



**Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C.**

**CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008**

**Comments of  
DoubleClick Inc.**

**September 13, 2004**

## INTRODUCTION

As a leading provider of email delivery technology, DoubleClick is well positioned to discuss the implications of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") for legitimate marketers and we are pleased to offer our comments in response to the Commission's request for information. DoubleClick's email clients send consent-based promotional messages, transactional messages (such as account statements, airline confirmations, and purchase confirmations); email publications; affinity messages; and relational messages. Our clients and we are eager to keep spam from filling consumers' Inboxes and obscuring our clients' emails, which are messages that consumers want to receive.

DoubleClick applauds the Commission's efforts in developing the proposed rules to determine the "primary purpose" of an electronic mail message and presenting thoughtful and comprehensive questions in its Notice of Proposed Rulemaking ("NPRM"), which are obviously designed to provoke considered responses. However, we believe that in drafting the proposed rule, § 316.3 (a), the Commission strayed from its intent to apply the "net impression" standard to the determination of the "primary purpose" of an electronic mail message.

### Net Impression vs. Subject Line

In the NPRM, the Commission noted that commenters from across the entire spectrum of interested parties supported the "net impression" standard presented in the Advance Notice of Proposed Rulemaking's ("ANPR") for determining the primary purpose of an email message.<sup>1</sup> Despite this acknowledgement, the Commission proposed that the primary purpose of one type of "dual-purpose" message - those messages containing both content that advertises or promotes a product or service as well as transactional and relationship content -- be decided based upon only two criteria: the subject line and the content of the beginning of the message. In addition, the Commission proposed that the primary purpose of another type of dual-purpose message - those containing both promotional content and content that is neither commercial nor transactional - should be determined based primarily upon its subject line or a "net-impression" like test. We believe that the Commission should adopt the "net impression" standard for **all** types of electronic mail messages.

### §316.3 (a) (2): COMMERCIAL COMBINED WITH TRANSACTIONAL CONTENT

*If an electronic mail message contains content that advertises or promotes a product or service as well as content that pertains to one of the functions listed in paragraph (b) of this section, then the "primary purpose" of the message shall be deemed to be commercial if:*

*(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or*

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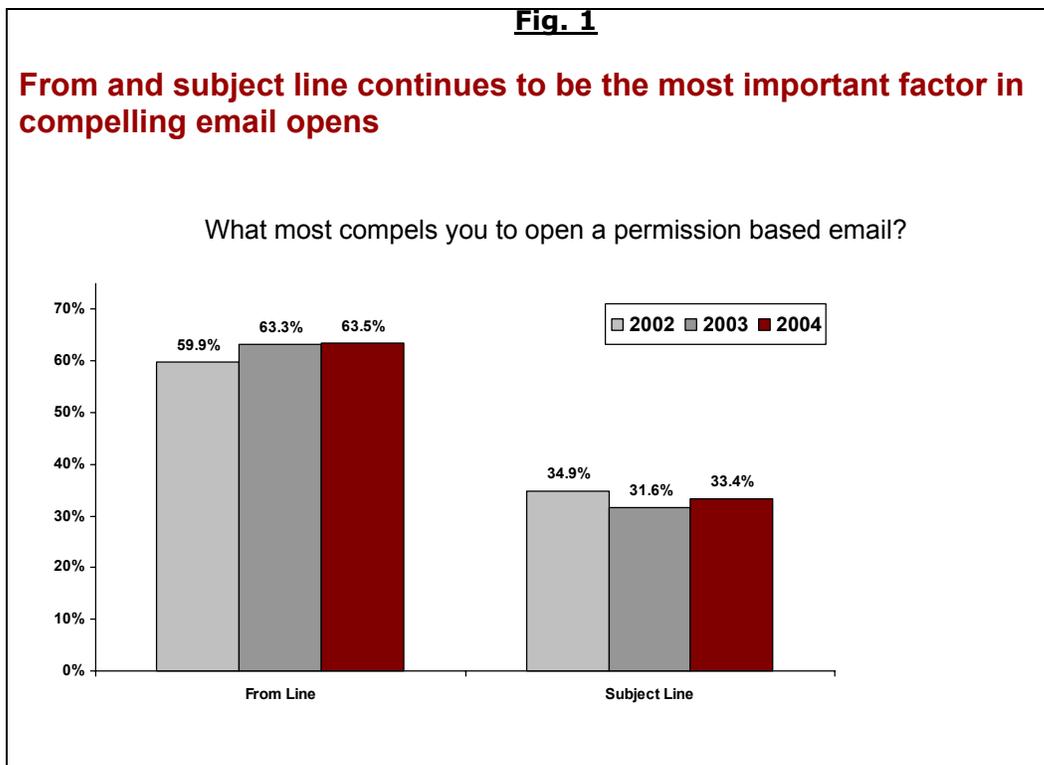
<sup>1</sup> "Consumers, advertisers, email service providers, and industry associations all supported the placement, proportion, style, and subject line elements of this approach, as well as the proposed criteria's focus on the reasonable recipient." NPRM, Pg 38.

(ii) The electronic mail message's content pertaining to one of the functions listed in paragraph (b) of this section does not appear at or near the beginning of the message.

We appreciate the Commission's intentions to create specific standards that can prevent consumers from wasting valuable time and resources dealing with unwanted messages. However, we believe that the two individual criteria that have been proposed in §316.3(a)(2) are inadequate for determining the "primary purpose" of a "dual-purpose" electronic mail message that contains both promotional and transactional content. The reliance on only two specific criteria results in the creation of an extremely rigid standard that places undue emphasis on the subject line and the content of the beginning of the electronic mail message. Although we agree that the two proposed criteria should be considered in determining the "primary purpose" of an electronic mail message, it would be short-sighted to adopt them as the sole factors in such an analysis.

The drawbacks of relying on these two criteria include the following:

1. Studies have shown that recipients pay less attention to the contents of an email message's subject line than they do to the "from" line.<sup>2</sup> The "from" line is very important to legitimate marketers, who use it to reinforce their brand names. In fact, the subject line only refines information gleaned from the "from" line. Previous surveys as well as our recent *DoubleClick 2004 Email User Survey* (excerpts of which are attached as Exhibits) highlight this crucial point (see Fig. 1). Further, the use of authentication technology (which is being promoted by companies such as Microsoft) is gaining wide acceptance in the industry and increases the reliability of the "from" line of an email.



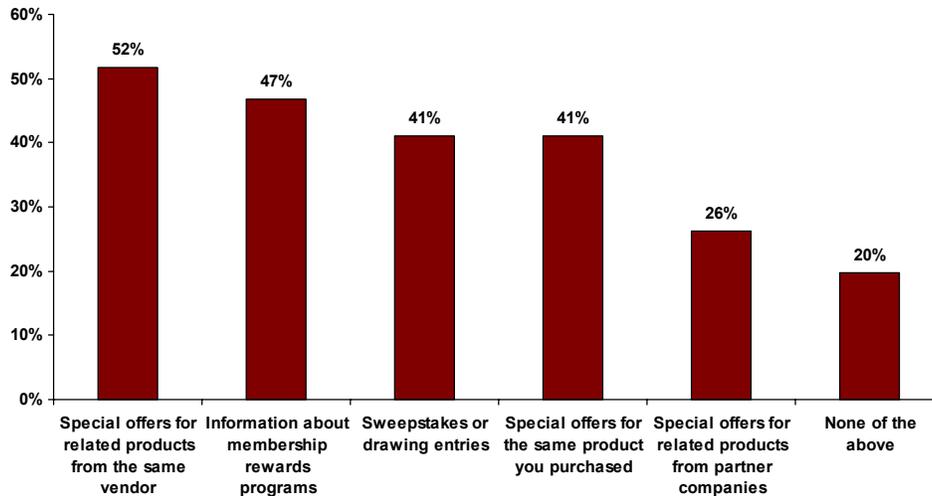
<sup>2</sup> We included two such surveys with the comments that we submitted in response to the ANPR.

2. The subject line that is ultimately presented to the recipient of an electronic mail message is largely dependent upon the ISP and the email client used by the recipient and not on the sender of the message. ISPs can limit or modify the appearance of a subject line to a specific number of characters, thereby altering the original subject line. This truncation of the subject line could significantly modify its meaning. For example, a recipient could see "Great Deals" displayed on the subject line of an email and construe the message to be purely commercial in nature. However, the intended subject line could have been "Great Deals and Your Account Details." Further, the ability of email recipients to accurately interpret the nature of an unopened email by viewing the subject line and the content that appears in a preview window – presumably what the Commission had in mind when specifying that the transactional content should appear "at or near" the top of the message – depends largely on whether the recipients use a desktop email client or Webmail. In addition, certain computer programs used by recipients to read electronic mail messages impose practical limits on the length of a subject line. Therefore, adopting a standard that places such importance on the content of the subject line is very problematic for legitimate senders of electronic mail messages, as well as for consumers. Legitimate marketers do not have complete control over how their subject lines are received, and consumers may be misled by truncated subject lines as to the actual contents of an email message.
3. Although analyzing the top of the body of the electronic mail message should be considered a factor in determining the "primary purpose" of an electronic mail message, it should not be analyzed in isolation and out of the context of the rest of the message. Unfortunately, "at or near" the beginning of a message results in a vague and inconclusive standard due to the myriad formats in which content is placed in electronic mail messages. What constitutes "at or near" the beginning of an electronic mail message? Is it the top 10% of the message, the top half, or the part of the message that can be seen in some email clients' preview window? Such a broad standard could not only pose problems for companies that are required to comply with the rule, but also provides insufficient guidance to consumers that are looking for an objective standard to help them better interpret the purpose of emails they receive.
4. The attached exhibits from the *DoubleClick 2004 Email User Survey* outline several important trends in consumer behavior and interests that are relevant to issues involved in this Rulemaking process. For example, the *Survey* also found that consumers like to receive offers in the context of transactional email messages (see Fig. 2). This highlights the crucial role that "dual-purpose" messages play in communications between marketers and their customers. In addition to being preferred by consumers, multi-purpose messages also have the beneficial effect of reducing the number of messages consumers receive from a legitimate marketer. Therefore, it is important to develop a more flexible standard for determining the "primary purpose" of multi-purpose messages to encourage their use by legitimate marketers.

**Fig 2**

**A strong interest exists for cross-promotions and offers in the context of transactional email messages**

Which of the following would you find useful if included in the communications you receive?



**Harm**

In addition to the specific drawbacks listed above, limiting the perspective of consumers to whom messages are directed to such restrictive criteria could prove counter-productive in general. There exist several kinds of electronic mail messages that might be wrongly construed to be “commercial” in nature. For example, suppose a transactional or relationship message does not have a subject line and the brand name of the sender appears in a large font at the top of the body of the message. Under the proposed rule, the “primary purpose” of such an electronic mail message would be deemed to be “commercial.” Further, we strongly disagree with the Commission’s suggestion in the NPRM that newsletters that combine editorial or informational content and advertising should be categorized by the subject line and upper content of the message.<sup>3</sup> Such an approach further highlights the shortcomings in the standard proposed by the Commission in §316.3(a)(2). Depending upon where a newsletter places its advertising, the application of the proposed rule would lead to different results, even if the newsletter had the same content. For example, a legal newsletter that provides updates on legislative developments would be deemed commercial if it had advertisements at the top of the message, while the same newsletter would be deemed “non-commercial” if the advertisements were shifted lower.

<sup>3</sup> NPRM, Pg 31 & 32.

In light of the varied and constantly evolving forms of possible communications between businesses and their consumers, it is critical that the proposed standard for determining the “primary purpose” of electronic mail messages be flexible and take into consideration an array of relevant factors. As previously noted, the Commission recognized in the NPRM that commenters from across the entire spectrum of interested parties supported the ANPR’s suggestion that the primary purpose of an email message should be determined based on the “net impression” created by the message. “Consumers, advertisers, email service providers, and industry associations all supported the placement, proportion, style, and subject line elements of this approach, as well as the proposed criteria’s focus on the reasonable recipient.”<sup>4</sup> However, it is unclear why the Commission ignored this broad consensus on the adoption of the “net impression” standard when drafting the proposed rules.

We strongly believe that the “net impression” standard should be adopted as a consistent test for determining the “primary purpose” of **all** electronic mail messages. Adopting a consistent standard would be very beneficial as it is rooted firmly in traditional Commission legal analysis, with a rich history of case law that can provide clear guidance to legitimate marketers, as well as consumers. Just as the Commission considers the “net impression” of an advertisement to determine if it is deceptive under § 5 of the FTC Act by looking to the impression made by the advertisement as a whole, we believe such a standard should also be adopted to determine the “primary purpose” of an electronic mail message. Marketers have long been under an obligation to evaluate their advertising material from the reasonable consumer’s perspective and determine what impression their material makes on consumers.<sup>5</sup> The importance of considering the overall impression of the consumer has also been reiterated by the Commission in the context of online advertising, where the Commission stated that disclosures that are required to prevent deception — or to provide consumers material information about a transaction—must be presented “clearly and conspicuously.” Whether a disclosure meets this standard is measured by its performance — that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. The key is the overall net impression of the ad — that is, whether the claims consumers take from the ad are truthful and substantiated.<sup>6</sup> The Commission has obviously recognized the benefit of the “net impression” standard by adopting it to some degree in §316.3(a)(3) and rightly stating in the NPRM that such an approach gives guidance to email marketers. This standard is also flexible enough to reflect recipients’ perceptions of the primary purpose of the messages they receive.<sup>7</sup> However, the Commission failed to adopt the standard in a consistent manner in the proposed rules.

As we suggested in our ANPR comments,<sup>8</sup> the “net impression” standard used to determine the “primary purpose” of an electronic mail message should, in addition to the “from” and “subject” lines, also take into account the following factors:

- Whether the advertising material is incidental to the email;

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<sup>4</sup> NPRM, Pg 38.

<sup>5</sup> FTC Policy Statement On Deception, <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

<sup>6</sup> “Dot Com Disclosures.” <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/>

<sup>7</sup> NPRM, Pg 40. <http://www.ftc.gov/os/2004/08/canspamfrn.pdf>

<sup>8</sup> # OL-105086, <http://www.ftc.gov/os/comments/canspam/OL-105086.pdf>

- Whether the advertising material is used as a mechanism to support free content within the email (i.e., essentially “paying the postage” for something like an email newsletter);
- Whether the email would still be sent absent the advertising material (assuming that the email could have been sent without the financial support of the advertising);
- The prominence (relative placement, size and conspicuousness) of the advertising material; and
- The form of the advertising material (e.g., whether the advertising material appears in a banner ad, or link in an email newsletter).

A “net impression” standard based on the above factors would be extremely relevant for assessing the purpose of an electronic mail message so that the message as a whole can be judged as to its “net impression” on the reasonable recipient. All the factors in such a standard should be analyzed in context with the rest of the message. An incongruent reliance on only certain specific factors would be inconsistent with the “net impression” standard, which involves analyzing the electronic mail message as a whole. Section 316.3(a)(2) in its current form is too rigid and could discourage legitimate online communications between businesses and their customers. As this result runs counter to the legislative intent behind the CAN-SPAM Act, we urge the Commission to adopt the “net impression” standard and revise §316.3(a)(2).

### **Suggested Approach**

Taking into consideration the drawbacks of the proposed standards in §316.3(a)(2) and the advantages of adopting a “net impression” standard to determine the “primary purpose” of an email, we propose the following revision of §316.3(a)(2):

*If an electronic mail message contains content that advertises or promotes a product or service as well as content that pertains to one of the functions listed in paragraph (b) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:*

*A recipient reasonably interpreting the message, as a whole would likely conclude that the primary purpose of the message is to advertise or promote a product or service.*

*Factors illustrative of those relevant to this interpretation include the “from” and “subject” lines of the electronic mail message; whether the content that advertises or promotes a product or service is incidental to the message; the placement of such content; the proportion of the message dedicated to such content; the form of such content, including but not limited to how color, graphics, type size, and style are used to highlight commercial content and whether parts of the such content distracts attention from content in the electronic mail message that pertains to one of the functions listed in paragraph (b) of this section.*

**§316.3(a)(3): COMMERCIAL COMBINED WITH NON-TRANSACTIONAL CONTENT**

*If an electronic mail message contains content that advertises or promotes a product or service as well as other content that does not pertain to one of the functions listed in paragraph (b) of this section, then the "primary purpose" of the message shall be deemed to be commercial if:*

*(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or*

*(ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. Factors illustrative of those relevant to this interpretation include the placement of content that advertises or promotes a product or service at or near the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.*

In part of §316.3(a)(3), the Commission rightly recognized the value and importance of adopting the "net impression" standard for arriving at the "primary purpose" of a "dual-purpose" electronic mail message that contains both commercial and non-transactional content. However, as outlined in our analysis of §316.3(a)(2), the Commission places inordinate reliance on the subject line in the proposed §316.3(a)(3)(i). As previously noted, we believe that the overemphasis on specific factors such as the subject line and the format of the electronic mail message conflicts with the very essence of the "net impression" standard that has been incorporated to a degree in §316.3(a)(3) and we urge the Commission to reconsider its approach.

In keeping with our recommendations for §316.3(a)(2), we suggest that the Commission adopt the "net impression" standard consistently for **all** electronic mail messages.

The following is our proposed revision of §316.3(a)(3):

*If an electronic mail message contains content that advertises or promotes a product or service as well as other content that does not pertain to one of the functions listed in paragraph (b) of this section, then the "primary purpose" of the message shall be deemed to be commercial if:*

*A recipient reasonably interpreting the message, as a whole would likely conclude that the primary purpose of the message is to advertise or promote a product or service.*

*Factors illustrative of those relevant to this interpretation include the "from" and "subject" lines of the electronic mail message; whether the content that advertises or promotes a product or service is incidental to the message; the placement of such content; the proportion of the message dedicated to such content; the form of such content, including but not limited to how color, graphics, type size, and style are used to highlight commercial content and whether parts of the such content distracts attention from the other content in the electronic mail message.*

In conclusion, we would like to reiterate our position that:

- The proposed reliance on only two specific criteria (the subject line and the content of the beginning of a message) creates an extremely rigid standard and is the incorrect approach to determine the "primary purpose" of an electronic mail message
- The "net impression" standard should be adopted as a consistent test for determining the "primary purpose" of **all** electronic mail messages.

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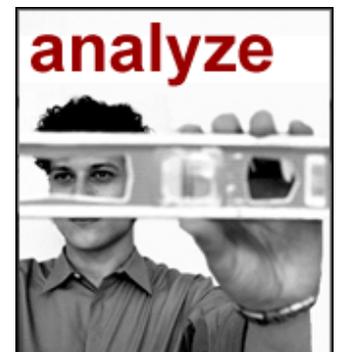
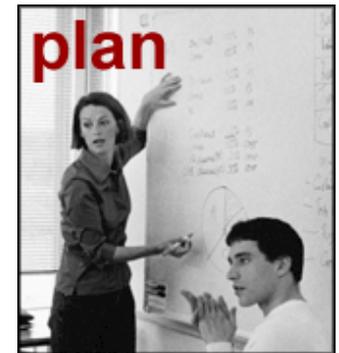
We appreciate the opportunity to submit comments on behalf of our email technology customers.



# EXHIBITS

Excerpts from the  
*DoubleClick 2004 Email User Survey*

# DoubleClick 2004 Consumer Email Study



We Make Marketing Work Better

# Background & Objectives

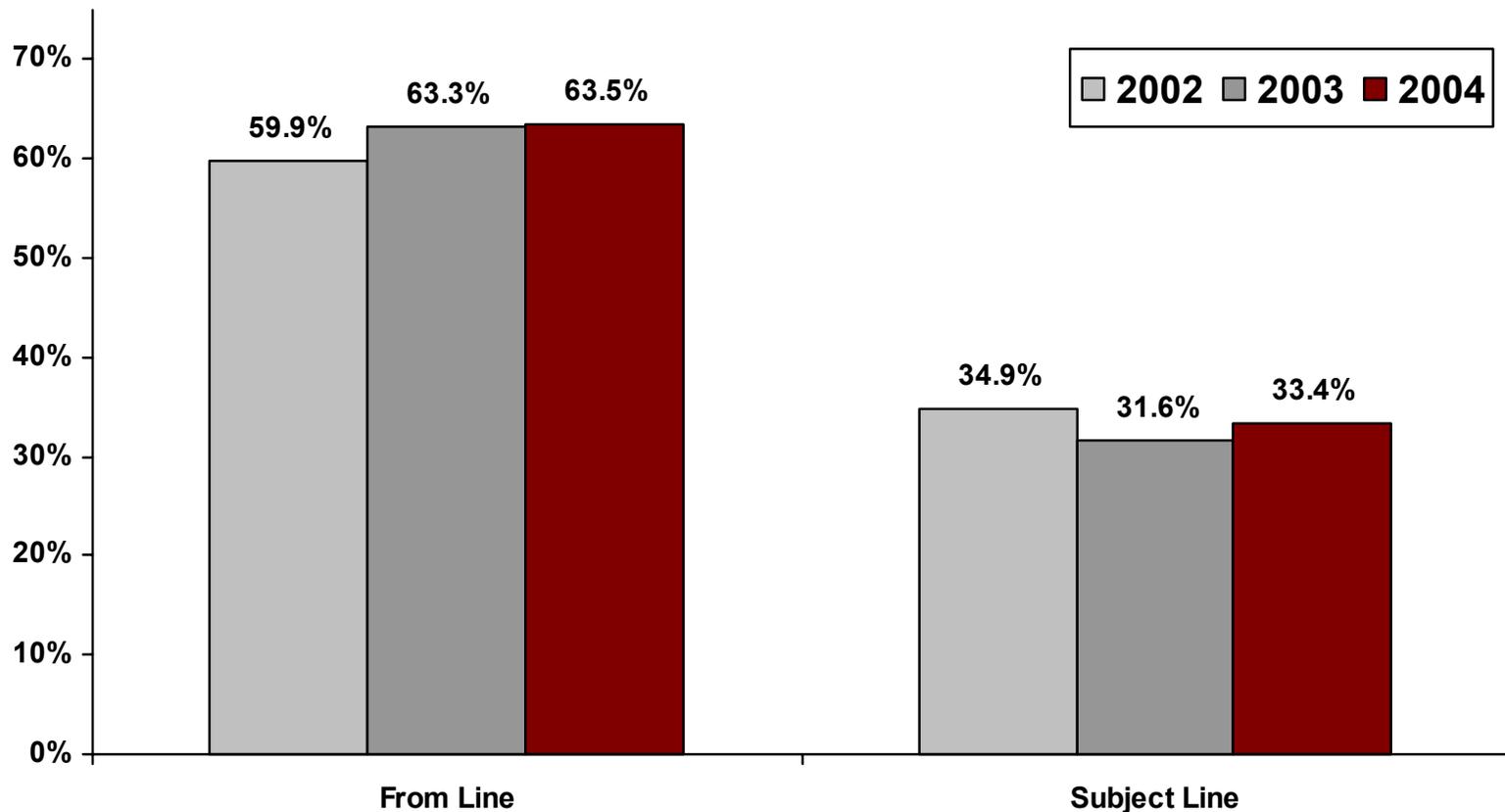
- For the past five years, DoubleClick has conducted a comprehensive study of the consumer email market, identifying trends and opinions about permission-based email (PBE), including:
  - Consumer preferences for permission-based email (PBE) formats, frequency, content, and interest categories
  - Multi-channel shopping behavior including coupon/offer conversion and store communications
  - Consumer behavior and attitudes regarding SPAM and awareness/usage of tool to limit, impact on ISP relationship, usage of different addresses
- In 2004, the Consumer Email Study additionally focuses on several timely issues around:
  - Bulk folders, preview panes, and spam-combating tools/features
  - Real Time messaging/confirmations
  - Awareness of CAN Spam legislation
- Results are presented in the following pages, with trend comparisons to 2000, 2001, 2002, and 2003 studies. For more information about study results contact: \_\_\_\_\_.

# Methodology

- Consistent with previous years' methodologies, this study was conducted among:
  - 1,000 users from NFO//net.source online panel of over 900,000 households
  - Respondents who use email/ internet at least once a week
    - “Online 1+ times a week” represents 94% of the US 18+ online population (Nielsen, 2003)
  - Demographic characteristics to reflect/represent the general online population
- The 2004 study was conducted in August of 2004 by **ROI Research, Inc.** ([www.roiresearch.com](http://www.roiresearch.com)), an independent online market research and consulting company.

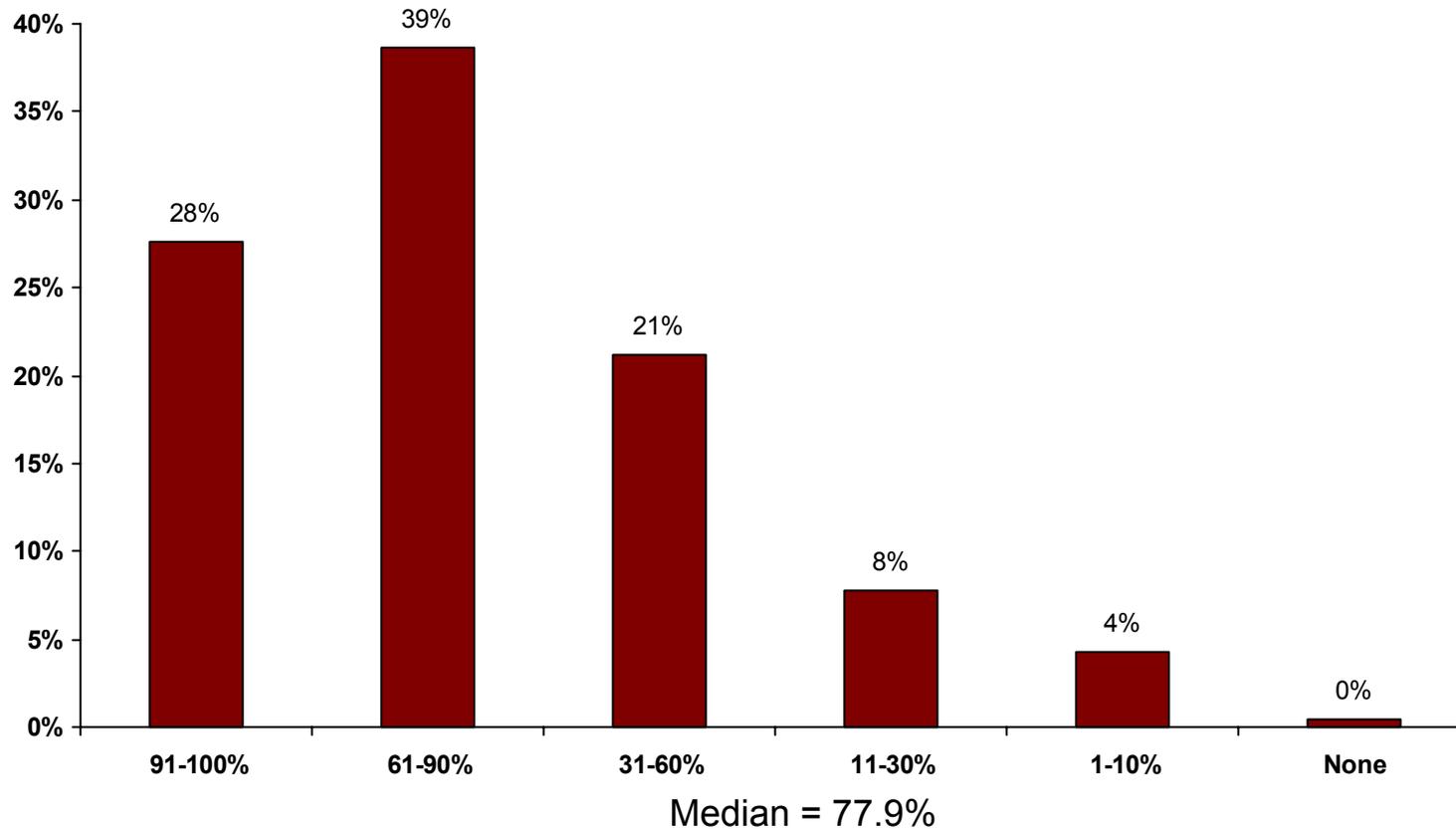
# From and subject line continues to be the most important factor in compelling email opens

What most compels you to open a permission based email?



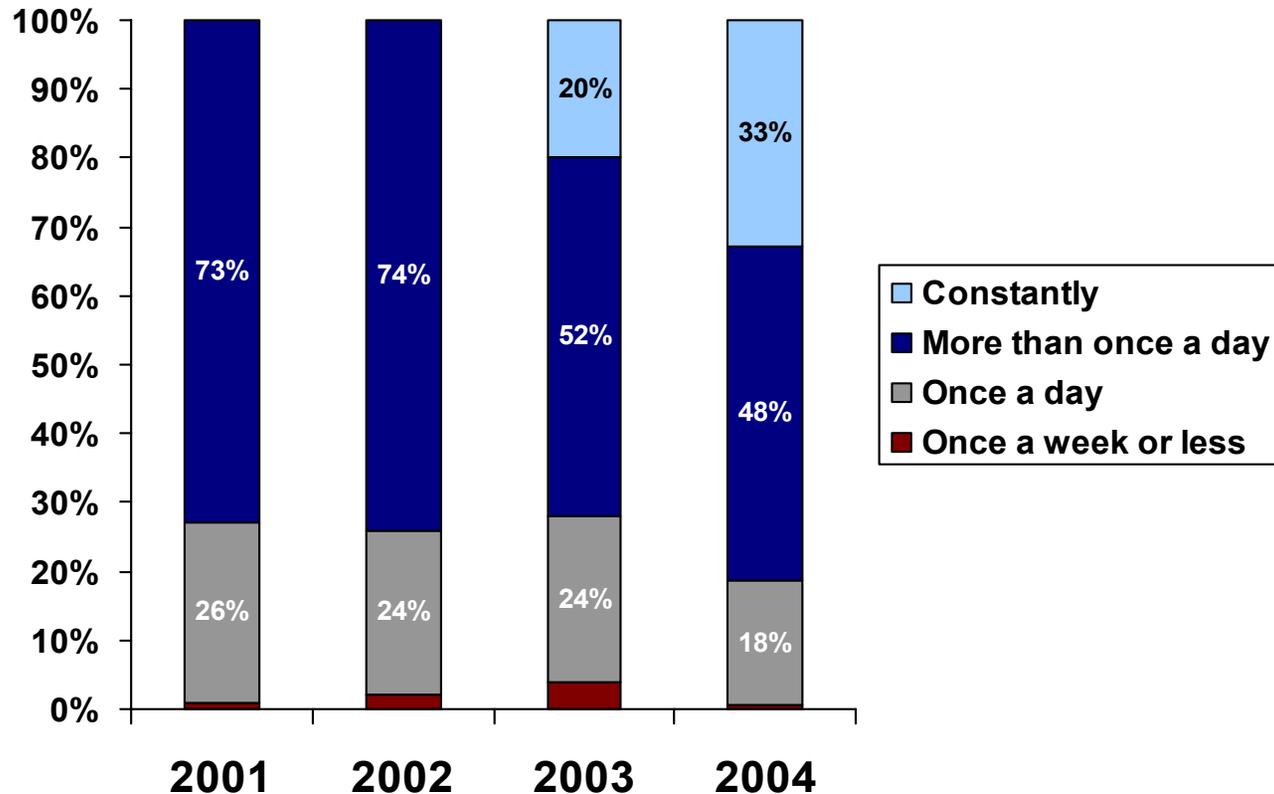
# Consumers report they open a majority of PBE received

What percent of the permission-based email you receive do you open?



# Email usage continues to increase -- 81% of consumers are on email multiple times daily

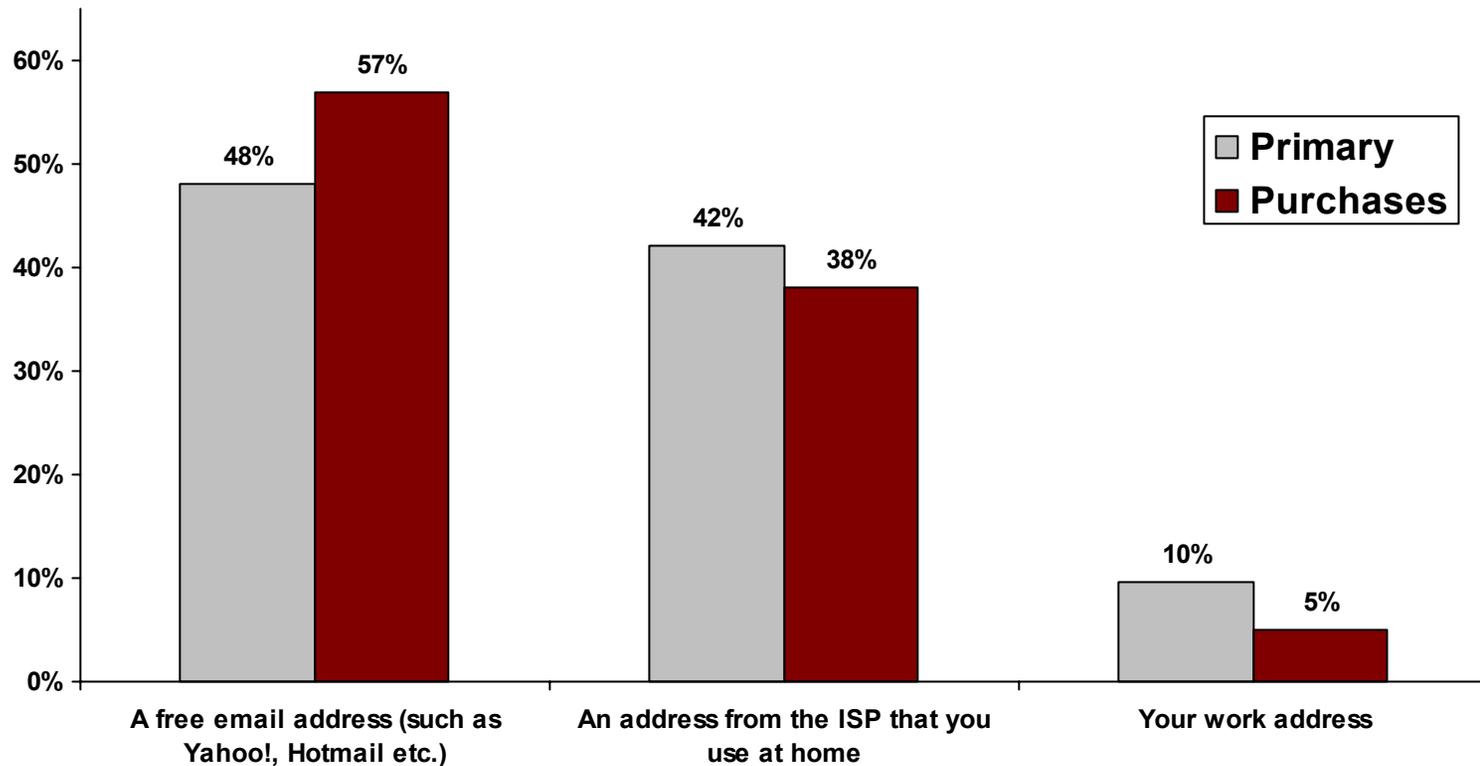
On average, how often do you usually go online to send and receive email?



# Webmail accounts are most popular as “primary” accounts, more-so for making purchases

Is your primary email address...?

Do you use one specific email address when purchasing products online?



# A strong interest exists for cross-promotions and offers in the context of transactional email messages

Which of the following would you find useful if included in the communications you receive?

