cc: Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>; Manalo, Jonathan (WAS-PWT) <JManalo@webershandwick.com>; Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Chris,

I can pull together Jon, Greg and Eben for 3:30, if you want to talk it through. Let me know.

Best,

Seth

Seth Levin
(W) 202-585-2825
(M) (b)(6)

From: Koepke, Christopher P. (CMS/OC) [mailto:Christopher.Koepke@cms.hhs.gov]
Sent: Tuesday, August 01, 2017 2:00 PM
To: Manalo, Jonathan (WAS-PWT); Levin, Seth (WAS-WSW); Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC)
Cc: Vass, Alex (LDN-WSW); Richer, Derek (WAS-KRC); Young, Greg (WAS-WSW); Gilfenbaum, Eben

(WAS-WSW); brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com); Joel Shuman; Benjamin Calvin; Ryan, Tim (WAS-WSW); Bramlett, Antoinette (NYC-WSW)
Subject: RE: Updated Econometric Modeling Deck -- DRAFT
Importance: High

This highlights my problem. It is due today… so… if Jonathan or someone wants to call and tell me how to do this differently, I'd appreciate it.

From: Koepke, Christopher P. (CMS/OC)
Sent: Tuesday, August 1, 2017 1:07 PM
To: 'Manalo, Jonathan (WAS-PWT)' <JManalo@webershandwick.com>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>; Ryan, Tim (WAS-WSW) <Tim.Ryan@webershandwick.com>; Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

(b)(5)

(b)(5)

From: Manalo, Jonathan (WAS-PWT) [mailto:JManalo@webershandwick.com]
Sent: Friday, July 28, 2017 11:20 AM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>; Ryan, Tim (WAS-WSW) <Tim.Ryan@webershandwick.com>; Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Yes.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Koepke, Christopher P. (CMS/OC)" <Christopher.Koepke@cms.hhs.gov>
Date: 7/28/17 10:56 AM (GMT-05:00)
To: "Manalo, Jonathan (WAS-PWT)" <JManalo@webershandwick.com>, "Levin, Seth (WAS-WSW)" <SLevin@webershandwick.com>, "Salerno, Laura (CMS/OC)" <Laura.Salerno@cms.hhs.gov>, "Horvath, Rachael G. (CMS/OC)" <rachael.horvath@cms.hhs.gov>, "Johanson, Barbara I. (CMS/OC)" <Barbara.Johanson@cms.hhs.gov>
Cc: "Vass, Alex (LDN-WSW)" <AVass@webershandwick.com>, "Richer, Derek (WAS-KRC)" <DRicher@KRCresearch.com>, "Young, Greg (WAS-WSW)" <GYoung@webershandwick.com>, "Gilfenbaum, Eben (WAS-WSW)" <EGilfenbaum@webershandwick.com>, brendan.cavanagh@bluelabs.com, "Dyskant Erek (erek.dyskant@bluelabs.com)" <erek.dyskant@bluelabs.com>, Joel Shuman <joel.shuman@bluelabs.com>, Benjamin Calvin <benjamin.calvin@bluelabs.com>, "Ryan, Tim (WAS-WSW)" <Tim.Ryan@webershandwick.com>, "Bramlett, Antoinette (NYC-WSW)" <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

(b)(5)

From: Manalo, Jonathan (WAS-PWT) [mailto:JManalo@webershandwick.com]
Sent: Friday, July 28, 2017 10:51 AM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>; Ryan, Tim (WAS-WSW) <Tim.Ryan@webershandwick.com>; Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Yes.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Koepke, Christopher P. (CMS/OC)" <Christopher.Koepke@cms.hhs.gov>
Date: 7/28/17 10:23 AM (GMT-05:00)
To: "Manalo, Jonathan (WAS-PWT)" <JManalo@webershandwick.com>, "Levin, Seth (WAS-WSW)" <SLevin@webershandwick.com>, "Salerno, Laura (CMS/OC)" <Laura.Salerno@cms.hhs.gov>, "Horvath, Rachael G. (CMS/OC)" <rachael.horvath@cms.hhs.gov>, "Johanson, Barbara I. (CMS/OC)" <Barbara.Johanson@cms.hhs.gov>
Cc: "Vass, Alex (LDN-WSW)" <AVass@webershandwick.com>, "Richer, Derek (WAS-KRC)" <DRicher@KRCresearch.com>, "Young, Greg (WAS-WSW)" <GYoung@webershandwick.com>, "Gilfenbaum, Eben (WAS-WSW)" <EGilfenbaum@webershandwick.com>, brendan.cavanagh@bluelabs.com, "Dyskant Erek (erek.dyskant@bluelabs.com)" <erek.dyskant@bluelabs.com>, Joel Shuman <joel.shuman@bluelabs.com>, Benjamin Calvin <benjamin.calvin@bluelabs.com>, "Ryan, Tim (WAS-WSW)" <Tim.Ryan@webershandwick.com>, "Bramlett, Antoinette (NYC-WSW)" <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

(b)(5)

From: Manalo, Jonathan (WAS-PWT) [mailto:JManalo@webershandwick.com]
Sent: Friday, July 28, 2017 10:22 AM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>; Ryan, Tim (WAS-WSW) <Tim.Ryan@webershandwick.com>; Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Nice. Who needs a simulator?

Wording looks good to me.

Best,
Jon

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Koepke, Christopher P. (CMS/OC)" <Christopher.Koepke@cms.hhs.gov>
Date: 7/28/17 10:15 AM (GMT-05:00)
To: "Manalo, Jonathan (WAS-PWT)" <JManalo@webershandwick.com>, "Levin, Seth (WAS-WSW)" <SLevin@webershandwick.com>, "Salerno, Laura (CMS/OC)" <Laura.Salerno@cms.hhs.gov>, "Horvath, Rachael G. (CMS/OC)" <rachael.horvath@cms.hhs.gov>, "Johanson, Barbara I. (CMS/OC)" <Barbara.Johanson@cms.hhs.gov>
Cc: "Vass, Alex (LDN-WSW)" <AVass@webershandwick.com>, "Richer, Derek (WAS-KRC)" <DRicher@KRCresearch.com>, "Young, Greg (WAS-WSW)" <GYoung@webershandwick.com>, "Gilfenbaum, Eben (WAS-WSW)" <EGilfenbaum@webershandwick.com>, brendan.cavanagh@bluelabs.com, "Dyskant Erek (erek.dyskant@bluelabs.com)" <erek.dyskant@bluelabs.com>, Joel Shuman <joel.shuman@bluelabs.com>, Benjamin Calvin <benjamin.calvin@bluelabs.com>, "Ryan, Tim (WAS-WSW)" <Tim.Ryan@webershandwick.com>, "Bramlett, Antoinette (NYC-WSW)" <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

(b)(5)

From: Manalo, Jonathan (WAS-PWT) [mailto:JManalo@webershandwick.com]
Sent: Friday, July 28, 2017 10:02 AM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>; Ryan, Tim (WAS-WSW) <Tim.Ryan@webershandwick.com>; Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Morning,

I chatted with Alex this morning, and he mentioned we built a simulator (which is based on the econometric model) for this type of scenario. So, I used that to obtain the following results. However, since the simulator is built on 13 weeks of data, I provide both 7 weeks and 13 weeks to provide a range of what could happen.

(b)(5)

Simulator Projected Enrollments

(b)(5)

IMPACT

(b)(5)

(b)(5)

Let me know if you have any questions. I'm actually PTO today, but I'll respond to email and have the laptop handy.

Hope this helps.

Take care,
Jon

From: Koepke, Christopher P. (CMS/OC) [mailto:Christopher.Koepke@cms.hhs.gov]
Sent: Friday, July 28, 2017 8:31 AM
To: Levin, Seth (WAS-WSW); Manalo, Jonathan (WAS-PWT); Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC)
Cc: Vass, Alex (LDN-WSW); Richer, Derek (WAS-KRC); Young, Greg (WAS-WSW); Gilfenbaum, Eben (WAS-WSW); brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com); Joel Shuman; Benjamin Calvin; Ryan, Tim (WAS-WSW); Bramlett, Antoinette (NYC-WSW)
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

(b)(5)

From: Levin, Seth (WAS-WSW) [mailto:SLevin@webershandwick.com]
Sent: Thursday, July 27, 2017 7:13 PM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Manalo, Jonathan (WAS-PWT) <JManalo@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>; Ryan, Tim (WAS-WSW) <Tim.Ryan@webershandwick.com>;

Bramlett, Antoinette (NYC-WSW) <Antoinette.Bramlett@webershandwick.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Hi Chris,

See the attached chart. I first estimated OE5 enrollments for television using this year's $11.5 million TV budget and last year's CPA. I then looked at the non-tv plan and applied the same method for each channel that received a portion of the redistributed TV budget (In the interest of time, I am admittedly sending this without the full team having a chance to weigh in, but Greg said I did good). The difference is 102,029 enrollments. This is likely a very conservative number, and Greg noted the impact could be much more significant given the following:

- As spend in digital increases, efficiency will decrease because of a decreasing marginal rate of return.
- The effectiveness of digital and radio at the given spend levels is likely due in part to the halo effect of TV.

Happy to talk it through in the AM, and other WS team members, please feel free to weigh in.

Thanks,

Seth

(W) 202-585-2825
(M) (b)(6)

From: Koepke, Christopher P. (CMS/OC) [mailto:Christopher.Koepke@cms.hhs.gov]
Sent: Thursday, July 27, 2017 5:50 PM
To: Levin, Seth (WAS-WSW); Manalo, Jonathan (WAS-PWT); Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC)
Cc: Vass, Alex (LDN-WSW); Richer, Derek (WAS-KRC); Young, Greg (WAS-WSW); Gilfenbaum, Eben (WAS-WSW); brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com); Joel Shuman; Benjamin Calvin
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Thanks everyone – we're back!

From: Levin, Seth (WAS-WSW) [mailto:SLevin@webershandwick.com]
Sent: Thursday, July 27, 2017 5:48 PM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Manalo, Jonathan (WAS-PWT) <JManalo@webershandwick.com>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Hi Chris,

We'll put our heads together ASAP.

Seth Levin
(W) 202-585-2825
(M) (b)(6)

From: Koepke, Christopher P. (CMS/OC) [mailto:Christopher.Koepke@cms.hhs.gov]
Sent: Thursday, July 27, 2017 5:37 PM
To: Manalo, Jonathan (WAS-PWT); Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC)
Cc: Vass, Alex (LDN-WSW); Richer, Derek (WAS-KRC); Young, Greg (WAS-WSW); Gilfenbaum, Eben (WAS-WSW); Levin, Seth (WAS-WSW); brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com); Joel Shuman; Benjamin Calvin
Subject: RE: Updated Econometric Modeling Deck -- DRAFT
Importance: High

(b)(5)

(b)(5)

From: Manalo, Jonathan (WAS-PWT) [mailto:JManalo@webershandwick.com]
Sent: Tuesday, April 11, 2017 2:56 PM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>
Subject: Re: Updated Econometric Modeling Deck -- DRAFT

Hello,

(b)(5)

I'll be available to answer any questions today, tomorrow, and Friday.

Alex will be available in the morning tomorrow, so if there are any questions he can address, like follow-ups with 'synergy', let us know by sometime tonight and he can answer in the morning.

Thanks,

Jonathan Manalo
Vice President of Analytics

Weber Shandwick
733 Tenth Street NW
Washington, DC 20001
(o) 202.585.2194
(c) (b)(6)
(e) jmanalo@webershandwick.com
(w) www.webershandwick.com

PRWeek Global Agency of the Year – 2015, 2016
Ad Age Agency A-List Honoree – 2014, 2015
The Holmes Report Global Agency of the Year – 2010, 2012, 2014, 2015

From: Manalo, Jonathan (WAS-PWT)
Sent: Monday, April 10, 2017 11:55 AM
To: Koepke, Christopher P. (CMS/OC); Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC)
Cc: Vass, Alex (LDN-WSW); Richer, Derek (WAS-KRC); Young, Greg (WAS-WSW); Gilfenbaum, Eben (WAS-WSW); Levin, Seth (WAS-WSW); brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com); Joel Shuman; Benjamin Calvin
Subject: Re: Updated Econometric Modeling Deck -- DRAFT

Morning Chris,

(b)(5)

(b)(5)

I'm currently working on updating the deck and will make these changes for this slide. I'm also working on updating the earlier CPAs, which will account for the Hispanic spend, which we recieved late last week. I should have the final deck out tomorrow afternoon, but let me know if you need specific numbers in the meantime.

Thanks,

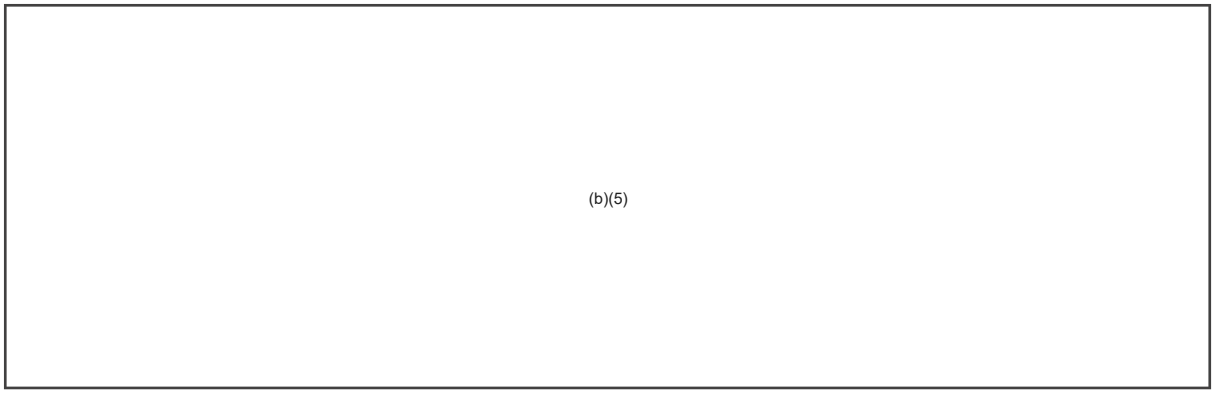
Jonathan Manalo
Vice President of Analytics

Weber Shandwick
733 Tenth Street NW
Washington, DC 20001
(o) 202.585.2194
(c) (b)(6)
(e) jmanalo@webershandwick.com
(w) www.webershandwick.com

PRWeek Global Agency of the Year – 2015, 2016
Ad Age Agency A-List Honoree – 2014, 2015
The Holmes Report Global Agency of the Year – 2010, 2012, 2014, 2015

From: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>
Sent: Monday, April 10, 2017 9:03 AM
To: Manalo, Jonathan (WAS-PWT); Salerno, Laura (CMS/OC); Horvath, Rachael G. (CMS/OC); Johanson, Barbara I. (CMS/OC)
Cc: Vass, Alex (LDN-WSW); Richer, Derek (WAS-KRC); Young, Greg (WAS-WSW); Gilfenbaum, Eben (WAS-WSW); Levin, Seth (WAS-WSW); brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com); Joel Shuman; Benjamin Calvin
Subject: RE: Updated Econometric Modeling Deck -- DRAFT

Hi everyone – I definitely want to dive into a few things more. But, I'm going to send a few one off questions I'd love answered asap as I'm getting a lot of budgeting questions right now.



Thanks - Chris

From: Manalo, Jonathan (WAS-PWT) [mailto:JManalo@webershandwick.com]
Sent: Tuesday, April 4, 2017 2:50 PM
To: Koepke, Christopher P. (CMS/OC) <Christopher.Koepke@cms.hhs.gov>; Salerno, Laura (CMS/OC) <Laura.Salerno@cms.hhs.gov>; Horvath, Rachael G. (CMS/OC) <rachael.horvath@cms.hhs.gov>; Johanson, Barbara I. (CMS/OC) <Barbara.Johanson@cms.hhs.gov>
Cc: Vass, Alex (LDN-WSW) <AVass@webershandwick.com>; Richer, Derek (WAS-KRC) <DRicher@KRCresearch.com>; Young, Greg (WAS-WSW) <GYoung@webershandwick.com>; Gilfenbaum, Eben (WAS-WSW) <EGilfenbaum@webershandwick.com>; Levin, Seth (WAS-WSW) <SLevin@webershandwick.com>; brendan.cavanagh@bluelabs.com; Dyskant Erek (erek.dyskant@bluelabs.com) <erek.dyskant@bluelabs.com>; Joel Shuman <joel.shuman@bluelabs.com>; Benjamin Calvin <benjamin.calvin@bluelabs.com>
Subject: Updated Econometric Modeling Deck -- DRAFT

Hello Team CMS,

Attached is the updated Econometric Modeling deck. It now includes Hispanic data as well as a fleshed out analysis for Low Risk (starting on Slide 75 with additional data in the Appendix starting on Slide 129).

We also updated the following:
- identified which slides were the result Econometric Modeling or an Experimental design
- included the variation of weekly GRPs across DMAs (slide 98)
- updated the waterfall charts for assessing the factors that impact enrollments
- added detailed bullets for the media channel impact slides

One thing we are still integrating is the Hispanic costs. So, you'll notice some modeling slides

(e.g., Slides 25 and 29) still don't include Hispanic information. However, we wanted to get you this version, so you could view the Low Risk/Young and Healthy analyses. We should have a final version with the Hispanic costs integrated in the next couple of days.

Let us know if you have any questions or would like to hop on a call to discuss in the meantime.

Regards,

Jonathan Manalo
Vice President of Analytics

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PRWeek Global Agency of the Year – 2015, 2016
Ad Age Agency A-List Honoree – 2014, 2015
The Holmes Report Global Agency of the Year – 2010, 2012, 2014, 2015

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EXHIBIT 2

From:	Manalo, Jonathan (WAS-PWT)
To:	Koepke, Christopher P. (CMS/OC); Salerno, Laura (CMS/OC); Johanson, Barbara I. (CMS/OC); Horvath, Rachael G. (CMS/OC); Healey, Brittany J. (CMS/OA)
Cc:	Gilfenbaum, Eben (WAS-WSW); Young, Greg (WAS-WSW); Levin, Seth (WAS-WSW); Richer, Derek (WAS-KRC); Morris, Tyler (WAS-WSW); Collier, Christopher (WAS-WSW); Spiegel, Ben (NYC-BPN); Joel Shuman; Benjamin Calvin; Dyskant Erek (erek.dyskant@bluelabs.com); Ryan, Tim (WAS-WSW); brendan.cavanagh@bluelabs.com; Strathy, April M. (CMS/OC)
Subject:	Preliminary Impact for Paid Media Channels and Direct Response in OE4
Date:	Tuesday, February 7, 2017 3:09:26 PM
Attachments:	Preliminary Impact for Paid Media Channels and Direct Response in OE4 -- 2-7-17.docx

Hello CMS,

As part of our post-mortem analyses, attached is a memo that provides a preliminary view into the impact for Paid Media and Direct Response.

Let Brendan or I know if you have any questions or concerns or would like to hop on a call to discuss.

We look forward to your feedback.

Thanks and have a good one,

Jonathan Manalo
Vice President of Analytics

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WEBER SHANDWICK engaging always. HealthCare.gov bluelabs analytics-data-technology

To: Center for Medicare & Medicaid Services

From: BlueLabs and Weber Shandwick

Subject: Preliminary Direct Response and Paid Media Impact in OE4

Date: February 7, 2016

Below are the preliminary results for Direct Response and Paid Media's impact on OE4. As a reminder, there were some external forces around OE4 that may have impacted these results. For instance:

- OE4 occurred during a government transition and there was considerable mixed-messaging/information in traditional and social media regarding the future of the Affordable Care Act and the ability of consumers to enroll in insurance through HealthCare.gov;
- On January 26th during one of the busiest enrollment periods, all Paid Media and Direct Response were suspended. Although Direct Response was resumed on January 27th, the large majority of Paid Media remained suspended for the duration of OE4; and
- OE3 enrollments may have changed the dynamics of the OE4 universe, such that our best prospects for First Time Consumers may have already enrolled in OE3, causing expectations for OE4 First Time Consumers to be skewed.

Again, these are just some considerations to keep in mind as you review the final results. In the meantime, we are working on the Econometric Model and other longitudinal analyses to help tease out the effect of the aforementioned as well as how channels interact with each other and ultimate enrollment.

Direct Response

Methodology

We excluded some consumers from direct response: As outlined in the experiment plan, a small number of consumers were randomly held out from email, phone and SMS contact in order to determine the impact of the direct response program during OE4. Consumers were not held out of transactional emails that are automatically sent when they create and submit an application because those emails were a fixed feature of the marketplace.

We compared action rates among the treatment and control: We measured the impact of the direct response program by comparing the enrollment rate and active enrollment rate (excluding auto re-enrollment) among consumers who were contacted ('treatment'), and consumers who were not ('control'). The increase in the enrollment rate and active enrollment rate among the treatment group is referred to as the 'uplift' attributable to the direct response program.

We estimated consumer enrollments netted: We estimated the number of consumer enrollments netted by the direct response program during OE4 in two steps. First, we multiplied the uplift among the treatment group by the number of applicants in the treatment group to estimate the number of application enrollments netted. Second, we multiplied that number by the average number of people on a policy for each consumer type to estimate the number of consumer enrollments netted.

Findings

More consumers enrolled as a result of direct response: We estimate that the direct response program increased the enrollment rate by 3.6% during OE4, netting 300k additional consumer enrollments. [Table 1]

Direct response was most effective at netting enrollments among prior experience consumers: We estimate that the direct response program increased the enrollment rate among prior experience consumers by 16% during OE4, netting 214k additional prior experience consumer enrollments. [Table 1]

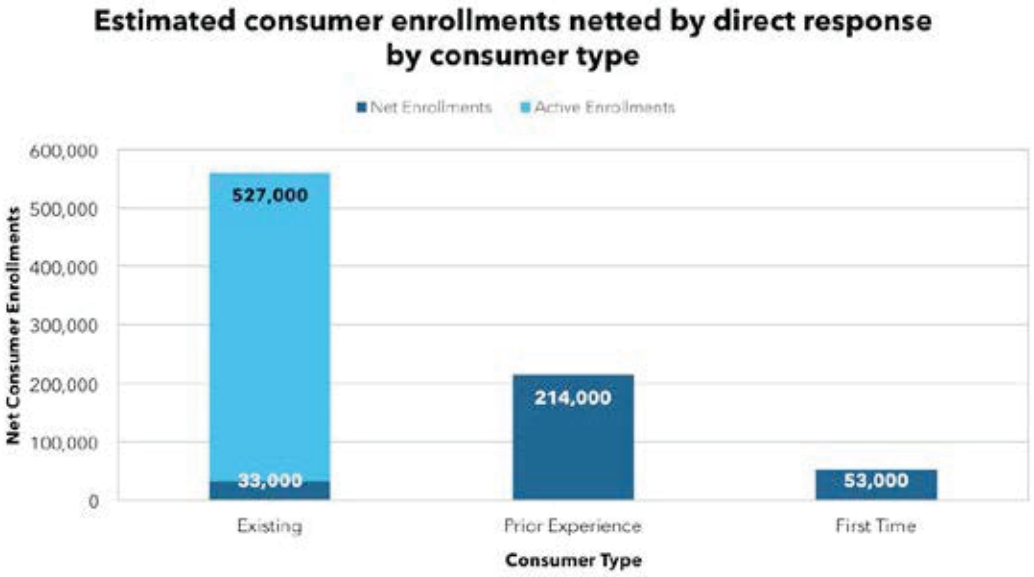
Table 1: Enrollment uplift as a result of direct response during OE4

Consumer type	Universe size	Enrollment rate (control)	Enrollment rate (treatment)	Uplift	Relative uplift
Topline	**45,864,555**	**13.4%**	**13.8%**	**0.5%**	**3.6%**
Existing	5,045,284	84.3%	84.8%	0.4%	0.5%
Prior Experience	36,561,957	2.6%	3.1%	0.4%	16.2%
First-Time	4,257,314	21.3%	22.2%	0.9%	4.3%

Direct response increased active plan selections: We estimate that the direct response program increased the active enrollment rate among existing consumers by 13% during OE4, netting 560k additional existing consumers who actively selected plans rather than being auto re-enrolled. The estimated 33k additional existing consumer enrollments (shown in the chart below) are a subset of the estimated 560k additional existing consumers who actively selected plans. [Table 2; Chart]

Table 2: Active plan selection uplift as a result of direct response during OE4

Consumer type	Universe size	Active enrollment rate (control)	Active enrollment rate (treatment)	Uplift	Relative uplift
Topline	**45,864,555**	**10.1%**	**11.4%**	**1.2%**	**12.2%**
Existing	5,045,284	55.1%	62.5%	7.3%	13.3%
Prior Experience	36,561,957	2.6%	3.0%	0.4%	16.4%
First-Time	4,257,314	21.3%	22.2%	0.9%	4.3%



Send Volume

Below, we provide some highlights on Direct Response's send volume to give you an idea of how and by how much we are reaching consumers in OE4.

We sent 9% more emails this year: We sent 810 million emails during OE4, compared to 744 million during OE3, despite fewer emails being sent in the first two weeks of OE4 due to website traffic constraints.

We made 24% more phone calls this year: We made 42.5 million phone calls during OE4, compared to 34.3 million during OE3, thanks to the call center starting calls sooner, and making more calls on weekends. Although outbound call volume increased across the board, the most significant increase was agent connect calls, which more than tripled from 1.6 million during OE3 to 5 million during OE4. We also made 10k live calls from Enrollment Assistance Centers for the first time during OE4.

We sent 9% more texts this year: We sent 22.5 million text messages during OE4, compared to 20.7 million during OE3.

We mailed eight times more letters this year: We mailed 6.6 million letters during OE4, compared to 800k letters during OE3. 2.5 million of these letters were directed to existing consumers, whom the direct response program did not mail during OE3.

Paid Media

For Paid Media, we ran experimental tests by including or excluding randomly selected DMAs from (Generic) Search, Outdoor, Radio, and (Local) TV ads. Since the unit of measurement was the DMA-level, sample sizes were very small. As a result, all tests were statistically insignificant, and would require a very large difference for them to be significant. However, based on the cumulative trends we saw in OE3 and OE4, we feel the directional findings are strong enough to inform decisions. Also as mentioned above, we are currently validating these findings using the econometric model.

Search

For both First Time and Prior Consumers, Generic Search appeared to have a moderate impact on enrollment rates. Specifically, Generic Search had a 13% lift for First Time Consumers (Test: 16.3% vs. Control: 14.5%), and a 5% lift for Prior Consumers (Test: 20.7% vs. Control: 19.7%).

Generic Search also had a moderate impact on Existing Consumers' enrollment rates. In particular, enrollment rates increased from 38.6% (Controls) to 40.6% (Test) if Generic Search ads were present.

Outdoor

The test results show Outdoor appears to be *highly* effective at driving enrollments for Prior Consumers (46% lift), but relatively ineffective for First Time consumers (1% lift). Prior Consumers with Outdoor media exposure finished with a 21.8% enrollment rate, while those without Outdoor media finished with a 14.9% enrollment rate. In contrast, First Time consumers finished with an enrollment rate around 15.9%.

Similar to First Time Consumers, Existing Consumers were not substantially impacted by Outdoor media (2% lift). Existing consumers had an enrollment rate of 40.0% if they were exposed to Outdoor media, while they had an enrollment of 39.3%, if they were not.

Radio

For both First Time and Prior Consumers, Radio exposure appeared to improve enrollment rates. In particular in areas where Radio was more prevalent, First Time Consumers saw an 8% lift in enrollment rates (Test: 15.6% vs. Control: 14.5%), while Prior Consumers saw an 16% lift in enrollment rates (Test: 21.0% vs. Control: 18.1%).

In contrast for Existing Consumers, Radio exposure did not appear to impact enrollment rates. In areas both where Radio was more prevalent and less prevalent, Existing Consumers had an enrollment rate around 40.8%.

TV

Local TV was shut off after December 15th. As a reminder, before the 15th we saw very little impact on First Time, Prior, and Existing Consumers.

Segment Findings

The initial results above suggest that Existing Consumers are most impacted by Generic Search; Prior Experience Consumers are impacted by Search, Outdoor, and Radio; and First-Time Consumers are impacted by Generic Search and Radio (see Table 3 below). However, this is only a piece of the puzzle, as consumers can still be exposed to multiple Paid Media channels. Additionally, they can be exposed to these channels more heavily during different periods of the enrollment campaign. As we have mentioned throughout this report, a better way of measuring this is by using an econometric model, which is in progress and which can provide a more definitive answer into how each of these channels interact and how each impacts enrollments.

Table 3: Paid Media Impact by Channel and Consumer Segment

Consumer type	Generic Search	Outdoor	Radio	Local TV
Existing	M	L	L	L
Prior Experience	M	H	M	L
First-Time	M	L	M	L

Note: L = Low; M = Moderate; H = High