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April 11, 2008

Via Electronic Mail

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: # 228 Project No. P859900: Phorm, Inc.'s Comments to the Statement of the Federal Trade Commission's Bureau of Consumer Protection Proposing Governing Principles For Online Behavioral Advertising

Dear Secretary Clark:

Phorm, Inc. ("Phorm") is pleased to submit comments regarding the Federal Trade Commission ("FTC" or "Commission") Bureau of Consumer Protection staff statement proposing governing principles for online behavioral advertising ("Proposed Principles").[1] Phorm commends the FTC's long-standing commitment to protecting consumer privacy, encouraging innovative industry approaches to enhancing the Internet experience, and supporting self-regulation as a valuable mechanism for protecting consumer interests.

Phorm is a London- and New York-based digital technology company that has developed online advertising targeting technology that specifically enhances users' ability to protect their privacy. Phorm's technology is designed to be utilized with Internet Service Provider ("ISP") partners to provide targeted online advertising using anonymized, aggregated behavioral data gathered at the ISP level. Phorm recently announced agreements with three major U.K. ISPs: British Telecommunications, TalkTalk, and Virgin Media.

Phorm's approach to consumer privacy addresses the concerns raised by the FTC in developing its Proposed Principles: (1) lack of transparency – consumers have a limited understanding of what data is collected and how it is used; (2) lack of protection – leading online companies control massive amounts of user information that might potentially fall into the wrong hands; and (3) lack of choice and control – consumers are

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[1] Phorm's comments are in response to the Commission's request for public comment released on December 20, 2007, *available at* http://www.ftc.gov/opa/2007/12/principles.shtm [hereinafter "Proposed Principles"].

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not provided with a clear method for managing the control of their information (*e.g.* a clear, simple way to switch off data collection technology).

In addressing these concerns, Phorm has created a privacy transformation built on the foundation of Phorm's three pillars of privacy. First, Phorm does not and cannot know who the user is. Second, Phorm cannot know where the user has been. Third, the user has transparent notice and informed choice to switch the Phorm service off.[2]

Phorm recognizes each user only by a randomly generated, anonymous ID number, and its systems are designed so that Phorm cannot access any information the ISP may have about its users. In addition, Phorm's systems are designed to avoid personal information. For example, Phorm's technology ignores words or phrases containing the "@" symbol to avoid collecting email addresses, and strings of numbers longer than three digits to avoid the collection of credit card numbers, telephone numbers, social security numbers, and other numbers-based personal information. Also, Phorm's systems are designed so that Phorm cannot access secure (*i.e.* HTTPS) pages. Moreover, and as discussed in detail below, Phorm does not store any browsing data that would allow Phorm to know where the user has been (nor for that matter, does Phorm store IP addresses). By implementing these first two privacy pillars, Phorm's technology dispels the notion that in order to make online advertising relevant to users, it is necessary to use and retain their personal information or their Web-browsing activity.

With respect to the third privacy pillar (*i.e.* informed choice), users will be proactively informed of the Phorm technology in a variety of ways, and will be given a choice when they sign up with their ISP or when the ISP begins using the Phorm technology, and at times in the future. Phorm also intends to provide notice to users in advertisements noting that the technology is "on," and users will have the opportunity to turn it "off." Users will also be able to visit the Phorm service website (www.webwise.com) where their status ("on" or "off") will be displayed to them, and they will have the option to "Switch On" or "Switch Off," depending on their current selection. Phorm believes that multiple methods of notice and opportunities to switch the service off provide users with transparent choice and control over whether the Phorm technology is utilized to serve them more relevant advertising. Phorm intends to maintain flexibility regarding its methods of providing users transparent notice and informed choice so as to assure that users may make informed decisions about the use of these services. Phorm believes that this innovative ability to switch its services on or off provides users with an unprecedented level of control.

Through its dedication to its privacy pillars, Phorm is uniquely able to provide users more relevant advertising while protecting users' privacy and providing them transparent notice and informed choice. With its privacy pillars and behavioral advertising experience in mind, Phorm offers these specific comments on the FTC's Proposed Principles.

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[2] Users that choose to switch the Phorm service off will have the option to switch the Phorm service on in the future if they so choose.

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Phorm Supports No Retention of the Users' Browsing Data

The FTC recognizes stakeholders' concerns about the length of time that companies retain consumer data collected for behavioral advertising purposes. The FTC's Proposed Principle 2 therefore proposes that "[c]ompanies should retain data only as long as is necessary to fulfill a legitimate business or law enforcement need."[3] Phorm has specifically designed its systems so as not to retain users' browsing information. Phorm makes a real-time match between advertiser categories (or "channels") and page keywords, search terms, and URLs. Phorm immediately discards such keyword, search term, and URL information as part of the matching process.[4] The discarded information is irretrievably deleted. Because Phorm's technology operates without retaining users' browsing data, Phorm clearly meets the FTC proposal and far exceeds the industry standard regarding data storage and retention.

Phorm Supports Transparent Notice and Informed Choice

As discussed above, Phorm proactively informs users of the Phorm technology in a variety of ways, and users will be given a choice when they sign up with their ISP or when the ISP begins using the Phorm technology, and at times in the future. Phorm believes that the Commission should focus Proposed Principle 3 on the concept of meaningful and transparent notice and informed choice rather than mandating a specific one-size-fits-all method of notice and choice. Phorm is concerned that a requirement of "affirmative express consent" or opt-in consent for material privacy policy changes (applied on a going-forward basis) will be burdensome for industry and consumers alike, converting a successful privacy standard into an ineffectual one.

In addition, it is not clear what constitutes a "materially different" use of data, as this term is not defined and no examples are provided. FTC staff acknowledges in its statement setting forth the Proposed Principles that "[i]t is widely recognized . . . that businesses may have a legitimate need to change their privacy policies from time to time."[5] In light of this accepted business reality, the proposed restrictive opt-in approach creates a potentially unworkable and non-consumer friendly standard under which companies will be forced repeatedly to contact consumers about changes to online privacy policies.

Also, it is not entirely clear what constitutes "affirmative express consent." Does a pre-checked box with an opportunity to uncheck the box constitute affirmative express consent? Phorm encourages the Commission to call for robust, transparent notice and informed choice for material changes to existing policies – regardless of the precise form utilized – and to provide industry with guidance that it can use to effectively provide consumers with such notice and obtain the appropriate type of consent.

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[3] *See* Proposed Principles at 4.

[4] The information is also purged where no appropriate match is found. Phorm retains only the anonymous user ID number, the channel match(es), and the date/time stamp, which indicates when the match was made.

[5] *See* Proposed Principles at 5.

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Transparent notice and informed consent, whereby the user may choose whether to use or continue using the service, have been successfully adopted by companies and are accepted and understood by consumers without being overly burdensome to either industry or consumers. Phorm respectfully requests that the Proposed Principles be modified to encompass the common practice of providing transparent notice and obtaining informed consent for material privacy policy changes.

Phorm Supports the Notion of a Sensitive Data Category

Proposed Principle 4 contemplates restricting or prohibiting the collection and use of sensitive information for behavioral advertising. As a threshold matter, Phorm, through the implementation of its first two privacy pillars, cannot associate any sensitive data to a particular user. Regardless of this fact, Phorm supports the FTC's desire to develop a category of sensitive data and is committed to seeking to prevent the collection and use of such sensitive information.

Phorm implements measures to prevent advertising based on sensitive information. First, Phorm's systems and processes have been designed to prevent the creation of channels based on sensitive information. Phorm does this through regularly reviewing the advertising channels to ensure that they do not include any sensitive subject matter such as adult content or medical conditions. Second, Phorm's systems are designed to prevent the delivery of advertisements containing sensitive information. For example, Phorm screens ad campaigns and rejects those that contain sensitive information. Phorm supports the FTC's proposal to create a definition of sensitive data, and commits to utilize its channel and ad campaign processes to restrict the collection and use of such sensitive information.

Phorm looks forward to working with the Commission to support industry best practices and self regulation in the online privacy arena. Phorm hopes that the FTC continues to support industry innovation and to value the benefits of free web content, potentially less expensive ISP service, and more relevant ads that behavioral advertising provides consumers.

Phorm appreciates this opportunity to comment on the Proposed Principles and thanks the Commission for continuing the dialogue with industry and other stakeholders in order to address these important issues in a manner that protects consumers and does not unnecessarily harm or limit electronic commerce.

Sincerely,

David Pester (YR)

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