

# THE NATIONAL BUSINESS COALITION ON E-COMMERCE AND PRIVACY

April 20, 2004

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
Room 159-H  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Mr. Secretary:

On behalf of the National Business Coalition on E-Commerce and Privacy (the "Coalition"), we are pleased to have the opportunity to submit comments on topics relating to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act" or "the Act") pursuant to the Advanced Notice of Proposed Rulemaking (ANPR) issued on March 11, 2004.

The Coalition is comprised of nationally recognized companies from diverse economic sectors dedicated to the pursuit of a balanced and uniform national policy pertaining to electronic commerce and privacy. Our member companies are top competitors in the e-commerce marketplace, and are strongly committed to ensuring the privacy and security of our customers, both on-line and off-line.

As some of America's most reputable companies, we are deeply concerned about the problem of spam and false or misleading email advertisements. The credibility of legitimate companies who market and advertise using the medium of email is damaged when email is perceived as being either deceptive or a nuisance. The Coalition is eager to act as a resource to the Commission during implementation of the Act in order to insure the FTC creates an effective, realistic, and efficient framework allowing for the continued success of email marketing.

Before addressing the substantive issues raised by the ANPR, the Coalition would like to note some concerns about the Commission's "simple" form for the electronic submission of comments, or "webform", available on the [www.regulations.gov](http://www.regulations.gov) Web site. While we appreciate the intent of the Office of Management and Budget's March 1, 2004 memorandum to increase and facilitate public participation in the rulemaking process, this form could

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inadvertently lead to manipulation and abuse of the comment process. Any form that employs a limited, multiple-choice approach invites special interests groups to merely print out the form, fill in their preferred answers (as with a sample ballot) and then mass mail them with instructions about how to file, resulting in thousands of scripted comments. Clearly, then, the quality as well of the quantity of the responses will need to be evaluated.

### **Primary Purpose**

Section 3(2)(C) of the CAN-SPAM Act requires that the FTC issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.” “Primary purpose” is the key phrase in the Act, and it affects the full definition and impact of both “commercial electronic mail message” and also “transactional or relationship message.” The definition of “primary purpose” will determine which email messages are and are not covered by the other provisions of the Act as well as how broad or how narrow the exceptions to coverage will be in the case of a transactional or relationship message.

It should be noted that the standard of “primary purpose” differs markedly from determining “deceptive acts or practices,” for which the Commission has traditionally been responsible, in that “primary purpose” inevitably reflects on the motives and intent of the sender, rather than the impressions and reactions of the recipient of an email message. We believe, therefore, that the Commission should assess “primary purpose” from the perspective of a “reasonable sender,” rather than a “reasonable observer,” as suggested by ANPR (sec. 5(A)(3)), or a “reasonable consumer,” as the Commission has historically applied the term to “deceptive acts or practices” on the part of advertisers. While this might differ from the Commission’s usual approach, it is dictated by the language of the Act. The Congress chose the “primary purpose” standard deliberately, and it had been the centerpiece of virtually every spam bill considered in the House and Senate.

Proper analysis of the term “primary purpose” ought to borrow from elements of the suggestions raised in questions VI (A)(1) and (A)(3) to create a new and different, but more appropriate, standard by which to judge the meaning of the term. In that regard, we advocate a “but for” test that represents a hybrid of the “more important” language that appears in question VI(A)(1) and a variation of the “reasonable observer” language that is reflected by VI(A)(3). Since the term “purpose” is not written in the plural, we believe that there can be only one “primary purpose” and that it can be either commercial or non-commercial, or transactional/relationship oriented, or not.

In order to make a determination as to whether or not an email qualifies as “commercial”, we urge the Commission to analyze it as follows: If, on the face of that email, it would appear to a “reasonable sender” that the commercial content was the “most important” part of the email, and, in particular, that it would not been sent “but for” its commercial content, it should properly be judged to have been a commercial email under the Act. If, on the face of the email, it is reasonable that it would have been

sent anyway, notwithstanding its commercial content, then the Commission should decide that it's "primary purpose" is non-commercial. This is a clear test that can be easily and reliably applied by the sender and that can just as easily be assessed by the trier of fact.

### **Transactional or Relationship Message**

The same motivational test, or "but for" test, should apply in the context of a "transactional or relationship message."<sup>1</sup> In such a context, the "primary purpose" applies to the reason why an email is initiated and whether it is intended "to facilitate . . . a commercial transaction"<sup>2</sup> or a range of other relationship purposes. If the email fits into any of these categories, it should not be covered by the Act.

In addition to our views concerning the application of the "primary purpose" test to transactional or relationship messages, the Coalition believes the Commission should utilize its authority under Section 17(B) of the Act to clarify the definition of "transactional or relationship message" in order to ensure that it accommodates common business-to-business emailing practices. Such business-to-business messaging, which is essential to day-to-day operations, should be included within this definition of transactional or relationship message and thus exempted from general commercial email compliance requirements. Such business-to-business messaging also includes email from both nonaffiliated and affiliated businesses. While such business email messages may indeed have a commercial component, they certainly do not raise the public policy issues the Act was intended to address. Senders who initiate such business-to-business emails should not be held liable for not including an opt-out mechanism or not utilizing a suppression list.

We also believe the Commission should exercise its authority under Section 3(17)(B) of the Act to modify the definition of a transactional or relationship message in order to accommodate companies sending promotional email to prospective trade customers. Trade customers desire to receive promotional email because it helps them sell the product they buy from manufacturers. Email to trade customers is typically sent by individual salespeople through individual email rather than bulk email. The Coalition does not believe there is any demand for an opt-out option in email sent to trade customers. If Section 3(17)(B) is not modified, companies sending email messages to prospective trade customers would need to find a way to:

- 1) include template opt-out language in the salesperson's promotional email to a trade customer. Because much of the salesperson's email will relate to existing accounts or transactions, companies would need to somehow develop a mechanism to deploy the opt-out only in the email that does not meet the current definition of transactional or relationship message.

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<sup>1</sup> CAN-SPAM Act § 3(17)(A).

<sup>2</sup> Id. at § 3 (17)(A)(i).

2) establish an email link, and suppression list for the collection of email addresses of any trade customers who opt out from the company's email.

3) allow and require individual salespeople to access that database to determine if a planned email recipient is in the database, and then not send the email if it is a commercial advertisement or promotion and not a transactional or relationship message under the current definition.

Further, the Coalition also believes that the "transactional or relationship" exemption's application to employer-employee communications also needs to be clarified. Section 3(17)(A)(iv) of the Act exempts messages to "provide information directly related to an employment relationship . . .". Employers customarily provide a range of commercial information to their employees when they believe it might be of interest to them. This practice is intended only as a means by which the employer can provide value to employees by making them aware of commercial opportunities when the employers believes it would be appreciated and/or utilized by the employees. The Commission, therefore, should interpret this language to apply to all commercial emails sent by an employer to an employee, even where they may be created by a third party and then forwarded to the employee by the employer. Containing employer-employee email communication was not the goal of the CAN-SPAM Act, and the language in section 3(17) was written to recognize this reality. Further clarification would be useful.

Finally, the Commission should exercise its authority under Section 3(17)(B) of the Act to modify the definition of a transactional or relationship message in order to clarify that email sent or received as a result of an "electronic subscription" is a transactional or relationship message, and not commercial email under the CAN SPAM Act. Many of our member companies offer consumers e-newsletters, e-subscriptions, and e-clubs to which consumers affirmatively opt-in. These "electronic subscriptions" contain content of consumer value, including educational information from third party experts, useful tips and advice, as well as notification of new products and services. While newsletters and alerts often include advertisements and coupons promoting a product or service, they are not the primary purpose of the communication with the consumer. The affirmative opt-in – the request by the consumer to receive the newsletter – should establish that the newsletter, or any similar message, is a transactional or relationship message because the recipient agreed to enter into a relationship with the newsletter provider (even though there may not be a prior or pending financial relationship).

### **Definition of Sender**

The Coalition urges the Commission to clarify the definition of "sender" under Section 3(16) of the Act. Section VI (E) of the ANPR invites comments on the issue of whether an email with multiple advertisers should be treated as having multiple senders. We believe it should not.

While the Coalition recognizes that the CAN-SPAM Act does not require the Commission to address the issue of multiple senders, we believe that the Commission must ensure that the Act is implemented in a manner consistent with how the email marketing industry actually functions. In most cases, for example, acquisition email marketing is provided by a service that collects email addresses from a website, or multiple Web sites. The advertiser rarely collects the email addresses for prospecting themselves. Instead, advertisers use email list service providers, who often email on behalf of multiple advertisers. We believe that the “sender” in such a case should be the entity that collects the email address of the recipient – whom the recipient should be able to clearly identify based upon the email address from which the message is sent.

We believe that the legislative history of the Act is clear that the definition of “sender” was only intended to apply to the “person who initiates” the email message “*and whose product [or] service*” is “advertised or promoted” by that email (emphasis added). It should not be extended to include all advertisers in a multiple advertisement email. Such a definition, we believe, would have a devastating impact on advertisers, the email marketing industry, and consumers.

First, the email recipient would have to choose which advertisers to opt-out from, in addition to considering whether to opt-out from the list itself. Apart from being inconsistent with the statute and the Senate Report,<sup>3</sup> choices such as these would be burdensome and confusing for email recipients. The consumer would be faced with choosing not only whether to opt-out from the company who sent the email, but also which of the contributing advertisers to opt-out from. To introduce multiple opt-outs and corresponding multiple physical addresses of contributing advertisers will not only confuse the consumer, but it will also increase the time and effort a typical consumer expends in his interaction with e-marketing messages.

Second, sharing suppression files with multiple advertisers or partners in joint marketing campaign will lead to increased costs for email acquisition and marketing, and potentially undermine the use of email as an advertising and marketing medium. At a minimum, these costs will be passed along to consumers. Many advertisers may determine the expense associated with third party suppressions outweighs the benefits of email marketing altogether. As a result, consumers would lose the opportunity to receive new and relevant offers from advertisers. We hope that the FTC understands the tremendous costs that would be imposed on advertisers if the Commission declines to clarify the definition of sender.

Third, interpreting the Act to permit multiple senders may undermine consumer privacy rather than enhance it. If the Commission finds that there can be multiple senders of one email, then the advertisers who provided content to the email will need to share their suppression files with the advertiser or other party who sends the email (because the Act prohibits a “sender” from sending promotional email to an individual who previously had opted-out). This will appreciably increase the risk that consumer data will be transferred inaccurately, stolen by hackers, or misused. Sharing suppression files also

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<sup>3</sup> S. REP. No. 108-102 at 16 (2003).



may violate established privacy policies to never share, sell, or trade a customer's personal information. Thus, the price of sharing suppression lists may be a loss or invasion of consumer privacy.

If, however, the Commission does determine that it is necessary to recognize multiple senders in some limited cases, then we urge the Commission to provide clear guidance about how to identify those cases. As part of this submission, we offer for Commission consideration an analytical framework to help determine when a dual or multiple opt-out may be warranted (see Attachment).

There are many different approaches to e-marketing that involve multiple contributors. The most obvious case where there should not be multiple opt-outs is the one mentioned in the ANPR – a single email with multiple advertisers, which may be sent by one of the advertisers to its customer list, or by a third party advertising service provider. In this case, the consumer perception is that the company who sends the email is the sender, and that this company is in control of the email. This is the company to whom the consumer provided his address, and this is who is identified in the return address of the email. It is typical for the consumer to see only an opt-out from the company who sends the email in these multiple advertiser cases. The Commission should not require multiple opt-outs in such cases, where it is obvious that one party is in control of the email. With respect to third party advertising services, the Commission could achieve this result by treating the third party service in a manner that is parallel to that of separate lines of business or divisions under section 3(16)(B) of the Act.<sup>4</sup>

Another obvious case where there should be only a single opt-out is where a company sends out periodic email to its customer base, containing a common masthead and “look and feel”, but changes the content from week to week based on materials provided by contributing advertisers. One week the email may highlight partner A's products, the next week partner B's products, and each week the email may be funded primarily by a different partner. The consumer's affinity is with the sending company, and the consumer believes the sending company is in control of the email. In fact, the sending company is in control because it determines whether and when to send the email and with what content, and the sending company derives the primary value from the email. From both the consumer and company standpoint, the correct result is to offer only one opt-out in the email (that of the sending company).

A more difficult case might be one where a consumer receives an email about a product of company A which has been specially designed for customers of company B. If the email is not one of series of email the consumer receives regularly from either company, the consumer may believe it came from both companies. In fact, it may be true that both companies equally contributed to the design and development of the email, and determined to which consumers to send it, and when. In this case, it may indeed be

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<sup>4</sup> For example, the Commission could interpret the Act as providing that a “third party advertising service” which “holds itself out to the recipient throughout the message as that particular [third party advertising service] rather than as the [advertiser itself], shall be treated as the sender of such message for purposes of this Act.”

appropriate to offer the consumer an opt-out from each company, based on the consumer's expectation, the respective roles of each company in the email, and the value each company derives from the email.

These examples demonstrate that determination of whether to burden an email with dual or multiple opt-outs requires consideration of a number of variables. The consumer's affinity, or who the consumer thinks is the sender, is an important concern, as are the relative levels of control each of the contributing parties exerts and the value each party derives from the email.

We have developed a framework for analysis that the Commission may find useful. The framework is described in the Attachment to this letter, which includes a visual representation of the framework, a "roadmap" describing the framework, and example scenarios that demonstrate its use. We believe that application of the framework will better inform the Commission and companies about the rare situations that may warrant a dual or multiple opt-out. We would welcome an opportunity to discuss further with you the framework and the variables involved in deciding these issues. Clearly, given the burdens on both consumers and business that will be imposed by dual or multiple opt-outs, there should be very few situations that require more than a single opt-out.

### **Physical Address Requirement**

The Coalition also believes that the Commission should provide guidance on what is necessary to comply with the requirement, in section 5(a)(5)(A)(iii) of the Act, that initiators include "a valid physical postal address of the sender." The ANPR raised the issue over whether a post office box would qualify under this section, and we believe it should. We are sensitive to the Commission's law enforcement concerns about the generally anonymous nature of a post office box, but if spammers are going to try and elude authorities, any other address they may provide can be just as misleading or false. Many legitimate companies use post office boxes to communicate with their customers, including the use of post office boxes by transfer agencies or other vendors to receive customer inquiries, applications, transactional documents, and complaints. It could very well create unnecessary confusion if the Commission were to single out email advertisements to require that a street address be used, especially when virtually all other types of marketing, including direct mail, provide customers with options that include a post office box number.

### **Referral Marketing**

The Coalition believes that it would be immensely helpful if the Commission would propose a rule that would clarify the law that is applicable to the practice of referral marketing. Referral marketing, or Forward-to-a-Friend (also known as "Refer a Friend") campaigns, as discussed in section VI (E)(3) of the ANPR, are an important and legitimate tool for both consumers and businesses in the information marketplace. We believe that referral marketing primarily benefits recipients as opposed to senders.

Referral marketing offers the same benefits inherent to consumers in traditional email communications – speed, affordability, convenience, etc. Referral marketing adds “ease of use” functionality to the consumer’s ability to choose products and services. Consumers are able to easily pass along the benefits of products and services they recommend. Both the consumer and the advertiser benefit from the credence lent when consumers receive messages from individuals they know.

Although all forms of referral marketing should comply with the fraud provisions of the CAN-SPAM Act, referral marketing that does not involve a payment or other consideration should not be required to comply with the commercial provisions of the Act. Referral marketing that relies on customers to refer or forward commercial emails to someone else, clearly does not fall within the parameters of “inducing” a person to initiate a message on behalf of someone else unless there is some form of payment or consideration. The consumer independently decides whether to share the content with a friend, without any influence by the Web site owner or other party who offers the referral feature.

Referral marketing is primarily consumer driven. These marketing campaigns are sent on behalf of one individual to another, with the “reply-to” mechanism functioning back to the individual rather than the original senders. These messages, therefore, should be treated as messages from individuals, not from institutions, and should be exempt from the commercial portions of the Act. The consumer perception is that the recipient’s friend caused the email to be sent, and the recipient does not expect to be able to opt-out from such personal email.

Question VI (E)(3)(b) inquires as to the different types of referral marketing. First, senders may include a “prompt” in their email that will allow the recipient to forward that message to another secondary recipient using a mechanism installed by the original sender. The email may include a link to a Web page. Second, senders may include a forwarding prompt in addition to an incentive that may take the form of an award or a coupon that the recipients are offered for forwarding the message. Finally, a consumer may visit a commercial Web site and choose to forward a message from the Web site directly to a recipient. In none of these situations is it common for the company that facilitates the forwarding to collect or store the email addresses of the designated recipients, or to process the names against suppression lists. In particular, in the Web page referral situation, it is not possible to do that because the emails are generated at the Web server in real time, and sent almost immediately to the designated friends.

Modifying the mechanism offering the forwarding service to apply the advertisers suppression list prior to the deployment of the email message would be extremely difficult and potentially cost prohibitive. Currently, many referral marketing programs do not result in the original sender actually receiving contact information about the referred recipient. First, marketers would need to begin storing email addresses of the recipient friends, in order to add it to the marketer’s suppression list. This arguably violates the recipient’s privacy; he or she has no knowledge of, and has not consented to,



the marketer's retention of his or her address. Second, marketers would need to reprogram their referral marketing programs, to convert to a database environment from the Web server environment described above. Suppression lists cannot be maintained on Web servers due to the high potential for hacking as well as the size of the suppression lists. This not only will create tremendous costs for the marketer, but it will result in significant delay in the generation of the email to the recipient friend, and possibly create suspicion that the marketer is not following through, or that email addresses are being used for other purposes.

Requiring marketers to collect opt-outs from recipient friends will inhibit the process of referral marketing and prove cumbersome and expensive to consumers and marketers alike. Doing so would strip both consumers and businesses of an innovative and effective information-sharing technique that has already been successfully deployed in the marketplace. Consumers would, conceivably, no longer be able to benefit from sharing information about products and services instantaneously with friends.

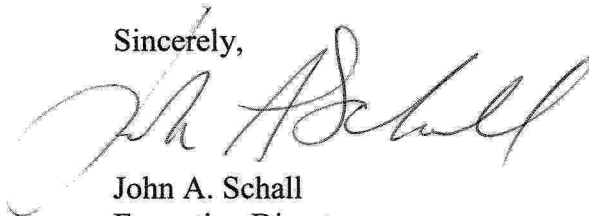
### **Additional Issues**

Section VI (H) of the ANPR requests comments on the report mandated by Congress on the effectiveness of the Act. In drafting its report, the Commission should note the impact of industry efforts to combat spam through the use of legal enforcement and technology including email authentication and enhanced delivery mechanisms.

The Coalition also urges the Commission to take a close look at placing a reasonable cap on the duration of the "opt-out," once exercised. We do not believe that Congress intended for opt-outs to be in effect indefinitely, especially when the senders may change identities and new products and services may evolve over time. Since the marketplace is a readily adaptive environment and the life of a particular product or service is finite, we believe that three years is a reasonable time period for a recipient's opt-out to apply to the sender which he or she originally registered an objection. Much like the five-year period applicable to telephone numbers on the National Do Not Call Registry under the Commission's Telemarketing Sales Rule, consumers and industry would be better served by a similar expiration of individual opt-outs. The Coalition believes that the Commission should at least solicit comments on this important issue.

Again, the Coalition very much appreciates the opportunity to offer comments to the Commission on implementation of the CAN-SPAM Act. The Coalition will gladly provide any further information, should the Commission require clarification or additional explanation of any of these issues.

Sincerely,

A handwritten signature in cursive script, appearing to read "John A. Schall".

John A. Schall  
Executive Director

**ATTACHMENT:**  
**A Road Map to the Joint E-mail Analytical Framework**

- **The analytical framework is composed of two tiers, with one threshold question.**
  - Before applying the two analytical tiers, one must determine whether the consumer has affirmatively consented to receive from the sender e-mail that includes third party content. If so, the inquiry concludes and there is no need to apply the framework. The result is that only one opt-out is required, that of the sender. If there is no consent, then first apply the tier 1 analysis. If the tier1 analysis result is inconclusive, then apply the tier 2 analysis.
  
- **The Tier 1 analytical framework** requires the application of each of *three analytical categories* to each joint e-mail, utilizing their tightly *correlated variables*.
  - The first analytical category is **consumer affinity**. Its two variables are: 1) whether a consumer likely has any affinity towards the sender based on the presence of the sender's corporate or product brand in the email and 2) whether the e-mail is a one-off email or a regularly scheduled email. The first variable articulates the key inquiry of deriving a reasonable consumer's expectation with respect to who is the sender of a particular joint e-mail. Still, both variables are determinative, i.e., if either variable is present, then the sender enjoys some level of consumer affinity.
    - Consumer expectation is weighted at a marginally higher value than the two other categories, i.e. 1.5 vs. 1 for the other two categories.
  - The second analytical category applied is **control** - who among the parties involved in the e-mail has the most control over the e-mail? The four control variables are: who triggered the e-mail/drove the idea behind the e-mail; who designed the final manifestation of the joint e-mail/who had ultimate creative control; who set the manner and time of the e-mail distribution; and whose e-mail list was used for the distribution. The third analytical category is **value** - who among the contributors to the e-mail derives the most value from the particular joint e-mail? The applicable variables are whether the joint e-mail includes content from a sole advertiser or multiple advertisers; whether a jointly developed (customized) product or service is promoted or advertised; and who bears most or all of the joint e-mail's cost. Even when one party carries most or all of the cost, the other party may extract value, in terms of factors such as enhancing consumer affinity towards its corporate or product brand through continued relationship building.
  
- **The Tier 2 analytical framework** captures public interest considerations and is applied if the tier 1 analysis is not conclusive as to who is the sender(s).
  - One inquiry at this level is whether the sharing of suppression lists that would be required to support multiple opt-outs enhances consumer interests, such as privacy, or not. The risks and concerns that arise from such list sharing include: a) the consumer will not know, and will not have consented to, the sharing of his address; b) the recipient of the suppression list may send another promotional e-mail to the consumer, on behalf of only himself not the other party; and c) frequent transmission of suppression lists increases the danger of misappropriation by hackers.
  - A corollary to the first inquiry is whether having multiple opt-outs places an undue burden on the consumer or whether the burden is warranted by gains in consumer control and choice. Will the consumer really understand all the different opt-outs, and be able to use them in a way that achieves the consumer's intended result? Will the consumer be precluded from receiving e-mail he wants?

# Joint E-mails: An Analytical Framework

## Tier 1 – Affirmative Consent

- Has the consumer consented to receive from the sender email that includes content from third parties? (If yes, the inquiry ends. **Result: Only a sender opt-out is required.**)

## Tier 2 – Email Analysis

Categories	Variables
<p><b>Consumer Affinity</b> Value Multiplier: 1.5</p>	<ul style="list-style-type: none"> <li>▪ Does the customer have an <b>affinity</b>, based on corporate or product branding, with the sender of the email?</li> <li>▪ Is the email a <b>regularly scheduled</b> email?</li> </ul>
<p><b>Control</b> Value Multiplier: 1</p>	<ul style="list-style-type: none"> <li>▪ Who <b>triggered</b> the email (decided to send it or include this content)?</li> <li>▪ Who controls the <b>final layout</b> of the e-message?</li> <li>▪ Who controls the <b>Manner &amp; Timing</b> of Message Dispatch</li> <li>▪ Whose <b>Distribution List</b> is used?</li> </ul>
<p><b>Value</b> Value Multiplier: 1</p>	<ul style="list-style-type: none"> <li>▪ <b>Sole or Multiple Content?</b></li> <li>▪ <b>Financial:</b> Who bears the cost of sending the email?</li> <li>▪ <b>Non-financial:</b> Does the other party gain an <b>increased customer affinity</b> by sending the email?</li> <li>▪ Is the product/service featured in the email <b>jointly developed or customized?</b></li> </ul>

## Tier 3 – Public Interest

- Burdens/harms resulting from sharing of suppression lists
- Undue burden on consumer

## Scenario #1:

### Email service provider w/ affirmative consent

- Provider provides an email service to Company A.
- Provider physically executes an email on behalf of Company A.
- Company A directs the timing, manner, and message content.
- The commercial email contains content solely related to Company A's product / service.

#### **Apply the Framework:**

##### Affirmative Consent:

Determine whether the consumer has affirmatively consented to receive commercial e-mail from sender that includes third-party content. In this case, **the consumer has agreed** to receive email including third party content from the Provider so the inquiry concludes and there is no need to apply the framework.

##### Result:

The result is that only one opt-out is required, that of the Provider who obtained the affirmative consent. **Opt-out required for list provider, only.**

## Scenario #2:

### List rental w/o affirmative consent

- Company A rents a list from a list provider (Provider).
- Provider physically executes the email as a paid service to Company A.
- Company A directs the timing, manner, and message content.
- The commercial email contains content solely related to Company A's product / service.

#### **Apply the Framework:**

##### Affirmative Consent:

Determine whether the consumer has affirmatively consented to receive commercial e-mail from sender that includes third-party content. In this case, **the consumer has NOT agreed** to receive email including third party content from the Provider so the inquiry continues.

##### Customer Affinity with email Sender:

- Q:** Does the customer have an affinity, based on corporate or product branding, with the sender of the email?  
**A:** No. Provider is the physical sender of the email, however **Company A** is strongly and solely branded.
- Q:** Is this a regularly scheduled email from the sender?  
**A:** No. This is not a regular communication that the consumer is expecting from Provider.

##### Control:

- Q:** Who had control over the final lay out of the emails?  
**A:** Company A
- Q:** Who initiated this email (decided to send it or include this content?)  
**A:** Company A

Control (continued):

Q: Who controls the manner and timing of dispatch?  
A: Company A

Q: Whose Distribution list is used?  
A: Provider

Value:

Q: Sole or multiple content?  
A: Company A; sole content

Q: Is the product / service featured in the email jointly developed or customized exclusively for Company A and Provider?  
A: No.

Q: Who bears the cost of sending the email?  
A: Company A

Q: Does the Provider gain increased customer affinity through this email?  
A: No

Result:

Only one opt-out is required, that of the Company A because Company A leads in customer affinity, control, and value. **Opt-out required for Company A, only.**

### Scenario #3:

#### Retailer email with manufacturer content

- Retailer includes content from several manufacturers within a regularly scheduled, multiple content email communication.
- Retailer physically executes the email using marketing funds from each manufacturer featured in the email.
- Retailer directs the timing, manner, and message content.

Apply the Framework:

Affirmative Consent:

Determine whether the consumer has affirmatively consented to receive commercial e-mail from third-parties. In this case, **the consumer has NOT agreed** to receive email including third party content from the Retailer so the inquiry continues.

Customer Affinity with email Sender:

Q: Does the customer have an affinity, based on corporate or product branding, with the sender of the email?  
A: Yes. Retailer is strongly branded.

Q: Is this a regularly scheduled email from the sender?  
A: Yes. This is a regular communication that the consumer is expecting from the Retailer.



Control:

Q: Who had control over the final lay out of the emails?

A: Retailer

Q: Who initiated this email (decided to send it or include this content?)

A: Retailer

Q: Who controls the manner and timing of dispatch?

A: Retailer

Q: Whose Distribution list is used?

A: Retailer

Value:

Q: Sole or multiple content?

A: Multiple content selected by Retailer

Q: Is the product / service featured in the email jointly developed or customized exclusively for Retailer and Manufacturer?

A: No.

Q: Who bears the cost of sending the email?

A: Manufacturer

Q: Does the Retailer gain increased customer affinity through this email?

A: Yes

Result:

Only one opt-out is required, that of the Retailer, because Retailer leads in customer affinity, control, and value. **Opt-out required for Retailer, only.**

**Scenario #4:**

*Joint Retailer / single Manufacturer email*

- Retailer includes content from single manufacturer in a non-regularly scheduled email communication.
- Retailer physically executes the email using marketing funds from the manufacturer featured in the email.
- The email will be sent to the Retailer's consumer list.
- Retailer controls email timing, manner, and final lay out of the email.

**Apply the Framework:**

Affirmative Consent:

Determine whether the consumer has affirmatively consented to receive commercial e-mail from third-parties. In this case, **the consumer has NOT agreed** to receive email including third party content from the Retailer so the inquiry continues.

Customer Affinity with email Sender:

**Q:** Does the customer have an affinity, based on corporate or product branding, with the sender of the email?

**A:** Yes. There is Retailer branding in the email.

**Q:** Is this a regularly scheduled email from the sender?

**A:** No. This is not a regular communication that the consumer is expecting from the Retailer.

Control:

**Q:** Who had control over the final lay out of the emails?

**A:** Joint: Retailer and Manufacturer

**Q:** Who initiated this email (decided to send it or include this content?)

**A:** Joint: Retailer and Manufacturer

**Q:** Who controls the manner and timing of dispatch?

**A:** Retailer

**Q:** Whose Distribution list is used?

**A:** Retailer

Value:

**Q:** Sole or multiple content?

**A:** Sole Manufacturer content

**Q:** Is the product / service featured in the email jointly developed or customized exclusively for Retailer and Manufacturer?

**A:** No.

**Q:** Who bears the cost of sending the email?

**A:** Manufacturer

**Q:** Does the Retailer gain increased customer affinity through this email?

**A:** Yes

Result:

Only one opt-out is required, that of the Retailer. The customer affinity and control factors favor Retailer while the Value factor favors Manufacturer. Therefore, **Opt-out is required for Retailer, only.**

-Continued on next page-

## **Scenario #5:**

### *Joint marketing email between two companies*

- Company A and Company B create a unique marketing program / promotion
- Promotion uses products/services from both Company A and Company B, but the offering is customized for A and B's customers (For example, "Buy x product of A only at B's entertainment venue and get \$2 off!")
- Both companies jointly determine offer, final creative, and timing of email.
- Both companies provide email lists and execute the same communication to their respective lists.

#### **Apply the Framework:**

##### Affirmative Consent:

Determine whether the consumer has affirmatively consented to receive commercial e-mail from third-parties. In this case, **the consumer has NOT agreed** to receive email including third party content from either company so the inquiry continues.

##### Customer Affinity with email Sender:

**Q:** Does the customer have an affinity, based on corporate or product branding, with the sender of the email?

**A:** Yes. The customer has affinity with both companies based on branding of both companies who participated in sending the email.

**Q:** Is this a regularly scheduled email from the sender?

**A:** No. This is not a regular communication that the consumer is expecting.

##### Control:

**Q:** Who had control over the final lay out of the emails?

**A:** Joint: Both companies

**Q:** Who initiated this email (decided to send it or include this content?)

**A:** Joint: Both companies

**Q:** Who controls the manner and timing of dispatch?

**A:** Joint: Both companies

**Q:** Whose Distribution list is used?

**A:** Joint: Both companies

##### Value:

**Q:** Sole or multiple content?

**A:** Sole content

**Q:** Is the product / service featured in the email jointly developed or customized exclusively for Company A and Company B?

**A:** Yes.

**Q:** Who bears the cost of sending the email?

**A:** Joint: Both companies

**Q:** Does either company gain increased customer affinity through this email?

**A:** Joint: Both companies

**Result:**

A dual opt-out is required for both companies. The customer affinity criteria shows affinity for both companies. The control and value criteria show joint control, and value to both companies.

**Opt-out is required for BOTH companies.**

Both of the parties are evenly vested in the email and should both accept responsibility for an opt-out in the email.