

Complaint

IN THE MATTER OF

INTEL CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. D-9341; File No.061 0247
Filed December 16, 2009 — Decision, October 29, 2010

The Commission issued an administrative complaint, alleging that Intel Corporation (“Intel”) illegally used its dominant market position to foreclose rivals from competing in the CPU microchip market. The complaint further alleges that Intel misled and deceived potential competitors in order to preserve its monopoly power. The consent order prohibits Intel from conditioning benefits to computer makers on their promise to purchase microchips exclusively from Intel or on their refusal to purchase microchips from others. The consent order also prohibits Intel from retaliating against computer makers if they do business with suppliers other than Intel. The consent order further requires, in part, that Intel modify its intellectual property agreements with AMD, Nvidia, and Via; offer to extend Via’s x86 licensing agreement; and disclose to software developers that Intel computer compilers discriminate between Intel and non-Intel microchips. The consent order further requires Intel to reimburse all software vendors that wish to recompile their software using a non-Intel compiler.

Participants

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Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (“FTC Act”) and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Intel Corporation (“Intel”), a corporation, hereinafter sometimes referred to as “Respondent,” has engaged in a course of conduct that, considered individually or collectively, violates the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

THE FEDERAL TRADE COMMISSION ACT

1. The Federal Trade Commission Act “was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as ‘unfair methods of competition’ existing violations” of those acts and practices.¹ The Act gives the Commission a unique role in determining what constitutes unfair methods of competition. “[L]ike a court of equity, the Commission may consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”² Examples of conduct that fall within the scope of Section 5 include deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition. Moreover, where a respondent that has monopoly power engages in a course of conduct tending to cripple rivals or prevent would-be rivals from constraining its exercise of that power, and where such conduct cumulatively or individually has anticompetitive effects or has a tendency to lead to such effects, that course of conduct falls within the scope of Section 5. Respondent may defend against such charges, however, by

¹ *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)). See also *F.T.C. v. Texaco*, 393 U.S. 223, 225-26 (1968).

² *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). See also *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693 (1948); *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

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proving that any actual or incipient anticompetitive effects resulting from the Respondent's course of conduct are offset by procompetitive effects, and that engaging in that course of conduct was reasonably necessary to achieve those offsetting precompetitive effects. The conduct alleged in this complaint, if proven, falls within the scope of Section 5.

NATURE OF THE CASE

2. This antitrust case challenges Intel's unfair methods of competition and unfair acts or practices beginning in 1999 and continuing through today, and seeks to restore lost competition, remedy harm to consumers, and ensure freedom of choice for consumers in this critical segment of the nation's economy. Intel's conduct during this period was and is designed to maintain Intel's monopoly in the markets for Central Processing Units ("CPUs") and to create a monopoly for Intel in the markets for graphics processing units ("GPUs").

3. Intel holds monopoly power in the markets for personal computer and server CPUs, and has maintained a 75 to 85 percent unit share of these markets since 1999. Intel's share of the revenues in these markets has consistently exceeded 80 percent, and Intel is currently not sufficiently constrained by any other CPU manufacturers, including the two other manufacturers of x86 CPUs, Advanced Micro Devices ("AMD") and Via Technologies ("Via"), or the handful of non-x86 CPU manufacturers. A number of CPU manufacturers have exited the marketplace over the last decade. Due to both Intel's conduct and high barriers to entry in the CPU markets, new entry is unlikely.

4. In 1999 after AMD released its Athlon CPU and again in 2003 after AMD released its Opteron CPU, Intel lost its technological edge in various segments of the CPU markets. Original equipment manufacturers ("OEMs") recognized that AMD's new products had surpassed Intel in terms of performance and quality of the CPU.

5. Its monopoly threatened, Intel engaged in a number of unfair methods of competition and unfair practices to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers. Among those practices

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were those that punished Intel's own customers – computer manufacturers – for using AMD or Via products. Intel also used its market presence and reputation to limit acceptance of AMD or Via products, and used deceptive practices to leave the impression that AMD or Via products did not perform as well as they actually did.

6. First, Intel entered into anticompetitive arrangements with the largest computer manufacturers that were designed to limit or foreclose the OEMs' use of competitors' relevant products. On the one hand, Intel threatened to and did increase prices, terminate product and technology collaborations, shut off supply, and reduce marketing support to OEMs that purchased too many products from Intel's competitors. On the other hand, some OEMs that purchased 100 percent or nearly 100 percent of their requirements from Intel were favored with guarantees of supply during shortages, indemnification from intellectual property litigation, or extra monies to be used in bidding situations against OEMs offering a non-Intel product.

7. Second, Intel offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets. In most cases, it did not make economic sense for any OEM to reject Intel's exclusionary pricing offers. Intel's offers had the practical effect of foreclosing rivals from all or substantially all of the purchases by an OEM.

8. Third, Intel used its position in complementary markets to help ward off competitive threats in the relevant CPU markets. For example, Intel redesigned its compiler and library software in or about 2003 to reduce the performance of competing CPUs. Many of Intel's design changes to its software had no legitimate technical benefit and were made only to reduce the performance of competing CPUs relative to Intel's CPUs.

9. Fourth, Intel paid or otherwise induced suppliers of complementary software and hardware products to eliminate or limit their support of non-Intel CPU products.

10. Fifth, Intel engaged in deceptive acts and practices that misled consumers and the public. For example, Intel failed to disclose material information about the effects of its redesigned

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compiler on the performance of non-Intel CPUs. Intel expressly or by implication falsely misrepresented that industry benchmarks reflected the performance of its CPUs relative to its competitors' products. Intel also pressured independent software vendors ("ISVs") to label their products as compatible with Intel and not to similarly label with competitor's products' names or logos, even though these competitor microprocessor products were compatible.

11. Intel's course of conduct over the last decade was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct has limited market adoption of non-Intel CPUs to the detriment of consumers, and allowed it to unlawfully maintain its monopoly in the relevant CPU markets.

12. Having succeeded in slowing market adoption of competing CPUs over the past decade until it could catch up with competitors, Intel once again finds itself behind competitors in the GPU markets and related markets.

13. Intel has engaged in unfair methods of competition in the relevant GPU markets. Intel's conduct is specifically intended to, and does, threaten to eliminate potential competition to the CPU from GPUs and maintain Intel's monopoly in the relevant CPU markets.

14. There is also a dangerous probability that Intel's unfair methods of competition could allow it to acquire a monopoly in the relevant GPU markets.

15. The GPU markets are highly concentrated and dominated by Intel. Intel currently lags behind its competitors in both quality and innovation for both discrete GPUs (GPUs used on separate graphics cards) and integrated GPUs (GPUs integrated into computer chipsets). Intel's market share in the GPU markets is in excess of 50 percent.

16. GPUs are a threat to Intel's monopoly in the relevant CPU markets. GPUs are adding more CPU functionality with each product generation. GPU manufacturers, such as Nvidia and AMD, through its affiliate, ATI, are developing General Purpose GPUs and programming interfaces that threaten Intel's control

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over the computing platform. This General Purpose GPU computing (“GP GPU”) platform has the potential to marginalize Intel’s long-standing CPU-centric, x86-based strategy. Currently, both high-performance computing and mainstream applications and operating systems are beginning to adopt GP GPU computing functionality.

17. GPUs also could facilitate new entry or expansion in the relevant CPU markets by other firms, such as Nvidia, AMD, or Via. The need for high-end microprocessors may be reduced as more computing tasks are handled by the GPU. Some OEMs could get equivalent performance at a cheaper cost by using a lower-end CPU with a GPU microprocessor.

18. As it did in the CPU markets, Intel recognized the threat posed by GPUs and GP GPU computing and its technological inferiority in these markets and has taken a number of anticompetitive measures to combat it. These tactics include, among others, deception relating to competitors’ efforts to enable their GPUs to interoperate with Intel’s newest CPUs; adopting a new policy of denying interoperability for certain competitive GPUs; establishing various barriers to interoperability; degrading certain connections between GPUs and CPUs; making misleading statements to industry participants about the readiness of Intel’s GPUs; and unlawful bundling or tying of Intel’s GPUs with its CPUs resulting in below-cost pricing of relevant products. Although it is not a necessary element in a Section 5 case, because Intel is likely to achieve a monopoly in the relevant GPU markets and has a monopoly in the relevant CPU markets, it is likely to recoup in the future any losses it suffered as a result of selling relevant products at prices below an appropriate measure of cost.

19. These measures are intended to slow down developments in the relevant markets until Intel can catch up, and have had the effect of foreclosing competitive GPU products and slowing the development and widespread adoption of GP GPU computing.

20. Intel’s efforts to deny interoperability between competitors’ (e.g., Nvidia, AMD, and Via) GPUs and Intel’s newest CPUs reflect a significant departure from Intel’s previous course of dealing. Intel allowed, and indeed encouraged, other companies including Nvidia to develop products that

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interoperated in a nondiscriminatory manner with Intel's CPUs (and its chipsets and related connections) for the last ten years. The interoperability of these complementary products, along with the innovation and intellectual property contributions made by these companies to Intel in exchange for such interoperability, made Intel's CPUs more attractive to OEMs and customers. Indeed, Intel used other companies' technologies to enhance Intel's graphics capabilities and its monopoly power in CPUs.

21. Intel's conduct and representations created a duty to deal and cooperate with its competitors, such as Nvidia, AMD, and Via, to enhance competition and innovation for the benefit of consumers. These companies' reliance on Intel's original representations was reasonable.

22. Once Nvidia and other companies committed to working with Intel, and in some cases granted significant intellectual property to Intel, and were thus locked into Intel's strategy, Intel changed its position with these companies and used its power to harm competition.

23. Intel adopted these anticompetitive business practices when the GPU began to emerge as a potential challenge to Intel's monopoly over CPUs. Intel's refusal to allow Nvidia, AMD, and Via to interoperate freely, fully, and in a nondiscriminatory manner with its CPUs, chipsets, and related connections is an unfair method of competition and an unfair practice.

24. Intel also has bundled the price of its CPU and chipset with integrated graphics to foreclose Nvidia in some market segments, resulting in below-cost pricing of relevant products in circumstances in which Intel was likely to recoup in the future any losses that it suffered as a result of selling relevant products at prices below an appropriate measure of cost.

25. Intel's unfair methods of competition have harmed current and future competition in the relevant GPU and CPU markets.

26. These and other anticompetitive practices by Intel since 1999 allowed it to maintain its monopoly position in the relevant CPU markets and will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. As a result,

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consumers today have fewer choices of CPU and GPU manufacturers than they had a decade ago, and fewer than they would have had absent this conduct.

27. The loss of price and innovation competition in the relevant markets will continue to have an adverse effect on competition and hence consumers. Absent the remedy provided herein, Intel will continue to maintain or even enhance its market power, consumers will have fewer choices, prices will be higher than they would be in competitive markets, and quality and innovation will be diminished.

28. The synergistic effect of all of Intel's wrongful conduct has and will continue to harm competition and consumers. Intel does not have legitimate or sufficient business justifications for its conduct.

RESPONDENT

29. Respondent Intel is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2200 Mission College Boulevard, Santa Clara, California 95052. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs. For the fiscal year that ended December 31, 2008, Intel reported revenues of approximately \$37 billion and profits of approximately \$5 billion. Intel's microprocessor business reported revenues in excess of \$27 billion in 2008.

30. At all times relevant herein, Intel has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. For the purposes of this Complaint, "Intel" also includes its subsidiaries and affiliates.

31. The acts and practices of Intel, including the acts and practices alleged herein, are in commerce or affect commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

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RELEVANT MARKETS

32. One set of relevant product markets are CPUs for use in desktop, notebook, netbook (or nettop) computers, servers, and narrower relevant markets contained therein, including without limitation:

- a. microprocessors for servers,
- b. microprocessors for desktop computers,
- c. microprocessors for laptop or notebook computers,
- d. microprocessors for netbook computers,
- e. any of the foregoing products in this paragraph that are based on an x86 architecture,
- f. any of the foregoing products in this paragraph as intended for particular end users or any category of end users, such as enterprise customers, and
- g. any of the foregoing products in this paragraph as distributed or resold by a particular class of OEMs or distributors.

33. A CPU is a type of microprocessor used in a computer system. A CPU is an integrated circuit chip that is often described as the “brains” of a computer system. The microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system.

34. A CPU requires a chipset to communicate with other parts of the computer. The chipset operates as the computer’s nervous system, sending data between the microprocessor and input, display, and storage devices, such as the keyboard, mouse, monitor, hard drive, and CD or DVD drive.

35. Intel, Via, and AMD are the only three firms that manufacture and sell x86 microprocessors -- the industry standard for CPUs used in personal computers and servers. The x86

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microprocessor architecture is the only one capable of running either the Microsoft Windows operating system (e.g., Windows XP, Vista, or Windows 7) or Apple's current Mac operating system natively for personal computers and servers. Most purchasers do not consider computers using non-x86 microprocessors as acceptable substitutes because they cannot efficiently run the Windows operating system and compatible software.

36. A few firms produce microprocessors that are based on non-x86 microprocessor architecture. For example, IBM's Power and Sun's Sparc are used only in very high end servers and mainframes sold by those companies. These non-x86 microprocessors represent a small and diminishing niche of the relevant server CPU market. Another example of a non-x86 microprocessor architecture is ARM. ARM is used primarily in handheld devices and mobile phones. Non-x86 architectures are rarely used in mainstream personal computers or servers. Microprocessors built on non-x86 architectures do not significantly restrain Intel's monopoly power.

37. A second set of relevant product markets are GPUs (including all graphics processors, or chipsets with graphics processors regardless of industry nomenclature) for use in desktop, notebook, netbook (or nettop) computers, servers, and narrower relevant markets contained therein, including without limitation:

- a. GPUs integrated onto chipsets, and
- b. Discrete GPUs.

38. GPUs originated as specialized integrated circuits for processing of computer graphics, but as they have evolved they have taken on greater functionality. Computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

39. A GPU may either reside on a separate graphics card within a computer ("discrete GPUs") or be integrated onto the chipset. Integrated graphics solutions are usually cheaper to

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implement but are often less powerful than discrete GPUs.

40. The relevant geographic market is the world.

INTEL HOLDS A MONOPOLY IN THE RELEVANT CPU
MARKETS AND IT IS LIKELY TO OBTAIN A MONOPOLY
IN THE RELEVANT GPU MARKETS

41. Intel possesses monopoly power in the relevant CPU markets. Intel's unit share in the relevant markets has exceeded 75 percent in each of the years since 1999. Its share of revenue in these markets has consistently exceeded 80 percent during that time.

42. There are significant barriers to entry in all the relevant markets. These barriers include, but are not limited to: (1) product development; (2) the cost and expertise to develop manufacturing capabilities; (3) intellectual property rights; (4) establishment of product reputation and compatibility; and (5) Intel's unfair methods of competition and efforts to maintain or obtain a monopoly position in the markets.

43. The development of a commercial product for a single segment of the market, such as servers, takes years of engineering work and several hundred million dollars in sunk capital. An entrant would have to develop a product and ensure it was compatible with computer operating systems and applications software used by business and consumer users.

44. A supplier of a product in the relevant markets also requires access to cutting-edge manufacturing facilities capable of mass-producing products and of achieving the minimum scale required to operate efficiently and profitably. The cost of developing, building, and equipping a new facility is at least \$3 billion. In order to remain at the cutting-edge of process technology the manufacturer also would have to be prepared to invest another \$1 billion in each facility every two or three years. An entrant could not begin shipping products for four or more years after commencing construction of such a facility.

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45. An entrant would have to avoid infringing the patents that apply to the relevant products.

46. An entrant would need to develop a reputation for reliability once it has a commercially ready CPU or GPU and production facilities. This is a multi-year project. Buyers of computer systems and microprocessor components demand highly reliable products.

INTEL'S UNFAIR METHODS OF COMPETITION AND
DECEPTIVE PRACTICES MAINTAINED AND
STRENGTHENED INTEL'S MONOPOLY POSITION
IN THE RELEVANT MARKETS

47. Intel has engaged in a course of conduct since 1999 that, considered individually or collectively, had the tendency to hamper and exclude rivals, and to maintain, create, or enhance Intel's monopoly power in the relevant markets.

48. Intel's unfair methods of competition harmed competition in the relevant markets. Intel's methods are coercive, oppressive, deceptive, unethical or exclusionary and caused injury to competition and consumers. Intel's conduct is likely to continue to harm competition absent the relief requested herein, and violates § 5 of the FTC Act.

A. Exclusionary Conduct with OEMs and Distributors.

49. Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu are the largest OEMs in the world ("Tier One OEMs"). Tier One OEMs account for over 60 percent of the computers with CPUs in the relevant markets. Intel has prevented or limited the sale of non-Intel CPUs to these Tier One OEMs.

50. Because of Intel's actions and threats, certain Tier One OEMs reasonably feared that purchasing too many non-Intel CPUs would expose their companies to retaliation from Intel. They were susceptible to retaliation because Intel is a "must have" or essential supplier for every Tier One OEM, for several reasons. Intel is the only firm with the CPU product breadth to meet all the

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requirements and be the sole supplier to a Tier One OEM. Intel is also the only CPU supplier with the current capability to supply all or nearly all of the requirements of the largest OEMs. As a result, the Tier One OEMs could not credibly threaten to shift all or even a majority of their CPU purchases away from Intel; to the contrary, Tier One OEMs needed Intel as a primary supplier.

51. Intel took advantage of its monopoly power and induced and/or coerced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs, or to limit such purchases to a small percentage of the sales of certain computer products. In other cases, Intel paid Tier One OEMs not to sell computers with other CPUs, such as AMD's or Via's CPUs. Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

52. When Intel was unable to compel a Tier One OEM to forgo entirely the purchase of non-Intel CPUs, Intel's strategy was to induce and coerce the OEM to forgo marketing and distribution methods for computers that contained the non-Intel CPU (referred to herein as "restrictive dealing arrangements"). For example, Intel induced OEMs to forgo advertising, to forgo branding, to forgo certain distribution channels, and/or to forgo promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, to withhold technical support, to withhold supply, and/or to terminate joint development projects, among other things. Tier One OEMs reasonably feared that marketing computers that contained non-Intel x86 microprocessors would expose them to retaliation from Intel. Intel monitored the OEMs' compliance with these restrictions, and in some instances presented scorecards to the OEMs, evaluating their compliance.

53. Intel offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets. First, Intel taxed OEM purchases of non-Intel CPUs through the use of market share discounts. Second, Intel also offered its CPUs at prices below an appropriate measure of cost (in sales of CPUs or in kit prices of CPUs with chipsets), or volume discounts on CPU purchases that are effectively below cost (which for

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purposes of this complaint includes average variable cost plus an appropriate level of contribution towards sunk costs), in an effort to exclude its competitors and maintain its monopoly in the relevant CPU markets. Although it is not a necessary element under a Section 5 claim, Intel as a monopolist is likely to recoup any losses that it suffered as a result of selling any of its products to certain OEMs below cost. Third, Intel gave OEMs a choice between higher prices on both contested (meaning that another CPU manufacturer was selling that product) and uncontested CPUs, or, if the OEM refrained from purchasing certain volumes of CPUs from Intel's CPU competitors, Intel offered lower prices on certain volumes of both contested and uncontested CPUs.

54. Intel used OEMs that were exclusive to Intel to discipline and punish OEMs that chose to deal with Intel's competitors. Intel gave OEMs that agreed to buy CPUs exclusively from Intel the best pricing, supply guarantees in times of shortage, and indemnification from patent liability relating to the patent litigation initiated by Intergraph against several OEMs. Intel also offered these OEMs a slush fund of hundreds of millions of dollars to be used in bidding competitions against OEMs that offered non-Intel-based computers. These payments were contingent on the OEMs purchasing CPUs exclusively or nearly exclusively from Intel. Intel's disparate treatment of these different purchasers is not justified by any savings in Intel's costs of manufacture, delivery or sale between the favored and disfavored purchasers, or any differential services performed by the favored purchasers, but rather was another anticompetitive tactic to obtain and enforce exclusive or near exclusive dealing respecting relevant products by OEMs with Intel, thus reinforcing and maintaining Intel's monopoly in the relevant CPU markets.

55. Intel's use of penalties, rebates, lump-sum and other payments across multiple products, differential pricing, and other conduct alleged in this Complaint maintained or is likely to maintain Intel's monopoly power to the detriment of competition, customers, and consumers. Intel would not have been able to continue charging comparably higher prices across its product lines but for its conduct, as alleged in this Complaint, that harmed competition.

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B. Intel Redesigned its Software to Slow Software Performance on Non-Intel CPUs.

56. Intel sought to undercut the performance advantage of non-Intel x86 CPUs relative to Intel x86 CPUs when it redesigned and distributed software products, such as compilers and libraries.

57. A compiler is software that translates the “source code,” programs written by programmers or software developers in high-level computer languages such as C++ or Fortran into “object code” (0’s and 1’s), the language understood by CPUs. Libraries are collections of code for performing certain functions that can be referred to by software programmers rather than rewriting the code each time the functions are performed.

58. For example, in response to AMD introduction of its Opteron CPU for servers in 2003, Intel became concerned about the competitive threat posed by Opteron processors. Intel then designed its compiler and libraries in or about 2003 to generate software that runs slower on non-Intel x86 CPUs, such as Opteron. This decrease in the efficiency of Opteron and other non-Intel x86 CPUs harmed competition in the relevant CPU markets.

59. To the public, OEMs, ISVs, and benchmarking organizations, the slower performance of non-Intel CPUs on Intel-compiled software applications appeared to be caused by the non-Intel CPUs rather than the Intel software. Intel failed to disclose the effects of the changes it made to its software in or about 2003 and later to its customers or the public. Intel also disseminated false or misleading documentation about its compiler and libraries. Intel represented to ISVs, OEMs, benchmarking organizations, and the public that programs inherently performed better on Intel CPUs than on competing CPUs. In truth and in fact, many differences were due largely or entirely to the Intel software. Intel’s misleading or false statements and omissions about the performance of its software were material to ISVs, OEMs, benchmarking organizations, and the public in their purchase or use of CPUs. Therefore, Intel’s representations that programs inherently performed better on Intel CPUs than on competing CPUs were, and are, false or misleading. Intel’s

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failure to disclose that the differences were due largely to the Intel software, in light of the representations made, was, and is, a deceptive practice. Moreover, those misrepresentations and omissions were likely to harm the reputation of other x86 CPUs companies, and harmed competition.

60. Some ISVs requested information from Intel concerning the apparent variation in performance of identical software run on Intel and non-Intel CPUs. In response to such requests, on numerous occasions, Intel misrepresented, expressly or by implication, the source of the problem and whether it could be solved.

61. Intel's software design changes slowed the performance of non-Intel x86 CPUs and had no sufficiently justifiable technological benefit. Intel's deceptive conduct deprived consumers of an informed choice between Intel chips and rival chips, and between Intel software and rival software, and raised rivals' costs of competing in the relevant CPU markets. The loss of performance caused by the Intel compiler and libraries also directly harmed consumers that used non-Intel x86 CPUs.

C. Intel Misrepresented Industry Benchmarks to Favor its CPUs.

62. Benchmarking is the act of executing a computer program, or a set of programs, on different computer systems, in order to assess the relative performance of those computer systems. Consumers decide on purchases, OEMs select components, and CPU producers make pricing and model number designations, based on benchmark results; ISVs rely on benchmarks as well.

63. Intel failed to disclose the effects of its software redesign on non-Intel CPUs to benchmarking organizations, OEMs, ISVs, or consumers.

64. Several benchmarking organizations adopted benchmarks that measured performance of CPUs running software programs compiled using the Intel compiler or libraries. Intel's deception affected among others, the Business Applications Performance Corporation ("BAPCo"), Cinebench, and TPC benchmarks.

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65. Intel disseminated or caused to be disseminated advertisements, including product labeling and other promotional materials, to induce consumers to purchase computers with Intel CPUs. In these advertisements, Intel promoted its systems' performance under various benchmarks, which Intel expressly or by implication represented to be accurate or realistic measures of typical or "real world" computer usage or performance.

66. In truth and in fact, the benchmarks Intel publicized were not accurate or realistic measures of typical computer usage or performance, because they did not simulate "real world" conditions, and/or overestimated the performance of Intel's product vis-à-vis non-Intel products. Therefore, the representations and omissions of material facts made by Intel as described in paragraphs 63 through 65 above, were and are false or misleading.

67. Intel publicized the results of the benchmarking to promote sales of products containing its x86 CPUs even though it knew the benchmarks were misleading. For example:

- a. On its website, Intel states: "Sysmark 2007 Preview [BAPCo's then-latest benchmark] features user-driven workloads." In truth and in fact, the workloads were not user-driven, in that they did not reflect a typical user experience, but instead were manipulated to make Intel processors perform better on the benchmark than AMD's.
- b. In its "Quick Reference Matrix Q3 2008," Intel stated that its x86 CPUs had a "27% faster productivity benchmark than the competition," based on a test against an AMD processor using SysMark 2007. In truth and in fact, the benchmark did not reliably measure productivity.
- c. Intel's website includes a White Paper called "Choosing the Right Client Computing Platform for Public Sector Organizations and Enterprises." In the document, Intel stated that the "SYSmark 2007 Preview is a benchmark test that measures the

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performance of client computing software when executing what is designed to measure real-life activities.” In truth and in fact, the benchmark was not designed to measure “real life activities,” but to favor Intel’s CPUs.

- d. In the same White Paper (written to help governments write technical specifications to purchase computer systems) Intel wrote: “With regard to notebooks, Intel recommends the use of BAPCo MobileMark 2007 or later versions. This benchmark measures the performance of a computer system . . . by running relevant real-world computer programs typically used by business users.” Intel further stated that this benchmark provides “a performance evaluation that reflects their typical day-to-day use by business users.” In truth and in fact, the benchmark did not reflect typical or day-to-day use by business users.
- e. In its “Competitive Guide” on “Quad-Core Intel Xeon Processor-based Servers vs. AMD Opteron,” Intel stated that its Quad-Core Intel Xeon 5300 Series Processor was 26 percent faster in digital content creation than AMD’s Quad-Core Opteron 2300 Series Processor based on the Cinebench benchmark. Intel also stated that its Quad-Core Intel Xeon 5400 Series Processor was 34 percent faster in digital content creation than AMD’s Quad-Core Opteron 2300 Series Processor based on the Cinebench benchmark. In truth and in fact, the benchmark did not reliably measure the speed of digital content creation.

Therefore, the representations set forth in subparagraphs (a) through (e) above were, and are, material and false or misleading.

68. Through the means described in paragraphs 63 through 65 and 67, above, Intel has represented, expressly or by implication, that:

- a. Benchmarks, such as SysMark2007 Preview, that Intel used to compare Intel CPUs to competitors’ CPUs

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were accurate and realistic measures of typical computer usage or performance;

- b. Intel's x86 CPU works 27 percent faster under typical computer usage conditions than competitive CPUs, including the AMD processor;
- c. The BAPCo MobileMark 2007 benchmark and later versions provide a reliable performance evaluation of x86 CPUs against competitive brands based on typical day-to-day use by business users; and
- d. The Cinebench benchmark provides a reliable performance evaluation of x86 CPUs against competitive brands in performance of digital content creation.

69. Through the means described in paragraphs 63 through 65 and 67, Intel has represented, expressly or by implication, that it possessed and relied upon a reasonable basis to substantiate the representations set forth in paragraph 68, at the time the representations were made.

70. In truth and in fact, Intel did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph 68 at the time the representations were made. Therefore, the representations set forth in paragraph 69 were and are false or misleading.

71. Intel's conduct as described in paragraphs 52 through 70, above, eroded the credibility and reliability of these benchmarks and the software compiled by Intel compilers to the detriment of consumers. Intel's conduct was misleading and had the purpose and effect of harming competition and thus enhancing Intel's monopoly power. Intel had a duty, arising from its conduct and statements, to disclose the complete truth, which would have eliminated most if not all of the harm to competition and consumers. Intel lacks a legitimate or sufficient business justification for its conduct.

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D. Intel Induced OEMs and Companies in Complementary Markets to Eliminate or Limit Support of Competitive CPU Products.

72. Intel paid or otherwise induced OEMs and companies in complementary markets to eliminate or limit their support of competitive CPU products.

73. For example, Intel paid ISVs to change their software designs, including by switching to use of Intel's compilers and software, to favor Intel's CPUs. As a result of Intel's inducements, they also labeled their products as compatible with Intel but intentionally omitted that they were also compatible with non-Intel CPUs.

74. Intel also prevented ISVs from promoting or otherwise engaging in co-development or joint marketing with AMD and other CPU manufacturers, by causing those ISVs to fear that Intel would withdraw its support for their products. As a result, Intel created a false impression that the ISV software was incompatible with non-Intel CPUs because Intel required that only its name (versus including other CPU manufacturers as well) be listed on the product.

INTEL'S UNFAIR METHODS OF COMPETITION IN THE
RELEVANT GPU MARKETS

75. Intel, Nvidia, and ATI (a subsidiary of AMD) account for nearly all the sales of GPUs in the relevant markets. Intel holds approximately 50 percent of these markets through its sales of GPUs integrated on chipsets, with the remainder of the markets split between Nvidia and ATI.

76. There are high barriers to entry in the relevant GPU markets.

77. GPUs allow OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance.

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78. Nvidia has developed GP GPUs and related programming tools that can perform many of the same functions as CPUs.

79. Nvidia's ongoing development of sophisticated GPUs and related tools poses a potential threat to Intel's monopoly position in the relevant CPU markets.

80. Manufacturers of complementary products, such as GPUs, rely on open interfaces (e.g., busses, connections, and related programming) between the CPU and the chipset, and between the chipset and the GPU. Intel dictates the interoperability of these interfaces, because it has monopoly power over the relevant CPUs.

81. These interfaces are essential for such complementary products to be used in a computer. For many years, Intel allowed unhindered accessibility to these interfaces and encouraged others to become reliant on that accessibility. However, after Nvidia, Via, AMD, OEMs, and consumers became dependent on the Intel-controlled interfaces, recently Intel has selectively cut off or hindered accessibility to enhance or obtain monopoly power in the relevant markets.

82. For example, Intel encouraged Nvidia to innovate on the Intel platform. Intel and Nvidia worked together for a number of years to ensure that Nvidia's GPUs could interoperate with Intel's CPU.

83. Intel licensed Nvidia to allow it to manufacture GPUs integrated on chipsets to be used with Intel's CPUs.

84. Intel's apparent willingness to allow Nvidia to interoperate with Intel's CPU has dissolved as it has begun to perceive Nvidia as a threat to its monopoly position in the relevant markets. Intel now has reversed its previous course of allowing Nvidia integrated GPU chipsets to interoperate with Intel CPUs, thereby foreclosing Nvidia's integrated GPU chipsets from connecting to Intel's future CPU platforms.

85. Before expressly refusing to deal with Nvidia on integrated GPU chipsets for its new family of CPUs, Intel engaged in deception by misleading Nvidia on Intel's CPU

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roadmaps, thereby greatly increasing its competitor's costs and further delaying the development of other products that would have accelerated the adoption of GP GPU computing. Intel also took steps to create technological barriers to interoperability to preclude the possibility that integrated CPU chipsets could interconnect with future Intel CPUs.

86. For discrete GPUs, Intel has created several interoperability problems, including reductions of speed and encryption, that have had the effect of degrading the industry standard interconnection with Intel's CPUs. Some of this conduct appears to have been specifically targeted at crippling GP GPU computing functionality.

87. Intel has sought to ensure that its own x86-based GP GPU computing programming tools and interfaces will become the industry standard. In order to accomplish this, Intel has disparaged non-Intel programming tools and interfaces and made misleading promises to the industry about the readiness of Intel's GP GPU hardware and programming tools.

88. Intel also bundles its CPUs with its own GPU chipsets and then prices the bundle to deter OEMs from pairing Intel CPUs with non-Intel GPUs. Intel's bundling scheme has led to significant loss of consumer choice and has no legitimate justification except to exclude competition. Moreover, it has resulted in below-cost pricing by Intel in circumstances in which Intel is likely to recoup in the future any losses that it suffered as a result of below-cost pricing.

89. Intel sells its Atom CPU bundled with a graphics chipset. Some OEMs purchased the bundle from Intel, discarded Intel's inferior graphics chipset and chose instead to use Intel's Atom CPU with the Nvidia graphics chipset. To combat this competition, Intel charged those OEMs significantly higher prices because they used a non-Intel graphics chipset or GPU. Intel would offer the bundled pricing only to OEMs that would then use the Intel chipset in the end-product and not use a competitive product.

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90. Intel's unfair methods of competition in the relevant GPU markets have specifically been used to enhance and have enhanced its monopoly position in the relevant CPU markets.

91. Intel's wrongful conduct also creates a dangerous probability that it will acquire a monopoly in the GPU markets. Intel's conduct has no legitimate or sufficient business justification and has and will continue to harm competition, innovation, and consumers, unless it is enjoined.

INTEL'S UNFAIR METHODS OF COMPETITION IN
INDUSTRY STANDARDS

92. Intel's course of anticompetitive and unfair conduct extends to its control of industry standards to hinder innovation by its CPU competitors and to maintain its monopoly power in the CPU markets. Using its dominant CPU position, Intel has manipulated the content and timing of many industry standards to advantage its own products and prevent competitors from introducing standards-compliant products prior to product introduction by Intel. Two examples of such anticompetitive conduct relate to the Universal Serial Bus host controller specification and the High Definition Content Protection ("HDCP") standard for use in DisplayPort connections between computers and display devices such as monitors and televisions. In these instances, Intel encouraged the industry to rely on standards that Intel controlled and represented that the standards would be fairly accessible. But Intel has delayed accessibility to the standards for its competitors so that Intel can gain a head start with its own products and wrongfully restrain competition. Intel's conduct has no offsetting, legitimate or sufficient procompetitive efficiencies but instead deters competition and enhances Intel's monopoly power in CPUs.

ANTICOMPETITIVE EFFECTS OF INTEL'S CONDUCT

93. The acts and practices of Intel as alleged herein have the purpose, capacity, tendency, and effect of harming competition and consumers in the relevant CPU markets. As a result, Intel's rivals and potential rivals incur higher distribution costs, face diminished sales opportunities, and secure lower revenues. Intel's conduct reasonably appears capable of making a significant

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contribution to the maintenance of its monopoly power or enabling it to achieve monopoly power in the relevant markets. Intel's monopoly power also has been buttressed by various unjustified restraints it places on licensees of its x86 intellectual property.

94. Intel's conduct adversely affects competition and consumers by, including but not limited to:

- a. causing higher prices of CPUs and GPUs and the products containing microprocessors;
- b. reducing competition to innovate in the relevant CPU and GPU markets by Intel and others;
- c. inhibiting Intel's competitors from effectively marketing their products to customers;
- d. reducing output of CPUs, GPUs, and the products containing them;
- e. raising rivals' costs of distribution of CPUs and GPUs;
- f. harming choice and competition at the OEM level and hence depriving consumers of their choice of CPUs and GPUs;
- g. reducing the incentive and ability of OEMs to innovate and differentiate their products in ways that would appeal to customers; and
- h. reducing the quality of industry benchmarking relied upon by OEMs and consumers in purchasing computers.

95. The acts and practices of Intel as alleged herein have the purpose, capacity, tendency, and effect to restrain competition unreasonably and to maintain Intel's monopoly power in the relevant markets. In addition, Intel's conduct is an illegal attempt to monopolize the relevant markets, and Intel has a dangerous probability of achieving a monopoly in these markets absent

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appropriate relief. Absent such relief, for OEMs and consumers of the relevant products, the consequences have been and likely will continue to be supracompetitive prices, reduced quality, and less innovation.

96. Intel's course of unfair methods of competition, considered individually or collectively, has harmed competition and consumers in the relevant markets. Intel's conduct has no legitimate or sufficient efficiency justification that would outweigh the anticompetitive effects of its conduct. Moreover, Intel has not used a least restrictive means to advance any legitimate goals, if any, to minimize anticompetitive effects.

FIRST VIOLATION ALLEGED

97. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel's acts and practices, considered individually or collectively, constitute unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

98. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SECOND VIOLATION ALLEGED

99. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant markets, constituting unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

100. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

THIRD VIOLATION ALLEGED

101. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel has willfully engaged in anticompetitive and exclusionary acts and practices, with the

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specific intent to monopolize or maintain a monopoly in the relevant markets, resulting, at a minimum, in a dangerous probability of monopolization in the relevant markets, constituting unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

102. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION ALLEGED

103. The allegations in paragraphs 56 through 96 above are herein incorporated by reference. The acts and practices of Intel, as alleged herein, constitute deceptive acts or practices in or affecting commerce, in violation of Section 5 of the FTC Act.

104. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FIFTH VIOLATION ALLEGED

105. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. The acts and practices of Intel, as alleged herein, constitute unfair acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

106. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to the Respondent that September 15, 2010, at 10:00 a.m., or such earlier date as is determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580, as the place, when and where a hearing will be held before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade

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Commission and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

Due to the nature of the complaint, the Commission finds good cause under § 3.41(b) of the Commission's Rules of Practice for Adjudicative Proceedings to extend the timed hearing to no more than 322 hours. Each side shall be allotted no more than half of the 322 hours within which to present its (i) opening statements, (ii) in limine motions, (iii) all arguments excluding the closing argument, (iv) direct or cross examinations in either party's case, or (v) other evidence that is presented live at the hearing. Counsel supporting the complaint and Respondent's counsel shall report jointly to the Administrative Law Judge each day as to the time each party has used each hearing day.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time provided above shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be

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as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will schedule an initial pre-hearing scheduling conference to be held not later than ten days after the answer is filed. The scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (and in any event no later than five days after the answer is filed by the last answering respondent). Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent has violated or is violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Intel as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Intel to cease and desist from the conduct alleged in the Complaint, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Intel.
2. An order that limits the manner in which Intel uses threats, bundled prices, quantity discounts, and other offers to encourage exclusivity or to deter competition or unfairly raise the price of its microprocessors or GPUs (including pricing conditioned on Intel getting so much of a resellers' purchases that that condition has the practical effect of foreclosing rivals from all or substantially all of that resellers' purchases, provided that pricing based purchases exceeding 60% of a resellers' historical purchases during the period the pricing is offered will be presumed to have that effect); such order may, among other things, include a

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prohibition against Intel from directly or indirectly requiring its customers to:

- a. purchase only microprocessors or GPUs that have been manufactured by Intel;
- b. purchase a minimum or fixed volume or percentage of the customer's overall CPU or GPU requirements from Intel (regardless of whether such fixed percentage relates to a product line for customers with multiple product lines or on a company-wide basis);
- c. not purchase CPUs or GPUs manufactured by a company, or by companies, other than Intel;
- d. purchase a maximum or fixed number of CPUs or GPUs manufactured by a company, or by companies, other than Intel (regardless of whether such maximum or fixed number relates to a product line for customers with multiple product lines or on a company-wide basis);
- e. purchase a maximum or fixed percentage of the customer's GPU requirements from a company, or from companies, other than Intel (regardless of whether such maximum or fixed percentage relates to a product line for customers with multiple product lines or on a company-wide basis); or
- f. comply with restraints on the manner in which customers market, advertise, promote, distribute, or sell any products containing microprocessors that have not been manufactured by Intel.

3. Prohibiting Intel from inducing, or attempting to induce, OEMs or other third parties (i.e., ISVs) to adhere to, or agree to, any of the above requirements (as listed in Paragraphs 2.a. through 2.f. of this notice) by discriminating, or threatening to discriminate, against OEMs or other third parties that fail to adhere to, or agree to, such requirements, including, but not limited to, inducing or attempting to induce OEMs or other third

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parties to adhere to, or agree to, any of such requirements by engaging in, or threatening to engage in, the following:

- a. charging OEMs or other third parties lower or higher prices for CPUs or GPUs in the relevant markets (inclusive of rebates, allowances, discounts and any other adjustment to price, including anything of value that has the same practical effect as pricing, rebates, or discounts as a means of discrimination) when such price is contingent upon a specific Intel market share or if the OEM does not use a competitive product;
- b. withholding payments and/or other compensation to OEMs unless they are exclusive or near exclusive to Intel in the relevant markets;
- c. withholding research and development funds from OEMs unless they are exclusive or near exclusive to Intel in the relevant markets;
- d. allocating OEMs or other third parties fewer CPUs during periods of shortage (actual or manufactured) depending on whether they are exclusive or near exclusive to Intel in the relevant markets;
- e. providing OEMs reduced monetary or in-kind support to market, advertise, promote, or distribute products manufactured by Intel unless they are exclusive or near exclusive to Intel in the relevant markets;
- f. giving OEMs less technical support with respect to microprocessors or GPUs unless they are exclusive or near exclusive to Intel in the relevant markets;
- g. giving OEMs less access to technical information/specifications regarding microprocessors or GPUs unless they are exclusive or near exclusive to Intel in the relevant markets; and

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- h. prioritizing the supply of microprocessors or GPUs to OEMs that are exclusive or near exclusive to Intel in the relevant markets.

4. With respect to an OEM that purchases a greater percentage share of Intel microprocessors (versus the percentage share of microprocessors bought by that OEM from another microprocessor supplier), Intel is prohibited from giving to that OEM more advantageous terms or conditions than those that are offered to another OEM whose percentage share is not as favorable to Intel. Intel is also prohibited from enforcing any terms or conditions in a way that favors a greater percentage share of microprocessors from Intel. For purposes of this paragraph, terms and conditions expressly include but are not limited to contracts, pricing, or purchase terms and conditions, and all actions described in Paragraphs 3.a. through 3.h. of this notice. *Provided, however*, it should not be a violation for Intel to offer, or its customers to accept, discounts or lower prices based solely on volume (provided that the same are in accordance with the law).

5. Prohibiting Intel from producing or distributing software or hardware that has the purpose or effect of unreasonably excluding or inhibiting competitive microprocessor or GPU products or complementary products.

6. Prohibiting Intel from pricing its microprocessors so that the incremental price to a customer of microprocessors or GPUs sold in competition with another competitor is below cost when such price includes all rebates, payments, or other price decreases on other products not in competition. Pricing will be presumed to be below cost even if it exceeds Intel's average variable cost but does not contribute to its fixed sunk costs in an appropriate multiple of that average variable cost. Pricing or sale of kit or bundled products will be presumed to be above "cost" if the "kit" or "bundle" includes an x86 product or, if it does, if, after all discounts have attributed to the competitive product(s) in the bundle, the resulting pricing is well above Intel's average variable cost plus a contribution to Intel's fixed sunk costs in an appropriate multiple of that average variable cost.

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7. Requiring that, with respect to those Intel customers that purchased from Intel a software compiler that had or has the design or effect of impairing the actual or apparent performance of microprocessors not manufactured by Intel (“Defective Compiler”), as described in the Complaint:

- a. Intel provide them, at no additional charge, a substitute compiler that is not a Defective Compiler;
- b. Intel compensate them for the cost of recompiling the software they had compiled on the Defective Compiler and of substituting, and distributing to their own customers, the recompiled software for software compiled on a Defective Compiler; and
- c. Intel give public notice and warning, in a manner likely to be communicated to persons that have purchased software compiled on Defective Compilers purchased from Intel, of the possible need to replace that software.

8. Prohibiting Intel from manufacturing or distributing computer software, hardware, or other products that impair the performance, or apparent performance, of non-Intel microprocessors or GPUs.

9. Prohibiting Intel from inducing or coercing others to design, manufacture, or sell products that impair the actual or apparent performance of non-Intel microprocessors GPUs.

10. Prohibiting Intel from making deceptive or misleading statements and omissions concerning anything (including, but not limited to, performance, roadmaps, or plans) related to the manufacturing or sale of any x86 or related product, including CPUs, GPUs, chipsets, compilers, libraries, software.

11. Requiring Intel to correct the deceptive or misleading statements and omissions it has made in the past.

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12. Prohibiting Intel from coercing or influencing benchmarking organizations to adopt benchmarks that are deceptive or misleading.

13. Prohibiting Intel from improperly inducing or coercing customers not to use a competing GPU or graphics chipset.

14. Prohibiting Intel from designing or bundling together its own software or hardware so that they unfairly discriminate between Intel and non-Intel GPUs or graphics chip or related products.

15. Prohibiting Intel from directly or indirectly, expressly or by implication or effect, conditioning any discount, rebate, or other kind of consideration or benefit in connection with an OEM's purchase of Intel microprocessors on the condition that the OEM purchase another Intel product.

16. Prohibiting Intel from charging a higher price, or directly or indirectly conditioning any discount, rebate, or any other kind of consideration or benefit based solely on the inclusion, configuration, or type of software, operating system, or other component(s) used in any product into which an Intel microprocessor is to be incorporated or on the class of customers to whom the OEM's products containing Intel components will be marketed.

17. Requiring Intel to make available technology (including whatever is necessary to interoperate with Intel's CPUs or chipsets) to others, via licensing or other means, upon such terms and conditions as the Commission may order, including but not limited to extensions of terms of current licenses.

18. Prohibiting Intel from including or enforcing terms in its x86 licensing agreements that restrict the ability of licensees to change ownership, to obtain investments or financing, to outsource production of x86 microprocessors, or to otherwise partner with third parties to expand output.

19. Requiring that, for a period of time, Intel provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of assets, including but not limited to

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intellectual property, in the relevant microprocessor markets and complementary software and hardware products.

20. Requiring that Intel, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, in or affecting commerce, shall not make any representation, in any manner, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy or performance of any product unless the representation is not deceptive or misleading and, at the time the representation is made, Intel possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

21. Requiring that for a period of time after the last date of dissemination of any representation covered by any ordered relief in this matter, Intel shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- a. All advertisements and promotional materials containing the representation;
- b. All materials that were relied upon in disseminating the representation;
- c. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- d. All other documents supporting compliance with the Commission's order.

22. Prohibiting Intel from entering into, implementing, continuing, or enforcing a Contract with any Customer that requires the Customer to disclose to Respondent any plans the

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Customer may have to sell, or offer for sale, Computer Products containing a Competing Relevant Product.

23. Prohibiting Intel from suing or threatening to sue its competitors' third-party fabricators.

24. Requiring that Intel's compliance with the order be monitored for the full term of the order at Intel's expense by an independent monitor appointed by the Commission.

25. Requiring that Intel file periodic compliance reports with the Commission.

26. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this sixteenth day of December, 2009.

By the Commission, Commissioner Kovacic recused.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging the Respondent Intel Corporation with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the Respondent having been served with a copy of that complaint, together with a notice of contemplated relief and having filed its answer denying said charges; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent Order, an admission by Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 3.25(f) of its Rules, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Intel Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Mission College Boulevard, Santa Clara, California 95054.

Decision and Order

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

I.

IT IS ORDERED that for the purposes of this Order, the following definitions shall apply:

THE PARTIES

- A. “Respondent” or “Intel” means Intel Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Intel Corporation; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “AMD Patent Agreement” means the Patent Cross License Agreement between Advanced Micro Devices, Inc. and Intel Corporation dated November 11, 2009.
- D. “Benefit” means any price or non-price benefit including without limitation price discounts, marketing funds, supply, and marketing or engineering support; *provided, however*, that initiating or forbearance from initiating litigation (including without limitation any activity related to lawfully enforcing its intellectual property rights) shall not be a Benefit.
- E. “Clear(ly) and Prominent(ly)” means that the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it. All disclosures, including audio and video disclosures,

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shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication containing the disclosure.

- F. “Compatible x86 Microprocessor” means a Microprocessor (i) not designed, manufactured, promoted and sold by Respondent, (ii) that is substantially binary compatible with an Intel x86 Microprocessor without using non-native execution such as emulation, (iii) to perform substantially the same functions as an Intel x86 Microprocessor in response to substantially the same input, (iv) that is designed, manufactured, promoted and sold by any entity other than Respondent (v) for use in, and that is used in, any high-volume Computer Product.
- G. “Compiler” means a computer program that converts the instructions written in a high level computer programming language into assembly language or machine code that can later be executed directly by a Microprocessor, associated libraries (whether for use with Respondent’s or any other compiler, e.g., performance libraries such as Intel Math Kernel Library, Intel Threaded Building Blocks, and Intel Integrated Performance Primitives), and associated development tools.
- H. “Compiler Customer” means any customer that has purchased from Respondent any version of any Intel Compiler or associated libraries listed in Exhibit 1 since January 1, 2003, as reflected in Respondent’s business records.
- I. “Computer Product” means any desktop, laptop, netbook, notebook, workstation or server computer; *provided, however*, that no Non-PC Product shall be a Computer Product. For clarity, any product that includes a screen with a diagonal size of seven (7) inches or greater (i) shall not automatically be considered a Computer Product and (ii) shall not be

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considered a Computer Product unless it meets this definition.

- J. “Computer Product Chipset” means one or more integrated circuits in a Computer Product that (i) alone or together electrically connect(s) directly with a Relevant Microprocessor Product to connect and allow that Relevant Microprocessor Product to exchange binary information with other Microprocessors, input/output devices, networks, or system memory (also known as main memory or DRAM); and (ii) provide(s) the primary interface between the Computer Product’s Relevant Microprocessor Product and storage (including without limitation a hard disk drive) and input devices (including without limitation a keyboard) using a non-proprietary general purpose computer system bus.
- K. “Consent Order Cost” means Respondent’s Product Cost of Sales (“PCOS”), as that term is used by Respondent in the ordinary course of business as of August 3, 2010, minus depreciation (as customarily calculated by Respondent in the ordinary course of its business). “Consent Order Cost” shall be computed as a three-quarter rolling average, using the quarter in which assembly and testing of the shipped units of the Relevant Product is completed and the two immediately following quarters. Nothing herein shall be interpreted to mean that any particular component of Consent Order Cost does or does not vary with output over any particular range of production.
- L. “Constrained Supply” means the quantity demanded exceeds supply for one or more of Respondent’s Relevant Products, presently or as forecasted by Respondent.
- M. “Customer” means an OEM, ODM or End User Customer.
- N. “Designated Intel Competitor” includes only Advanced Micro Devices, Inc. (“AMD”), Nvidia

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Corporation (“Nvidia”) and Via Technologies Inc (“Via”), or their permitted successors and assignees under the Designated Patent Agreements, each of which is a Designated Intel Competitor.

- O. “Designated Patent Agreements” means the AMD Patent Agreement, the Nvidia Patent Agreements and the Via Patent Agreements.
- P. “Designated Intel Roadmap Competitor” means Nvidia Corporation or its permitted successors and assignees under the Designated Patent Agreements.
- Q. “End User” means a person that purchases Computer Products from an OEM and is not an End User Customer or OEM.
- R. “End User Customer” means a person that purchases Relevant Products from Respondent or a Designated Intel Competitor for use in manufacturing Computer Products for its own use and that derives less than five (5) percent of its revenue from the sale of Computer Products to third parties. Any person that derives five (5) percent or more of its revenue from the sale of Computer Products to third parties shall be deemed an OEM and not an End User Customer for purposes of this Order.
- S. “Extraordinary Assistance” means financial and/or technological support of a value of more than \$50 million that (i) is not made generally available to other Customers and (ii) is intended to enable a Customer to enter into a new (for the Customer) segment or channel or to introduce a new (for the Customer) product that includes new functionality the Customer is not offering in any other product into an existing market segment or channel. *Provided, however*, that a product that merely enhances or improves existing functionality shall not be a new product.
- T. “Intel x86 Microprocessor” means a Microprocessor designed, manufactured, promoted and sold by

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Respondent that is substantially binary compatible with Respondent's x86 instruction set used in Respondent's Core 2 Microprocessor without using non-native execution such as emulation.

- U. "Mainstream Microprocessor" means any Intel x86 Microprocessor designed, manufactured, promoted and sold by Respondent for use in, and that is used in, any high-volume Computer Product, including any such Intel x86 Microprocessor sold under the Xeon, Core, Pentium, Celeron, Atom and any of their successor brands.
- V. "Mainstream Microprocessor Platform" means each combination of a Mainstream Microprocessor and Computer Product Chipset promoted by Respondent for use together in Computer Products.
- W. "Market Segment Share" means the proportion of a Customer's requirements for a Relevant Product purchased from a particular vendor.
- X. "Microprocessor" means (i) an integrated circuit (ii) that is capable of processing digital data, (iii) that act(s) as the externally generally programmable central processing unit in a Computer Product, and (iv) that performs arithmetic, logic and control flow operations.
- Y. "Non-PC Product" means any product, other than a Computer Product, including without limitation any smart phone, cell phone, tablet, Pocket PC or other consumer electronic devices. For clarity, any product that includes a screen with a diagonal size of less than seven (7) inches is a Non-PC Product regardless of whether it meets this definition of NonPC Product or not.
- Z. "Nvidia Patent Agreements" means the Patent Cross License Agreement between Nvidia Corporation and Intel Corporation dated November 18, 2004, and the Chipset License Agreement Between Nvidia

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Corporation and Intel Corporation Dated November 18, 2004.

- AA. “Original Design Manufacturer” or “ODM” means a customer of Respondent whose primary business is the design and/or manufacture of a Computer Product which is specified and eventually branded by another firm for sale.
- BB. “Original Equipment Manufacturer” or “OEM” means a customer of Respondent that manufactures and sells Computer Products and who is not an End User Customer.
- CC. “Product Roadmap” means Respondent’s formal plan of record identifying Respondent’s strategic future product plans for Mainstream Microprocessors.
- DD. “Required Interface Roadmap” means a Respondent document that identifies the internal development name of future Mainstream Microprocessors under development by Respondent and, for each, the calendar quarter within which such product is then-planned to be commercially introduced and the then-planned version of the Standard PCI Express Bus interface.
- EE. “Relevant GPU” means one or more integrated circuit(s) that: (i) is the primary graphics processing unit in a Computer Product; (ii) is capable of performing real-time graphics rendering tasks separate from that Computer Product’s Relevant Microprocessor Product; (iii) does not provide the primary interface between the Computer System’s Relevant Microprocessor Product and storage (including without limitation a hard disk drive); and (iv) does not provide the primary interface between the Computer System’s Relevant Microprocessor Product and input devices (including without limitation a keyboard). In no case shall any one or more integrated circuits that meet this definition of Relevant GPU be

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considered a Microprocessor or Computer Product Chipset under this Order.

- FF. “Relevant Microprocessor Product” means (a) any Mainstream Microprocessor and (b) any Compatible x86 Microprocessor.
- GG. “Relevant Products” means (i) Relevant Microprocessor Products and (ii) Relevant GPUs.
- HH. “Standard PCI Bus” means a chip-to-chip interconnect designed to comply with a PCI Express (PCIe) Base Specification published by the PCI-SIG.
- II. “Via Patent Agreements” means the Litigation Settlement Agreement Between Via Technologies Inc. and Intel Corporation, dated April 7, 2003, including the Microprocessor Addendum and Patent Cross License Addendum to that Agreement, and any amendments thereto.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall, within thirty (30) days after the date this Order becomes final, for a period of not less than six (6) years, unless pursuant to rule 2.51(c) or 3.72(b) the Commission modifies this Order to reduce the time period in any respect, include in each of its Mainstream Microprocessor Platforms an interface (“Required Interface”) to a Standard PCI Bus.
- B. Respondent may determine the version or specification of the Standard PCI Express Bus interface (e.g., PCIe Base Specification 2.1, PCIe Base Specification 3.0) that will be included in each of its Mainstream Microprocessor Platforms subject to this provision.
- C. Respondent shall not design any Required Interface to intentionally limit the performance or operation of any Relevant GPU in a manner that would render the

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Required Interface non-compliant with the applicable PCIe Base Specification.

- D. The presence of “bugs” or errata in any product that render an interface non-compliant with the relevant PCI Express (PCIe) Base Specification shall not except such an interface from the definition of Required Interface.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall, within thirty (30) days after the date this Order becomes final, offer to each Designated Intel Competitor to amend its respective Designated Intel Competitor Patent Agreement(s) in a writing executed by both parties to provide that:
1. the Designated Intel Competitor may, without breaching that agreement, disclose, to any customer of the Designated Intel Competitor or any semiconductor foundry with which the Designated Intel Competitor is negotiating regarding a foundry relationship, the Licensed Rights Portions (as defined below) of that Competitor’s Designated Patent Agreement(s), so long as the Customer or foundry agrees in writing to keep those terms confidential; and,
 2. upon written request from the Designated Intel Competitor, Respondent will confirm to any semiconductor foundry with which the Designated Intel Competitor is negotiating regarding a foundry relationship or customer of that Designated Intel Competitor the content of the Licensed Rights Portions of its respective Designated Patent Agreement(s), so long as the Designated Intel Competitor agrees that Respondent may do so without breaching its respective Designated Intel Competitor Patent Agreement(s) and so long as the

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Customer or foundry agrees in writing with Respondent to keep such content confidential.

3. As used in this Section, “Licensed Rights Portions” shall mean the following portions of the Designated Patent Agreements:
 - a. the AMD Patent Agreement, as filed by AMD with the U.S. Securities and Exchange Commission on November 17, 2009;
 - b. the following provisions of the Via Patent Agreements: Sections 2.1, 2.2, 2.3, 2.4 and 4 of the Patent Cross License Addendum, as well as any defined terms referred to, directly or indirectly, in such sections; and
 - c. the following provisions of the Nvidia Patent Agreements: Sections 3.1, 3.2, 3.3, 3.4, 4.1 and 4.2 of the Patent Cross License and Sections 3.1, 3.2, 5.1, 5.2 and 5.3 of the Chipset License Agreement, as well as any defined terms referred to, directly or indirectly, in such sections.
- B. In the event the Designated Intel Competitor undergoes a “change of control” (as defined in the relevant Designated Intel Competitor Patent Agreement) that is publicly announced or a Designated Intel Competitor otherwise notifies Respondent that it has undergone a change of control within five (5) days of such change of control:
 1. for a period of thirty (30) days from the date of the change of control, Respondent shall not initiate patent litigation against the party acquiring the Designated Intel Competitor (“Acquiring Entity”) with respect to products previously manufactured by or acquired from the Designated Intel Competitor, unless the Designated Intel Competitor and/or the

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Acquiring Entity or another entity controlled by one of them has first filed any suit against Respondent;

2. within ten (10) days from the date of the change of control, Respondent shall offer to enter into a written, reciprocal Standstill Agreement with the Acquiring Entity, such Standstill Agreement to comprise the following terms:
 - a. Respondent and the Acquiring Entity shall enter into good faith negotiations regarding the future patent relationship, if any, between them;
 - b. to facilitate those good faith negotiations, for a period of one year from the change of control, neither Respondent nor the Acquiring Entity (or any Affiliate of either of them) shall initiate patent litigation against the other or any Affiliate thereof;
 - c. the Standstill Agreement shall not act as a license or provide any patent or other intellectual property rights or defenses to any person or party, either expressly or by implication, estoppel, exhaustion, license, waiver, laches or otherwise; and
 - d. Respondent shall afford the Acquiring Entity not less than ten (10) days from receipt of Respondent's written offer to accept in writing the offered Standstill Agreement.
 - e. For purposes of this Section, "Affiliate" means any entity that is directly or indirectly controlled by, under common control with, or that controls the subject entity.

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- C. Respondent shall, within thirty (30) days after the date this Order becomes final, offer to Via to sign written amendments to the Via Patent Agreements to:
1. extend the “Capture Period” in Sections 1.4 of the Litigation Settlement Agreement between Via Technologies, Inc. and Intel Corporation dated April 7, 2003, 1.3 of the Via Patent Cross License Addendum of the same date, and 1.1 of the Via Microprocessor Addendum of the same date, to provide that the Capture Periods end on the fifteenth yearly anniversary of the Effective Date of those agreements;
 2. confirm that under the Via Patent Agreements, Via is permitted to make, use, sell or import Via Microprocessors that are compatible with the x86 instruction set but not pin compatible or bus compatible with Intel Microprocessors, including such Via Microprocessors with graphics technology designed by and supplied to Via by a third party, so long as Via does not exceed the scope of the licenses expressly granted under or otherwise breach the terms of those Agreements; and
 3. provide that Respondent shall, upon the request of Via, publicly state that Via is permitted to make, use, sell or import Via microprocessors that are compatible with the x86 instruction set but not pin compatible or bus compatible with Intel microprocessors, including such Via microprocessors with graphics technology designed by and supplied to Via by a third party, so long as Via does not exceed the scope of the licenses expressly granted under or otherwise breach the terms of those Agreements.
 4. Respondent’s written offer shall state that Via has thirty (30) days from receipt of Respondent’s written offer to accept in writing any or all of the offered amendments. The amendments shall not

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be conditioned upon any other change to the Via Patent Agreements, including, without limitation, changes to provisions concerning Via's license rights concerning Microprocessors that are not Compatible x86 Microprocessors (including any intellectual property licensed from ARM Holdings) or Via's "have made" rights.

- D. Respondent shall not breach any term of any Designated Intel Competitor Patent Agreement that provides "have made" rights to the Designated Intel Competitor.
- E. Respondent shall comply with the requirements to offer the Designated Patent Agreement amendments described herein by the listed deadlines. *Provided, however,* nothing in this Order shall confer, by implication, estoppel, exhaustion, license, waiver, laches, or otherwise, to any person or entity (other than the Commission), any license or other right under any Intel patent, copyright, mask works, trade secret, trademark or other intellectual property right.

IV.

IT IS FURTHER ORDERED that in Respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase or sale of Relevant Products:

- A. Respondent shall not invite, enter into, implement, continue, enforce, or attempt to enter into, implement, continue or enforce, any condition, policy, practice, agreement, contract, understanding, or any other requirement that:
 - 1. conditions any Benefit to a Customer or End User on that person's agreement to use or purchase Relevant Products or Computer Product Chipsets exclusively from Respondent in any geography,

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market segment, product segment, or distribution channel;

2. conditions any Benefit to a Customer or End User on that person's agreement to limit, delay, or refuse to purchase (a) Relevant Products or Computer Product Chipsets from a supplier other than Intel or (b) Computer Products containing a Relevant Product or a Computer Product Chipset from a supplier other than Respondent;
3. conditions any Benefit to a Customer or End User based on whether that person or entity purchases, sells or launches products incorporating a Relevant Product or a Computer Product Chipset from a supplier other than Respondent;
4. denies any Benefit to a Customer or End User because of that person's design, manufacture, distribution, or promotion of products incorporating a Relevant Product or a Computer Product Chipset from a supplier other than Respondent;
5. conditions any Benefit to a Customer based on the Market Segment Share of a Relevant Product or a Computer Product Chipset that a Customer awards to Respondent or to any competitor;
6. conditions any Benefit to a Customer or End User, either formally or informally, directly or indirectly, upon a Customer's purchase or sale of (a) Mainstream Microprocessors and (b) Computer Product Chipsets in a fixed proportion where, if the entire value of the Benefit were attributed to the Mainstream Microprocessors or Computer Product Chipsets included in the bundle, the selling price of those Mainstream Microprocessors or Computer Product Chipsets, as the case may be, would be below Respondent's Consent Order Cost; or

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7. provides to a Customer or End User a discount as a flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of Respondent's Relevant Products or Computer Product Chipsets reaching a specified threshold (in units, revenues, or any other measure) or otherwise reducing the price of one unit of Respondent's Relevant Products because of the purchase or sale of an additional unit of that product; *provided, however*, that Respondent may offer a discount or other items of pecuniary value based upon sales or purchases beyond a specified threshold. By way of example, Respondent may offer or provide a discount of X% on all sales in excess of Y units, but it may not offer or provide a discount of X% on all units if sales exceed Y units.
- B. *Provided, however*, that nothing in this Order shall restrict the ability of Respondent to engage in any of the following activities:
1. conditioning any Benefit not otherwise prohibited by this Order upon the agreement of a Customer or End User to utilize the Benefit as the Customer or End User agreed when seeking or agreeing to receive the Benefit (e.g., for buying or promoting specified Relevant Products, or manufacturing, selling or promoting Computer Products with agreed-upon specifications);
 2. agreeing with any Customer that the customer will not:
 - a. use the same model number for Computer Products containing a Relevant Product or Computer Product Chipset supplied by Respondent in conjunction with Computer Products containing a Relevant Product or Computer Product Chipset not supplied by Respondent;

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- b. falsely designate or label a Computer Product as containing a Relevant Product or Computer Product Chipset sold by Respondent; or
 - c. communicate in a false or deceptive manner, directly or by implication, that a Computer Product contains a Relevant Product or Computer Product Chipset supplied by Respondent.
3. offering a Benefit, including a price discount, reasonably similar to one Respondent reasonably believes is being offered by a rival supplier; *provided, however*, that in such circumstance:
- a. the Benefit shall be applicable only to the quantity of Relevant Products or Computer Product Chipsets that Respondent reasonably believes that the rival supplier has offered to supply;
 - b. Respondent may not condition its Benefit upon receipt of exclusivity or a minimum Market Segment Share, regardless of whether or not the rival supplier has so conditioned its offer;
 - c. Respondent may not offer the Benefit for purchases over the course of more than one year; and
 - d. Respondent may condition its bid upon the purchase of a minimum number of units under the terms of its bid.
4. winning all of a Customer's business, so long as Respondent has not bid for more business than a Customer has asked to be bid and so long as Respondent does not engage in conduct otherwise prohibited by this Order to win the business;

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5. offering a price discount or other Benefit that otherwise complies with the requirements of this Order to an End User Customer;
6. offering price discounts to an End User if Respondent structures its offer of a discount based on the volume of Computer Products containing a Relevant Product or Computer Product Chipset manufactured by Respondent actually purchased in a given bid (e.g., \$X per-unit for the first x units; \$Y per-unit for the next y units; etc.), provided the terms are in writing. Such discounts must be based upon the End User's purchases pursuant to a single bid to acquire Computer Products and cannot be contingent on future purchases;
7. when a Relevant Product or Computer Product Chipset is in Constrained Supply, making product allocation decisions for Customers that accounted for two (2) percent or more of Respondent's sales of Relevant Product in the preceding year, provided that, in making such decisions, Respondent shall not retaliate or otherwise punish any Customer because of the extent or existence of any Customer's relationship with an Intel competitor, including without limitation whether the Customer purchases Relevant Products or Computer Product Chipsets from an Intel competitor;
8. agreeing with a Customer that the Customer will not purchase Relevant Products or Computer Product Chipsets from an Intel competitor where:
 - a. Respondent has provided Extraordinary Assistance to the Customer;
 - b. the period of such exclusivity is no longer than necessary for Respondent to achieve a return on invested capital (as that term is used and calculated by Respondent in the ordinary course of business) comparable to the return on

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invested capital of Respondent's other comparable investments and to ensure that intellectual property made available by Respondent to the Customer in connection with the provision of Extraordinary Assistance is not used in connection with Relevant Products or Computer Product Chipsets purchased by the Customer from an Intel competitor except as otherwise authorized or licensed by Respondent, but in no event longer than thirty months (or such longer time period as the Commission may approve) from the date on which the Customer's product reflecting the Extraordinary Assistance is first sold commercially;

- c. the exclusivity is limited to the new segment or channel or product;
 - d. any agreement regarding such assistance, investment and exclusivity is in writing, executed by both Respondent and the Customer, and retained by Respondent for at least ten (10) years; and
 - e. Respondent does not (i) enter into more than ten (10) such agreements over the term of this Order (or such additional agreements as the Commission may approve); and (ii) enter into more than two (2) such agreements in any twelve month period (or such additional agreements as the Commission may approve).
9. agreeing with a Customer that the Customer will maintain the confidentiality of Respondent's confidential business information disclosed to the Customer and that the Customer will use Respondent's confidential business information only in connection with Computer Products incorporating Relevant Products manufactured by Respondent; and

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10. providing to a Customer or End User a discount as a flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of fewer than eleven (11) units of any Relevant Product (such as "buy ten, get one free"). This provision does not apply to sales of greater than 11 units to any one customer (for example, Intel may not use this provision to offer 10,000 free units to an OEM in return for a purchase of 100,000 units).

V.**IT IS FURTHER ORDERED** that

- A. Respondent shall not make any engineering or design change to a Relevant Product if that change (1) degrades the performance of a Relevant Product sold by a competitor of Respondent and (2) does not provide an actual benefit to the Relevant Product sold by Respondent, including without limitation any improvement in performance, operation, cost, manufacturability, reliability, compatibility, or ability to operate or enhance the operation of another product; *provided, however*, that any degradation of the performance of a competing product shall not itself be deemed to be a benefit to the Relevant Product sold by Respondent. Respondent shall have the burden of demonstrating that any engineering or design change at issue complies with Section V. of this Order.
- B. *Provided, however*, that the fact that the degradation of performance of a Relevant Product sold by a competitor of Respondent arises from a "bug" or other inadvertent product defect in and of itself shall not constitute a violation of Section V.A.(1) Respondent shall have the burden of demonstrating that any such degradation of performance was inadvertent.

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VI.**IT IS FURTHER ORDERED** that:

- A. Respondent shall use reasonable efforts to ensure that any Product Roadmap that it discloses to any person will be, at the time it is disclosed, accurate and not misleading. When Respondent discloses a Product Roadmap to a third party, Respondent shall use reasonable efforts to respond accurately to any inquiries regarding changes in that Product Roadmap received from that third party during the one (1) year following such disclosure.
- B. No later than the first (1st), second (2nd), third (3rd) and fourth (4th) annual anniversaries of the date on which this Order becomes final, Respondent shall provide to each Designated Intel Roadmap Competitor a Required Interface Roadmap that will include the future Mainstream Microprocessor Platforms with a Required Interface that Respondent then-plans to introduce commercially before the fifth (5th) annual anniversary of this Order:
 - 1. Respondent shall use reasonable efforts to ensure that the Required Interface Roadmap provided is, at the time it is provided, accurate and not misleading; and
 - 2. Respondent shall use reasonable efforts to respond accurately to any reasonable number of inquiries (no more than one per calendar quarter) received on or before the fourth annual anniversary of this Order from a Designated Intel Roadmap Competitor regarding any material changes to the information provided on a Required Interface Roadmap previously provided to that Designated Intel Roadmap Competitor in compliance with this Order.
 - 3. *Provided, however*, that Respondent may condition the receipt of any Required Interface Roadmap

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upon (i) the recipient's execution of a written non-disclosure agreement to maintain the confidentiality of the Required Interface Roadmap and/or (ii) the receipt of a certification from the Designated Intel Roadmap Competitor stating that such Competitor is developing a Relevant GPU that is intended to connect, and would be capable of connecting, to a Mainstream Microprocessor via a Required Interface.

- C. Except for the Required Interface Roadmaps required by this Order, Respondent may decline to provide Customers and other entities with Product Roadmaps, updates to Product Roadmaps, and/or pre-release engineering product samples based on any lawful business considerations not otherwise prohibited by this Order, including the customer's or other entity's ability and desire to provide marketing, design, engineering, or other insight or assistance concerning such Product Roadmap information and/or product samples.

VII.

IT IS FURTHER ORDERED that in Respondent's activities, directly or indirectly, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase, sale, application engineering, or customer support of Compilers:

- A. Within ninety (90) days of the date on which this Order becomes effective, Respondent shall Clearly and Prominently inform its Compiler Customers on its web site, documentation, and compiler presentations that relate to compiler performance or optimizations that:
1. Intel's Compiler may or may not optimize to the same degree for non-Intel microprocessors for optimizations that are not unique to Intel microprocessors. These optimizations include SSE2, SSE3, and SSSE3 instruction sets and other

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optimizations. Intel does not guarantee the availability, functionality, or effectiveness of any optimization on microprocessors not manufactured by Intel. Microprocessor-dependent optimizations in this product are intended for use with Intel microprocessors.

- B. Respondent shall not misrepresent, or assist others in misrepresenting, expressly or by implication, the level of optimizations available in its Compilers for Compatible x86 Microprocessor.
- C. By the time of the next Compiler release, including update releases, but no later than six (6) months from the date on which this Order becomes final and on an ongoing basis, Respondent shall Clearly and Prominently provide the following disclosures in its product documentation (whether in paper form or on an internet site), marketing literature, and promotional literature, where optimizations are discussed, including but not limited to any descriptions of compiler optimization options such as those in user manual tables or in descriptions of library dispatching mechanisms.
 - 1. If an Intel Compiler optimizes for any Intel x86 Microprocessor for instruction sets that are common to Compatible x86 Microprocessors, such as SSE, SSE2, SSE3, and SSSE3 instruction sets, but does not do so equally for Compatible x86 Microprocessors, Intel must Clearly and Prominently disclose that fact, including identifying the specific instruction sets implicated.
 - 2. If other optimizations which could run on both Intel x86 Microprocessor and Compatible x86 Microprocessors are reserved for Intel x86 Microprocessors, Respondent must Clearly and Prominently disclose that optimizations not specific to Intel microarchitecture are reserved for Intel x86 Microprocessors.

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- D. Within ninety (90) days of the date on which this Order becomes final, Respondent shall implement, and shall notify its Compiler Customers that it has implemented, a program to reimburse Compiler Customers who (i) have detrimentally relied on Intel representations as to Compiler availability, functionality or effectiveness when using an Intel Compiler to compile code to be executed on a Compatible x86 Microprocessor and (ii) decide to recompile using a Compiler not developed or sold by Respondent (the “Intel Compiler Reimbursement Program”). Such a notification must include a link to or a copy of this Order and specifically reference this Section VII of the Order in the notification. The features of the Intel Compiler Reimbursement Program shall include the following:
1. Reimbursement shall be made based upon documented costs of such recompilation (including without limitation testing, distribution, or direct communications with customers) provided by the customer;
 2. Respondent’s total obligation to provide reimbursements under this section shall not exceed ten (10) million dollars;
 3. Respondent shall hold all applications to the Compiler Reimbursement Fund for six (6) months after Respondent’s notification to customers of the Compiler Reimbursement Program. If requests for reimbursement that comply with the requirements of Section VII.D of the Order received in the first six (6) months after Respondent’s notification to customers of the Compiler Reimbursement Program exceed ten (10) million dollars, customers shall be reimbursed from the Compiler Reimbursement Program on a pro rata basis.
 4. All requests for reimbursement from the Compiler Reimbursement Fund that comply with Section VII.D of the Order shall otherwise be reimbursed on

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a first-come first-served basis until the fund is exhausted;

5. Respondent may condition reimbursement upon receipt of a declaration from the customer asserting that it has relied upon Respondent's representations, describing the representations upon which the customer relied, and attesting to the accuracy of and basis for the recompilation reimbursement amount requested;
 6. Respondent may condition reimbursement upon a release of claims by the customer for any damages or other relief relating to Respondent's representations or to the recompilation; and
 7. Respondent may terminate the program once ten (10) million dollars has been reimbursed to customers under the program or two (2) years after announcement of the program, whichever comes first.
- E. Respondent shall not represent, in any manner, expressly or by implication, that its Compiler provides the same or superior performance than any other competing Compiler unless the representation is true and non-misleading, and, at the time of making such representation, Respondent possesses and relies upon competent and reliable evidence sufficient to substantiate that the representation is true. For purposes of this Part, competent and reliable evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

VIII.

IT IS FURTHER ORDERED that in Respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the marketing and promotion of Relevant Microprocessor Products (including

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promotion on Respondent's website, in advertisements or in other promotional material):

- A. Whenever Respondent (i) makes a claim comparing the performance of a Mainstream Microprocessor and a Compatible x86 Microprocessor, or (ii) makes any claim that references the performance of a Mainstream Microprocessor on any benchmark, Respondent shall Clearly and Prominently make the following disclosure:

Software and workloads used in performance tests may have been optimized for performance only on Intel microprocessors. Performance tests, such as SYSmark and MobileMark, are measured using specific computer systems, components, software, operations and functions. Any change to any of those factors may cause the results to vary. You should consult other information and performance tests to assist you in fully evaluating your contemplated purchase, including the performance of that product when combined with other products.

- B. *Provided, however,* that where the form of the promotion does not reasonably allow inclusion of this language (such as in an audiovisual advertisement or on a retail tear sheet that is too small to allow inclusion of this language in a font size that would be readable), Respondent may instead Clearly and Prominently make the following disclosure: "For more complete information about performance and benchmark results, visit www.intel.com/benchmarks," which website shall contain the disclosure set forth in paragraph VIII.A. above.
- C. *Provided further, however,* that with respect to Respondent's website at www.intel.com, Respondent shall be deemed to have satisfied the requirements of this paragraph VIII if:
1. Respondent Clearly and Prominently displays the disclosure set forth in paragraph VIII.A. on

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www.intel.com/benchmarks and http://www.intel.com/sites/sitewide/en_US/termsfuse.htm or successor pages to these pages in future versions of Intel's website; and

2. Respondent Clearly and Prominently displays the disclosure set forth in paragraph VIII.B on <http://www.intel.com/performance/>, http://www.intel.com/performance/resources/benchmark_limitations.htm, http://www.intel.com/performance/resources/perf_doc.htm, and <http://www.intel.com/technology/product/index.htm>, or successor pages to these pages in future versions of Intel's website.

IX.**IT IS FURTHER ORDERED** that:

- A. At any time after this Order becomes final, and for the limited purpose of assisting the Commission in monitoring and enforcing Respondent's compliance with Order Paragraphs II., IV.A.6., IV.A.7, IV.B.6-8, V., VI., VII., and VIII., including the definitions of all included terms (hereafter "Technical Consultant Provisions"), the Commission may appoint one or more Technical Consultants, subject to the consent of Respondent whose consent shall not be unreasonably withheld. The Commission shall submit the name, background, expertise and fee structure of any proposed Technical Consultants to Respondent and shall identify the Technical Consultant Provisions for which the Technical Consultants' services are sought by the Commission. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Technical Consultants within ten (10) days after notice by the Commission's staff, Respondents shall be deemed to have consented to the selection of the proposed Technical Consultant.
- B. Respondent shall, not later than ten (10) days after appointment, execute an agreement with any Technical

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Consultant that, subject to the approval of the Commission, and consistent with this Paragraph, provides, among other things, that the Technical Consultant shall act in a fiduciary capacity for the benefit of the Commission. Any Technical Consultants appointed by the Commission shall serve without bond or surety at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set and as provided in the agreement. If the Commission determines that a Technical Consultant has ceased to act or failed to perform its obligations diligently, the Commission may appoint a substitute Technical Consultant in the same manner as provided in this Paragraph.

1. *Provided, however,* that, pursuant to any agreements with any Technical Consultants, Respondent shall not be required to pay, for the duration of this Order, a total of more than two (2) million dollars to all Technical Consultants.
 2. *Provided further, however,* and for the avoidance of doubt, that Respondent's own expenses in responding to any requests for information, documents, and access, as elsewhere required by this Order, shall not be considered to be payments to Technical Consultants.
- C. Respondent shall expeditiously provide, subject to any demonstrated legally recognized privilege, any information requested by the Commission's staff. If requested by the Commission's staff, Respondent shall provide, subject to any demonstrated legally recognized privilege, and as otherwise permitted by law, any Technical Consultant complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information related to Respondent's compliance with the Technical Consultant Provisions. Any reports, information, or documents received by the Commission related to the Technical Consultant

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Provisions may be shared with appointed Technical Consultants at the Commission's discretion.

- D. Respondent may require any Technical Consultants and any of the Technical Consultant's consultants, engineers, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement and to certify that there are no conflicts of interests based on past or present representations. Provided however, such agreement shall not restrict the Technical Consultant from providing any information to the Commission. Technical Consultants will in all other respects be subject to the same ethical obligations as any other Commission consultant.
- E. The Commission may, among other things, require each Technical Consultant, and any consultants, engineers, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Technical Consultant's duties.
- F. *Provided, however*, that nothing in this Paragraph shall prevent the Commission from retaining the services of any Technical Consultant, for any purpose, pursuant to any separate contract or agreement between the Commission and such Technical Consultant.

X.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days of the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order.
- B. One (1) year after the date this Order becomes final, and annually for the following six (6) years on the

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anniversary of the date this Order becomes final, as well as at other such times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Among other information that may be required, Respondent shall include in all reports all communications between Respondent and any Designated Intel Competitor that are received during the reporting period regarding compliance with provisions of this Order.

XI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that Respondent shall retain, for a period of five (5) years, all written contracts with any customer for the purchase and sale of Intel Relevant Products.

Decision and Order

XIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent, including without limitation assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XIV.

IT IS FURTHER ORDERED that unless indicated otherwise, the provisions of this Order shall terminate ten (10) years from the date on which this Order becomes final.

By the Commission.

Decision and Order

EXHIBIT 1**Intel Compilers and Associated Libraries**

Intel Fortran Compiler for Linux

Intel Fortran Compiler for Windows

Intel C++ Compiler for Linux

Intel C++ Compiler for Windows

Intel C++ Compiler for Mac OS X

Intel® Compiler Suite Professional Edition for Windows

Intel® Compiler Suite Professional Edition for Linux

Intel® C++ Compiler Professional Edition for Windows

Intel® Visual Fortran Compiler Professional Edition for Windows

Intel® Visual Fortran Compiler Professional Edition for Windows with IMSL

Intel® C++ Compiler Professional Edition for Linux

Intel® Fortran Compiler Professional Edition for Linux

Intel® C++ Compiler Professional Edition for Mac OS X

Intel® Fortran Compiler Professional Edition for Mac OS X

Intel® C++ Compiler Professional Edition for QNX Neutrino RTOS

Intel® Application Software Development Tool Suite for Intel Atom™ Processor

Intel® Embedded Software Development Tool Suite for Intel Atom™ Processor

Decision and Order

EXHIBIT 1

Intel Parallel Studio

Intel Parallel Composer

Intel Cluster Toolkit Compiler Edition for Linux

Intel Cluster Toolkit Compiler Edition for Windows

Intel runtime libraries

Intel® Integrated Performance Primitives (Intel® IPP) for Windows

Intel® Integrated Performance Primitives (Intel IPP) for Linux

Intel® Math Kernel Library (Intel® MKL) for Windows

Intel® Math Kernel Library (Intel MKL) for Linux

Intel® Threading Building Blocks (Intel® TBB) for Windows

Intel® Threading Building Blocks (Intel TBB) for Linux

Intel® Threading Building Blocks (Intel TBB) for Mac OS X

Intel Math Libraries

Intel MPI Library for Linux

Intel MPI Library for Windows

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission” or “FTC”) accepted for public comment an Agreement Containing Consent Order (“Proposed Consent Order”) with Intel Corporation (“Intel”) to resolve an Administrative Complaint issued by the Commission on December 16, 2009.¹ The Complaint alleged that Intel unlawfully maintained its monopoly in the relevant CPU markets, and sought to acquire a second monopoly in the relevant graphics markets, using a variety of unfair methods of competition. Consumers were harmed by Intel’s conduct, which resulted in higher prices, less innovation, and less consumer choice in the relevant markets. Consumers were also harmed by Intel’s deceptive disclosures related to its compilers, which violated both competition and consumer protection principles. The Proposed Consent Order will bring immediate relief in the relevant markets and puts Intel under Commission Order.

As described in detail below, the Proposed Consent Order has two fundamental goals. First, it seeks to undo the effects of Intel’s past restraints on competition by enhancing the ability of AMD, NVIDIA, Via, and others to compete effectively with Intel. To that end, the Proposed Consent Order seeks: 1) to make it easier for AMD, NVIDIA, and Via to use third-party foundries to manufacture products (to enable them to better match Intel’s manufacturing advantages) (Section III.A.); 2) to give AMD, NVIDIA, and Via flexibility to secure modifications of change of control provisions in their Licensing Agreements with Intel (Section III.B); 3) to extend Via’s intellectual property license (Section III.C); and 4) to provide assurances to manufacturers of complementary and peripheral products that they will be able to

¹ The Complaint was brought under Section 5 of the Federal Trade Commission Act, which “was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as ‘unfair methods of competition’ existing violations” of those acts and practices. *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)); see also *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986). In addition, the Commission has the jurisdiction under Section 5 to challenge “unfair or deceptive acts or practices in or affecting commerce . . .”

Analysis to Aid Public Comment

connect their devices to Intel's CPUs (Section II). These provisions compel Intel to make certain offers; they do not compel a third party to accept them. The goal is to require Intel to open the door to renewed competition, not to force a third party to take any particular action.

Second, the Proposed Consent Order is designed to protect the ability of customers and existing and future Intel competitors to engage in mutually beneficial trade, while prohibiting Intel from using certain practices to deter or thwart such trade. The Proposed Consent Order therefore prohibits Intel from engaging in: 1) certain pricing practices that could allow Intel to exclude competitors while maintaining high prices to consumers (Section IV.A.); 2) predatory design that disadvantages competing products without providing a performance benefit to the Intel product (Section V); and 3) deception related to its product road maps, its compilers, and product benchmarking (Sections VI, VII, and VIII).

The Proposed Consent Order is for settlement purposes only and is tailored to remedy the effects of Intel's specific conduct in the market context in which that conduct took place. The purpose of the Commission's Order is not punitive but rather remedial.² Intel's adherence to the specific provisions will not insulate it from future Commission scrutiny or enforcement action if its conduct otherwise violates the antitrust laws. That is, the Proposed Consent Order does not operate as a safe harbor for Intel. The Commission can not only challenge (and seek civil fines for) Order violations, but also has authority to challenge any practice not prohibited by the Proposed Consent Order (including, but not limited to, any pricing practice or design change that harms competition) in a potential future legal challenge. The prohibitions and standards utilized in the Proposed Consent Order do not necessarily reflect the applicable legal standards under the Sherman Act, Clayton Act, or the FTC Act; indeed, the legal standards applicable to some of these practices remain unsettled by the Supreme Court and the federal courts of appeal. The

² As a general rule, the Commission's statutory authority is designed to remedy conduct going forward as opposed to punishing past conduct. For example, the Commission does not have the authority to levy fines for antitrust violations.

Analysis to Aid Public Comment

Commission expressly reserves the right to challenge Intel's future anticompetitive conduct if it has reason to believe that, considered in context, the effect of Intel's conduct is to enable it to increase or maintain power over price, output, or non-price competition in any market in which it is a participant. Furthermore, the Commission has the authority to monitor and determine whether the Commission has reason to believe that Intel has not strictly complied with all of the provisions of this Proposed Consent Order (including, but not limited to, the obligation to negotiate a license in good faith after a change of control of AMD, NVIDIA, or Via). The Commission expressly reserves its right to exercise this authority as well.

The Proposed Consent Order has been placed on the public record for 30 days for comments. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Proposed Consent Order and comments received and will decide whether it should withdraw from the Proposed Consent Order or make final the Order contained in the Agreement. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order.

I. The Commission's Complaint

The Federal Trade Commission voted 3-0 to issue an Administrative Complaint against Intel on December 16, 2009. Intel is a Delaware corporation with its principal place of business in Santa Clara, California. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs and graphics processors. The Complaint alleged that Intel engaged in a course of conduct over a ten-year period that was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct allowed Intel to unlawfully maintain its monopoly in the relevant CPU markets through means other than competition on the merits and created a dangerous probability that Intel would acquire a monopoly in the relevant GPU markets.

First, the Complaint alleges that Intel maintained its monopoly in the markets for x86 CPUs for desktops, notebooks, and servers,

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as well as smaller relevant markets, by engaging in a course of conduct that foreclosed or limited the adoption of non-Intel x86 CPUs. The CPU of a computer system processes data and controls other devices in the system, acting as the computer's "brains." The x86 CPU architecture and instruction set is the industry standard for CPUs used in notebooks, desktops, workstations, and volume servers.³ The Complaint alleges a variety of relevant markets tied to the x86 CPU architecture including an overall x86 market. The non-x86 CPU alternatives did not constrain Intel's monopoly during the relevant time period.

Intel's only significant competitor in the relevant x86 CPU markets is AMD, based in Sunnyvale, California. AMD mounted serious challenges to Intel's position in 1999 when it released its Athlon x86 CPU and again in 2003 when it released its Opteron x86 CPU. The only other firm that sells x86 CPUs is a small Taiwanese firm, Via Technologies. A fourth firm, Transmeta, sold a small number of x86 CPUs in the notebook market but exited the market in 2006.

Over the last decade, Intel's share of the overall x86 CPU market (desktop, notebook, and server) has consistently exceeded 65 percent; its share of the x86 CPU desktop market has consistently exceeded 70 percent; and its share of the x86 CPU notebook market has consistently exceeded 80 percent. Intel's monopoly position in these markets is partially protected by significant barriers to entry, including reputation, scale economies, intellectual property rights, costs associated with building and operating large manufacturing facilities, and research and development costs. These legitimate barriers to entry make vigorous enforcement of the competition laws all the more important. The Proposed Order is designed to ensure that Intel cannot blunt entry and expansion by raising barriers in the relevant markets using means other than competition on the merits.

³ There are a handful of alternative CPU architectures that are used in very high-end servers or handheld devices. However, these alternatives did not compete in the notebook, desktop, workstation, or volume server x86 CPU markets during the relevant time period.

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Second, the Complaint also challenges Intel's unfair methods of competition in the Graphics Processing Unit ("GPU", also referred to as "graphics") markets. GPUs originated as specialized processors for generating computer graphics. In recent years, GPUs have become increasingly sophisticated as computing graphics have grown in importance. GPUs have also evolved to take on more functionality. GPUs are increasingly performing computations traditionally performed by the CPU, allowing OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance. As a result, GPUs are creating better products at lower prices for consumers.

The graphics market is highly concentrated with high barriers to entry. Intel competes in the graphics market with NVIDIA and AMD/ATI. Intel makes and sells graphics processors that are either integrated into chipsets or directly onto the CPU. NVIDIA and AMD/ATI sell both graphics processors integrated into chipsets as well as discrete graphics cards. NVIDIA has been at the forefront of developing GPU functionality beyond merely graphics applications. The growth of NVIDIA's General Purpose GPU ("GP-GPU") computing allegedly threatened to undermine Intel's x86 CPU monopoly. The Complaint alleges that Intel engaged in behavior, other than competition on the merits, to marginalize NVIDIA and slow the adoption of GP-GPU computing.

A. Unfair and Exclusionary Commercial Practices in the Relevant CPU Markets

The Complaint alleges that Intel engaged in a variety of unfair methods of competition to foreclose or limit the adoption of non-Intel x86 CPUs by the world's largest original equipment manufacturers ("OEMs"). The largest original equipment manufacturers ("Tier One OEMs") include Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu, which combined account for more than 60 percent of all personal computer sales and are the only suppliers qualified to fulfill certain needs of large business buyers. Tier One OEMs provide a crucial distribution channel for any manufacturer of CPUs, chipsets or GPUs. Tier One OEMs supply high volume sales with the concomitant substantially

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reduced distribution cost. In three respects, Intel's conduct foreclosed significantly non-Intel x86 CPU suppliers from selling product to Tier One OEMs.

First, Intel induced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs. When Intel failed to prevent an OEM from adopting non-Intel CPUs, it sought to limit such purchases to a small percentage of the sales of certain computer products. The Complaint alleges, for example, that Intel entered into *de facto* exclusive dealing arrangements and market-share deals with those Tier One OEMs that agreed to limit their purchases of AMD or Via products. Tier One OEMs that purchased all or nearly all of their CPU requirements from Intel received large rebates and lump-sum payments from Intel, as well as guarantees of supply during supply shortages. In other cases, Intel paid Tier One OEMs not to sell computers with non-Intel CPUs, such as AMD's, Transmeta's or Via's CPUs. The Complaint alleges that these arrangements did not represent competition on the merits, were designed to minimize pass-through of rebates to consumers, and that Intel entered into these arrangements to block or slow the adoption of competitive products by the Tier One OEMs and thereby maintain its monopoly.

Second, Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

Third, Intel sought to induce OEMs to limit advertising and branding, and to forgo advantageous channels of distribution for computers that contained non-Intel CPUs. For example, Intel induced OEMs to forgo advertising, branding, certain distribution channels, and/or promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, technical support, supply, and/or to terminate joint development projects, among other things.

These practices severely limited the number of instances in which OEMs selling non-Intel-based PCs competed directly against OEMs selling Intel-based PCs, especially in servers and in

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commercial desktops and notebooks. When an OEM selling Intel-based PCs competed against OEMs selling AMD-based PCs, Intel often had to sell CPUs at competitive prices. When such competition was eliminated, Intel could sell CPUs at supra-competitive prices. Consequently, it was able simultaneously to charge above-competitive prices and at the same time to exclude its rivals, resulting in both higher prices and fewer choices for consumers. In addition, Intel's retroactive quantity discounts were of a type that could readily disguise effective below-cost pricing, which would, under the circumstances, present a strong risk of predatory effects.

This effectively allowed Intel to compete by raising the effective prices of AMD's and Via's products rather than lowering the effective prices of its own. It did this by effectively imposing a penalty on any customers who purchased from Intel's rivals. Intel's market share discounts and retaliatory practices described above all had this effect, constituting an effective increase to the rival's price. The end result was that Intel could make a rival's actual low prices look very costly to customers without Intel's needing to reduce its own prices or expand its own output.

B. Compiler and Benchmark Deception

The Complaint alleges that Intel's failure to fully disclose the changes it made to its compilers and libraries beginning in 2003 violated both competition and consumer protection provisions of Section 5 of the FTC Act.

A compiler is a tool used by software developers to write software. The compiler translates the "source code" written in high-level computer languages into 0's and 1's that can be run as software on consumers' computers. Intel's compilers compete with Microsoft's compilers, open-source compilers, and others. Intel's compiler is used by developers of high-performance applications.

The Complaint alleges that AMD's Athlon CPU, released in 1999, and its Opteron CPU, released in 2003, equaled, and in some segments surpassed, Intel's technology. Intel introduced a

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new version of its compiler shortly before AMD released its Opteron CPU. The compiler features introduced by Intel in 2003 effectively slowed the performance of software written using Intel's compilers on non-Intel x86 CPUs such as Opteron. To the unknowing public, OEMs, and software vendors, the slower performance of non-Intel-based computers when running certain software applications was mistakenly attributed to the performance of non-Intel CPUs.

The Complaint also alleges that the direct impact of Intel's deceptive disclosures was on independent software vendors and developers that used Intel's compiler to write software. They were unaware of the changes in the Intel compiler that would impact the performance of their software when it ran on non-Intel-based computers. The Complaint alleges Intel intentionally misrepresented the cause of the performance differences and whether it could be solved.

Intel's deceptive disclosures related to its compiler redesign were compounded by the adoption of industry standard benchmarks that included software compiled using Intel's compiler. Benchmarks are performance tests that compare attributes of competing CPUs. Industry standard benchmarks are used by OEMs and consumers to judge performance of competing CPUs. Intel failed to disclose to benchmarking organizations the effects of its compiler redesign on non-Intel CPUs. Several benchmarking organizations adopted benchmarks that measured performance of CPUs by running software programs compiled using the Intel compiler. The software compiled using Intel's compiler skewed the performance results in Intel's favor. Intel promoted its systems' performance under such benchmarks as realistic measures of typical or "real world" computer performance. The benchmarks were not accurate or realistic measures of typical computer performance and they overstated the performance of Intel's products as compared to non-Intel products.

The Complaint alleges Intel's deceptive disclosures related to its compiler contributed to Intel's maintenance of its monopoly power. For example, AMD's CPU performance advantages were muted by Intel's compiler. Intel's deception distorted the competitive dynamic and harmed consumers. The Complaint also

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alleges that Intel's failure to disclose was a deceptive act or practice.

Among the harms to consumers caused by Intel's deceptive conduct was the harm to the credibility and reliability of industry benchmarks. Industry benchmarks are important tools for consumers to make informed purchasing choices. Informed consumer choice is a basic building block of competition.

C. Unfair and Exclusionary Conduct to Suppress GPU Competition

Intel worked with NVIDIA for a number of years to ensure that NVIDIA's GPUs could interoperate with Intel CPUs, and licensed NVIDIA to allow it to manufacture Intel-compatible chipsets with integrated graphics (also referred to as "chipsets with integrated GPUs"). The Complaint alleges that Intel began to perceive NVIDIA as a threat in both the market for chipsets with integrated graphics and the market for CPUs. The Complaint further alleges that Intel took a number of actions to blunt the competitive threat posed by NVIDIA. For example, Intel denied NVIDIA the ability to produce integrated chipsets that would be compatible with Intel's next generation CPUs. In doing so, the Complaint alleges that Intel misled NVIDIA on Intel's "roadmaps" or product plans, causing NVIDIA to waste resources and crucial time researching and designing integrated chipsets when, in fact, Intel allegedly had no intention of permitting NVIDIA integrated chipsets to interoperate with Intel's next generation of x86 microprocessors. This increased NVIDIA's costs and delayed the development of other products that would have increased competition in both the market for chipsets and the market for CPUs. The Complaint also alleges that Intel took steps to create technological barriers to preclude non-Intel integrated chipsets from interconnecting with future Intel CPUs. The Complaint further alleges that Intel bundled its CPUs with its own integrated chipsets and then priced the bundle to punish OEMs for buying non-Intel integrated chipsets.

II. Terms of the Proposed Consent Order

The touchstone of the Proposed Consent Order is the protection of consumers and competition. Thus, the Proposed Consent Order provides structural relief designed to restore the competition lost as a result of Intel's past conduct, and injunctive relief that prevents Intel from engaging in future unfair methods of competition. The injunctive relief would prohibit Intel, when faced with new competitive threats, from engaging in the exclusionary and unfair conduct alleged in the Complaint. These provisions are designed to open the door to fair and vigorous competition in the relevant markets, leading to lower prices, more innovation, and more choice for consumers. The immediacy of this relief is particularly important in these rapidly changing markets.

The Complaint did not seek to strip Intel of its x86 monopoly, which was in large measure gained by innovation and associated intellectual property rights. Rather, the Proposed Consent Order is designed to undo the effects of Intel's anticompetitive conduct and prevent its recurrence, by restoring as much as possible the competitive conditions that would have prevailed absent the anticompetitive behavior and by ensuring that the doors to competition remain open. The Proposed Consent Order clarifies and extends AMD's and Via's rights to the x86 technology. The injunctive relief in the Proposed Consent Order is thus particularly important today to ensure that AMD's new CPU products can have a fair test in the marketplace on the merits and that Via more quickly has the clear path it needs to design and produce its next generation of CPU products. The Complaint did not seek to fine or penalize Intel for its conduct because the Commission lacks that authority for violations of the antitrust laws.

A. Section II of the Proposed Consent Order

Section II of the Proposed Consent Order requires Intel to maintain an open PCI Express ("PCIe") Bus Interface on all of its CPU platforms for six years. The PCIe bus is an industry standard bus used to connect peripheral products such as discrete GPUs to the CPU. A bus is a connection point between different components on a computer motherboard. The PCIe bus serves a critical function on the Intel platform. Intel's commitment to

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maintain an open PCIe bus will provide discrete graphics manufacturers, such as NVIDIA and AMD/ATI, and manufacturers of other peripheral products, assurances that their products will remain viable and thus maintain their incentives to innovate -- including the continued development of alternative computing architectures such as General Purpose GPU computing. Intel's commitment extends to high performance computing platforms that have been at the forefront of General Purpose GPU computing. The Commission recognizes the importance of the continued development of this potential alternative computing architecture.

The Commission recognizes that it may be difficult to forecast the future of innovation in these markets. The CPU and GPU markets are dynamic, and technology may be very different in three or four years. The Commission has the authority to reduce the number of years Intel must maintain the PCIe bus on any of its CPU platforms. For example, the Commission may reduce the commitment if the market has moved away from PCIe and it no longer serves a gateway function to Intel's CPU.

Section II.C of the Proposed Consent Order prohibits Intel from limiting the performance of the PCIe bus in a manner that would hamper graphics performance or GP-GPU compute functionality of discrete GPUs. The provision would assure NVIDIA, AMD/ATI, and other potential manufacturers of products that would use the PCIe bus that they will be able to connect to Intel CPUs in both mainstream and high-performance computers in the future, and that the performance of their products will not be degraded by Intel. These assurances will also allow NVIDIA and others to continue developing GP-GPU computing as a complement to the processing power of the CPU.

B. Intel Assurances on Third Party Foundry Rights

Section III.A of the Proposed Consent Order would require Intel to allow AMD, NVIDIA, and Via to disclose relevant "have made" rights under their respective licensing agreements with Intel to foundries and customers. The Proposed Consent Order would further require Intel to confirm to any foundry or customer that AMD, NVIDIA, and Via licenses confer such "have made"

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rights. “Have made” rights allow AMD, NVIDIA, and Via to contract out manufacturing to third parties. Absent Intel’s assurances and disclosures, customers and foundries might be deterred from making or selling the products of these competitors when they are, in fact, licensed, based upon unwarranted fear of being sued by Intel for infringement. These disclosures will help eliminate any uncertainty surrounding the rights of AMD, NVIDIA, and Via to use third party foundries to manufacture x86 microprocessors or other products under their respective cross licenses.

C. Change of Control Modifications to Current License Agreements with AMD, NVIDIA, and Via

Section III.B of the Proposed Consent Order would require Intel to offer to modify the change of control terms in Intel’s intellectual property licenses with AMD, NVIDIA, and Via. The Commission is concerned that Intel’s past conduct has weakened AMD and Via – Intel’s only x86 competitors. This provision seeks to ensure that these existing competitors can partner with third parties to create a more formidable competitor to Intel.

The existing change of control terms in licensing agreements potentially limit the ability of AMD, NVIDIA, and Via to take part in a merger or joint venture, or to raise capital. The provisions in the Proposed Consent Order are designed to allow AMD, NVIDIA, and Via to enter into a merger or joint venture with a third party, or to otherwise raise capital, without exposing itself to an immediate patent infringement suit by Intel. In the event that AMD, NVIDIA, or Via undergo a change of control, these provisions prohibit Intel from suing for patent infringement for 30 days. Furthermore, Intel must offer a one-year standstill agreement during which the acquiring party and Intel would not sue each other for patent infringement while both parties enter into good faith negotiations over a new license agreement.

The Commission takes seriously Intel’s commitment under these provisions in the Proposed Consent Order. The Commission has authority under the Order to evaluate and determine whether Intel in fact engages in good faith negotiations and the Commission will be able to enforce the Proposed Consent Order if Intel does not negotiate in good faith. In the event the

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change of control terms are invoked, the Commission will carefully scrutinize Intel's conduct and take action, if appropriate.

D. Via x86 Licensing Agreement Extension and Assurances

Section III.C of the Proposed Consent Order requires Intel to offer a five year extension to its cross-license with Via. The extension of the cross license guarantees that Via has the opportunity to continue competing in the x86 CPU market until at least 2018. Section III.C also requires Intel to confirm that Via may lawfully make, sell, and import x86 products without violating the Intel license. This disclosure is designed to eliminate uncertainty surrounding Via's right to compete in the relevant x86 CPU markets through 2018.

The extension of the Via license agreement, coupled with the modifications to the change-of-control provisions in Section III.B, open the door to a potential joint venture or acquisition of Via and its x86 license by a strong and well financed entrant to the x86 markets.

E. Commercial Practices Provisions

The prohibitions in Section IV.A of the Proposed Consent Order address Intel's commercial practices. These provisions are specifically designed to protect competition, not any one competitor. The Proposed Consent Order protects competition in the markets for CPUs (including CPUs with integrated graphics), chipsets, and GPUs. In contrast, Intel's settlement with AMD in November 2009 only protected AMD from certain exclusionary practices and did not extend to GPUs or chipsets.

The rationale for extending the prohibitions to all chipsets is two-fold. First, Intel's CPUs and chipsets are sold on a one-to-one basis. That is, an Intel chipset will only work with an Intel CPU. Thus, an agreement to purchase chipsets exclusively from Intel means that an OEM must purchase CPUs exclusively from Intel. Likewise, an OEM's agreement to purchase 95 percent of its chipsets from Intel means that an OEM will purchase at least 95 percent of its CPUs from Intel. Second, extending the Proposed Consent Order to chipsets also protects competition in

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the market for chipsets. The Commission recognizes that chipsets still play an important role in platform innovation. The provisions are designed to protect the development of new competitive options that may emerge from this market.

1. Prohibitions on Commercial Practices

The Proposed Consent Order prohibits Intel from engaging in seven enumerated sales practices in the CPU, chipset, and GPU markets. Section IV.A prohibits Intel from offering benefits to OEMs, original design manufacturer (“ODMs”), or End Users in exchange for assurances that the customers will refrain from dealing with Intel’s competitors. “Benefit” is broadly defined and includes not only monetary consideration but also encompasses access to technical information, supply, and technical and engineering support. Section IV.A also prohibits Intel from punishing its customers by withholding benefits from those that purchase from non-Intel suppliers of CPUs, chipsets, and GPUs.

Section IV.A.1 would prohibit Intel from conditioning a benefit on an OEM’s, ODM’s, or End User’s agreement to purchase a CPU, chipset, and/or GPU exclusively from Intel in any geographic area (e.g., the United States), market segment (e.g., servers, workstations, commercial desktops, etc.), product segment (e.g., multi-processor servers, high-end desktops, etc.), or distribution channel. For example, the Proposed Consent Order would prohibit Intel from conditioning a benefit on an OEM’s agreement to purchase CPUs for servers exclusively from Intel.

Section IV.A.2 would prohibit Intel from conditioning a benefit on an OEM’s, ODM’s, or End User’s agreement to limit, delay, or refuse to purchase a CPU, chipset, and/or GPU from a non-Intel supplier. For example, Intel would be prohibited from conditioning a benefit to an OEM on that OEM’s agreement to delay the introduction of a computer product incorporating a non-Intel product.

Sections IV.A.3 and IV.A.4 address threats to retaliate against an OEM, ODM, or End User for doing business with a non-Intel supplier. Section IV.A.3 would prohibit Intel from conditioning a benefit on whether an OEM, ODM, or End User purchases, sells, or launches a CPU, chipset, and/or GPU from a non-Intel supplier.

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For example, Intel could not condition a benefit on an OEM's agreement to cancel a launch of a Personal Computer that includes a non-Intel GPU. Section IV.A.4 prohibits Intel from withholding a benefit from an OEM, ODM, or End User if it designs, manufactures, distributes, or promotes a product incorporating a non-Intel CPU, chipset, and/or GPU. For example, Intel could not withhold a benefit from an OEM because that OEM participated in an AMD launch event.

Section IV.A.5 would prohibit Intel from directly or indirectly conditioning a benefit on the share of CPUs, chipsets, and/or GPUs that the OEM or End User purchases from Intel. For example, Intel could not condition a benefit on an OEM's agreement to purchase at least 95 percent of its CPU requirements for commercial desktops from Intel. Nor could Intel condition a benefit on an OEM's agreement to purchase no more than 5 percent of its CPU requirements for commercial desktops from a non-Intel supplier. In a market such as this one, where the most realistic mode of competition by competitors to a monopolist involves their selling initially modest quantities to direct buyers who also buy large quantities from the monopolist, such conditioning can amount to a tax on the growth of such competition, and can enable the monopolist to sustain high prices at the same time as it limits competition and decreases consumer choice.

Section IV.A.6 would prohibit Intel from bundling the sales of its CPUs with its chipsets when the effective selling price of either piece of the bundle is below Intel's Product Cost. Intel's Product Cost is based on data maintained in the ordinary course of business by Intel, is represented to be used by Intel for business decisions, and is significantly higher than its average variable cost. The provision is based on the standard articulated by the Ninth Circuit in *PeaceHealth* and is administrable using that standard and the Product Cost data. This provision is designed to target specific conduct alleged in the Complaint. For example, the Complaint alleges that Intel bundled the sale of its Atom x86 CPU and chipset in such a way that the effective selling price of the chipset was below cost, in an effort to foreclose third party vendors of chipsets. The provision does not reflect an endorsement or adoption of *PeaceHealth* by the Commission as

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the applicable legal test for bundling practices. The Commission expressly retains the right to pursue independent claims against Intel or any alleged monopolist under Section 2 of the Sherman Act or Section 5 of the FTC Act based on a different legal standard such as (by way of example), the standard articulated by the *en banc* decision in the Third Circuit's *LePage's* case.⁴

Section IV.A.7 would prohibit Intel from offering lump sum payments to an OEM, ODM, or End User for reaching a particular threshold of purchases from Intel. For example, Intel would be prohibited from offering an OEM a \$100 million rebate once it purchases 5 million x86 CPUs. The retroactive nature of these payment structures can disguise implicitly below-cost pricing that can unfairly exclude equally efficient competitors and smaller entrants, resulting in a loss of competition and harm to consumers. Intel, however, would not be precluded from offering volume discounts on incremental purchases above a particular threshold. For example, Intel could offer an OEM a price of \$100 for each CPU up to 1 million units and a price of \$90 for each CPU in excess of 1 million units. However, Intel would not be permitted to offer a price below Product Cost for the excess units. The Commission will carefully scrutinize Intel's implementation of this provision to ensure it does not price its products in such a way that forecloses competition.

2. Exceptions to the Commercial Practices Prohibitions

The exceptions to the prohibitions in Section IV.A are designed to allow Intel to offer competitive pricing and enter into other procompetitive deals with OEMs, ODMs, and End Users. These exceptions permit conduct that may truly benefit consumers while still preventing Intel from engaging in the type of anticompetitive behavior identified in the Complaint. Nothing in these exceptions, however, would prevent the Commission from pursuing independent claims against Intel under Section 2 of the Sherman Act or Section 5 of the FTC Act if Intel engages in practices that do not violate the Proposed Consent Order but are

⁴ Compare *LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 155, 162 (3d Cir. 2003) (*en banc*) with *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

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nonetheless exclusionary or unfair and result in harm to consumers.

Under Section IV.B.1, Intel is not prohibited from conditioning a Benefit on sales terms that are not expressly prohibited by the Order. For example, Intel could offer a discount to an OEM for a CPU with the condition that it is used in a laptop with a screen size of less than 9 inches.

Under Section IV.B.2, Intel is not prohibited from agreeing with an OEM, ODM, or End User customer that the customer will use distinct model numbers for Intel and non-Intel-based products. Similarly, Intel can agree with its customers that the customer will not falsely label a product based on non-Intel parts as based on Intel parts. The provision allows Intel and OEMs to use naming schemes that are intended to avoid customer confusion. For example, Intel could agree with an OEM that a specific laptop model would be branded Laptop-100A if it uses an AMD CPU and Laptop-100B if it uses an Intel CPU. However, this provision would not allow Intel to condition benefits on an OEM's agreement not to market or brand a product, which is explicitly prohibited by IV.A.3 and IV.A.4.

Under Section IV.B.3, Intel is not prohibited from meeting terms or benefits it "reasonably believes" are being offered by a rival supplier. This section does not immunize the offering of more favorable terms and conditions than those offered by the competitor, *i.e.*, predatory pricing. In addition, this exception is limited in that Intel's offer must be limited to the quantity of the competitive offer; it cannot be conditioned on exclusivity or share of the OEM's or end user's business, and it must be limited to less than a year. Intel may condition its bid upon the purchase of a minimum number of units. For example, if Intel reasonably believes that a rival supplier is offering to sell 10,000 CPUs for \$90 to an OEM, it can offer to meet that price so long as the OEM agrees to purchase at least 9,000 CPUs.

Sections IV.B.4 and IV.B.5 simply make explicit what is already implicit in the Proposed Consent Order. Under Section IV.B.4., Intel would not violate the Proposed Consent Order merely because it wins all of an OEM's business, so long as it has

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not engaged in other conduct prohibited by the Order. The fact that an OEM purchases a Relevant Product or Chipset exclusively from Intel would not automatically support a violation of the Proposed Consent Order. Under Section IV.B.5, Intel would not violate the Proposed Consent Order if it engaged in conduct not explicitly prohibited by the Proposed Consent Order.

Under Section IV.B.6, Intel is not prohibited from offering volume discounts directly to purchasers of computers in bidding situations. Intel's offers must be in writing and must be responsive only to single bids and not contingent on future purchases.

Section IV.B.7 would permit Intel to make supply allocation decisions during times of shortage so long as it does not use that process to retaliate against an OEM that is using non-Intel CPUs, chipsets, or GPUs. For example, Intel could not withhold chipset supply from an OEM to punish that OEM for using AMD CPUs.

Section IV.B.8 would allow Intel to enter into no more than ten exclusive agreements over the next ten years when it provides an OEM with "extraordinary assistance" under certain circumstances. The Commission recognizes that Intel has worked with OEMs and other customers to create innovative products that have benefitted consumers. The Commission wants to ensure that Intel has the opportunity to continue to invest monies in projects with OEMs and other customers to support future innovations. Intel, like any other firm, will only invest in research and development if it achieves a return on that investment. Section IV.B.8 recognizes that in "extraordinary" circumstances Intel should be able to negotiate exclusivity for a specific product in which it has invested research and development resources with an OEM or other customer. At the same time, the Commission is wary of creating a loophole to the Proposed Consent Order that can be exploited by Intel to eviscerate the prohibitions in Section IV.A. Thus, this provision is carefully limited.

First, Intel's "extraordinary assistance" to an OEM must be valued at greater than \$50 million and must not be made generally available to all customers. For example, the payment cannot simply take the form of marketing funds that are given to several OEMs but instead must be a unique offer to a particular OEM.

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Second, the “extraordinary assistance” must be intended to enable a customer to develop new and innovative products or sponsor an OEM’s entry into a new market segment where the OEM did not previously compete. For example, a payment of \$50 million to an OEM in return for that OEM’s agreement to use Intel’s newest CPU in its laptop lines would not qualify as “extraordinary assistance.” Third, in return for investing in new product development with a particular OEM, Intel may ask for a period of limited exclusivity of no more than 30 months to recoup its investment. Fourth, Intel would only be able to seek exclusivity for the specific segment or specific product in which it has offered the “extraordinary assistance.” For example, if Intel offered “extraordinary assistance” to an OEM to develop a new server it could only seek exclusivity for that particular product line, it could not seek exclusivity for other servers or other computer products manufactured by that OEM. Fifth, any agreement regarding “extraordinary assistance” must be in writing and include the terms of the assistance, investment, and exclusivity. Finally, Intel would not be permitted to enter into more than 10 arrangements that meet this limited exception over the 10-year duration of the Proposed Consent Order. Exclusive dealing is harmful to the extent that it forecloses an important distribution channel; well-justified exclusive dealing with (on average) just one or two of the Tier 1 OEMs is unlikely to do so.

Section IV.B.9 allows Intel to insist that a Customer maintain the confidentiality of Intel’s confidential business information.

Section IV.B.10 allows Intel to offer buy ten, get one free promotions to its smaller customers. The exception is literally limited to sales of fewer than 11 products. For example, Intel would not be allowed to multiply such an offer a thousand-fold. Thus, this exception would not allow Intel to offer an OEM the opportunity to buy 10,000 units and get 1,000 free.

F. Prohibition on Explicit Predatory Design

Section V of the Proposed Order would prohibit Intel from designing or engineering its CPU or GPU products to solely disadvantage competitive or complementary products. This provision addresses allegations in the Complaint that Intel

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engaged in predatory innovation by cutting off competitors' access to its CPUs and slowing down various connections to the CPU. The Proposed Consent Order would be violated if a design change degrades performance of a competitive or complementary product and Intel fails to demonstrate an actual benefit to the Intel product at issue. For example, Intel could not introduce a design change in its CPU that degrades the performance of a competitive GPU unless it could demonstrate that the design change resulted in an *actual* benefit to Intel's CPU. The benefit must be real – not simply a theoretical benefit. Nor can the benefit to Intel be simply the fact that the competitive product is rendered less attractive by the design change (and thus enhances the competitive position of Intel's product).

The burden is on Intel to demonstrate that any engineering or design change complies with the terms of Section V. However, Section V does not require proof that a design change was made to intentionally harm competitive or complementary products, or was otherwise anticompetitive, nor does Section V require a balancing test that would weigh the anticompetitive harms against the benefits of a particular Intel design change; it is sufficient that there be actual benefits. A balancing test would be appropriate in a legal challenge to an Intel design change under Section 5 of the FTC Act or Section 2 of the Sherman Act. As noted earlier, the Commission retains the authority to challenge any Intel design changes that are not prohibited by this provision of the Proposed Consent Order.

G. Assurances on the Accuracy of Intel Roadmaps

The provisions in Section VI address allegations in the Complaint that Intel misrepresented its roadmap to the detriment of competition. Section VI.A would prohibit Intel from disclosing inaccurate or misleading roadmaps for the 10-year duration of the Proposed Consent Order and would require Intel to respond, and do so truthfully, to any inquiries regarding potential roadmap changes for one year after it discloses its roadmap. Section VI.A does not require that Intel disclose its roadmap in the first instance; rather, it places conditions on disclosure in the event that Intel does so. Section VI.B would require Intel to disclose to NVIDIA, on an annual interval, what bus interfaces its platforms will use through 2015.

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Together, these provisions address allegations in the Complaint that Intel misled third parties concerning its interface roadmap. Reliable disclosure of Intel's interface roadmap will help to eliminate uncertainty about the availability of connections and interoperability with Intel platforms. With reliable roadmap information, competitors that design, manufacture, or sell products that rely on interconnections with Intel platforms will be able to make informed and confident decisions about resource allocation and research and development efforts. Similarly, Intel customers that receive Intel roadmaps will be able to count on the continuing accuracy of those roadmaps and develop products based on combinations of Intel and non-Intel parts. The provisions would help give NVIDIA, AMD/ATI, and other potential manufacturers of products that would interconnect with Intel's platform, assurances that they will be able to connect with the CPU in the future and will also allow continuing development of GP-GPU computing.

H. Compiler Disclosures

Section VII would require Intel to take steps to prevent future misrepresentations related to its compilers and libraries, which are used by software developers to write software and make it work efficiently. Intel's compilers and libraries, however, may generate different software code depending on the vendor of the CPU on which software is running. For example, when the software code runs on an Intel-based computer, it may use certain optimizations such as advanced instruction sets or faster algorithms. However, when that same software code runs on a non-Intel-based computer that has the same optimizations, it may not use those optimizations. Intel's compilers and libraries thus may disable functionality and performance available on non-Intel CPUs. The disclosure requirements in Section VII provide software developers with non-misleading information regarding the extent to which Intel's compilers and libraries optimize differently for different vendors' CPUs. These disclosures allow software developers to make more informed decisions about their use of Intel compilers and libraries, such as whether to investigate the types of optimizations disabled on non-Intel CPUs, whether to use any methods to override the code dispatch mechanisms in

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Intel compilers and libraries, and whether to use Intel compilers and libraries at all.

Section VII applies to Intel “Compilers,” which includes all Intel compilers, runtime libraries supplied with those compilers, and other libraries supplied by Intel for use with Intel and non-Intel compilers. Libraries are pre-compiled code or sample code provided to software developers for use in their programs. Because Intel could implement CPU vendor-based code dispatching in either compilers or in libraries, the disclosures required in Section VII must apply to both.

Section VII.C of the Proposed Order requires Intel to inform its customers when and how its compilers and libraries optimize for Intel processors but not for non-Intel processors that are capable of using such optimizations. If Intel’s compilers or libraries optimize for a standard instruction, such as SSE3, only for Intel CPUs but not for compatible AMD or Via CPUs, even in some circumstances, Intel must clearly and prominently disclose the extent to which the standard instruction set is not used and which instruction set is used instead. Section VII.C would also require Intel to disclose when its compiler performs other optimizations only on Intel CPUs but disables the same features on other CPUs that support the features.⁵

Intel also would be required under Section VII.D to notify its customers and implement an Intel Compiler Reimbursement Program that includes a \$10 million reimbursement fund from which Intel would reimburse customers who relied on Intel’s statements regarding its compilers or libraries for the costs associated with recompiling their software using non-Intel compiler or library products. A customer seeking to use the Intel Compiler Reimbursement program must describe an Intel statement on which it relied to ensure that the program is used by customers who were misled by Intel’s disclosures.

Section VII.E of the Proposed Consent Order prevents Intel from making claims about the performance of its compiler unless

⁵ Although compiler users will not know which precise optimizations are not available on non-Intel CPUs, they will be on notice that their compiler will not fully optimize for non-Intel CPUs.

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Intel has substantiated that those claims are true and accurate using accepted analytical methods. This prohibition seeks to prevent Intel from claiming, without substantiation, that its compiler and libraries are superior to other available compilers and libraries. Intel may not claim to have superior compilers and libraries for AMD CPUs, when other products, such as the GNU C Compiler (GCC) or AMD's Core Math Library (ACML) have better performance in some circumstances. This prohibition is particularly important regarding Intel's representations about performance of its compilers on non-Intel CPUs. This section ensures that Intel will provide the appropriate disclosures when it makes performance claims about its compilers and libraries.

I. Benchmark Disclosures

Section VIII would require Intel to make disclosures concerning the reliability and relevance of performance claims based on benchmarks. The provision requires Intel to notify any customers, whether hardware manufacturers or end consumers, that the performance tests may have been optimized only for Intel CPUs. Intel must make disclosures whenever it makes performance claims comparing its CPUs to competitors' processors and whenever it relies on a benchmark. The provision requires disclosures in all advertising or marketing materials that include performance claims, including presentations, audio-visual advertisements, and in prominent locations regarding performance on Intel's web site. The required disclosure will inform consumers and OEMs that certain benchmarks may not provide accurate performance comparisons with non-Intel CPUs. The provision will encourage consumers and OEMs to use benchmark results carefully and rely on multiple benchmarks in order to get accurate performance information about CPUs. The provision will thus help provide for more informed purchasing decisions.

J. Compliance Terms

Sections IX through XIII of the Proposed Consent Order contain reporting, access, and notification provisions that are common in the Commission's orders, and are designed to allow the Commission to monitor compliance with the Proposed Consent Order. Section IX permits the Commission to appoint

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Technical Consultants to assist in assessing Intel's compliance with several provisions of the Proposed Consent. Such consultants are warranted in light of the technical nature of the products at issue and the potential complexity of some compliance issues, including cost accounting, microprocessor design, and software design. Intel would be required to pay for the Technical Consultants, up to a total of \$2 million during the ten-year period of the Proposed Consent Order.

Section X would require Intel to submit to the Commission a written plan explaining what Intel has done and will do to ensure compliance with the Proposed Consent Order. Intel would also be required to submit annual reports for six years explaining how it has complied with the Proposed Consent Order. Intel would be required, in these reports, to submit to the Commission any communications Intel receives from its customers regarding compliance with the Proposed Consent Order, including complaints that it is violating the Proposed Consent Order.

Sections XI and XII would require Intel, for the next five years, to retain its written sales contracts and to allow the Commission access to Intel's records and employees. Section XIII would require Intel to notify the Commission at least thirty days prior to changes in corporate structure that would impact Intel's compliance provisions, such as Intel being purchased by another company or Intel creating or purchasing corporate subsidiaries.

Paragraph XIV provides that the Proposed Consent Order shall terminate ten (10) years after the date it becomes final.

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**STATEMENT OF CHAIRMAN LEIBOWITZ AND
COMMISSIONER ROSCH**

After a multi-year investigation, extensive discussions within the Commission – including an unprecedented four Commission meetings – and multiple meetings with Intel Corporation (“Intel”) and other interested parties, the Commission has voted unanimously to challenge an alleged course of conduct undertaken by Intel. Broadly speaking, the complaint alleges that Intel fell behind in the race for technological superiority in a number of markets and resorted to a wide range of anticompetitive conduct, including deception and coercion, to stall competitors until it could catch up. If the allegations in the complaint are true, Intel’s actions over a period of years and continuing up until today have diminished competition and harmed consumers.

The complaint challenges Intel’s conduct as an unfair method of competition, both in violation of the Sherman Act and also as a “stand-alone” violation of Section 5 of the FTC Act, i.e. as an unfair method of competition independent of the Sherman Act.¹ We focus this statement on the stand-alone Section 5 unfair method of competition claim because liability under that standard has the potential to protect consumers while at the same time limiting Intel’s susceptibility to private treble damages cases.

Despite the long history of Section 5, until recently the Commission has not pursued free-standing unfair method of competition claims outside of the most well-accepted areas, partly because the antitrust laws themselves have in the past proved flexible and capable of reaching most anticompetitive conduct. However, concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a “free pass” under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason, we have seen an increasing amount of potentially anticompetitive conduct that is

¹ Federal Trade Commission Act, 15 U.S.C. § 45. The complaint also includes a claim that Intel’s conduct constituted an unfair act or practice in violation of Section 5.

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not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5.

It has been understood for many years that Section 5 extends beyond the borders of the antitrust laws, and its broad reach is beyond dispute. Indeed, that broad authority is woven into the very framework of the Commission itself. When Congress passed the Federal Trade Commission Act in 1914, it specifically decided to create an agency that has broad jurisdiction to stop unfair methods of competition, and it balanced that broad authority by limiting the remedies available to the Commission.

Congress enacted Section 5 in light of court decisions whose reach had limited the effectiveness of the Sherman Act in contravention of Congressional intent.² Thus, Section 5 was clearly a Congressional effort to bolster enforcement and provide protection for competition and consumers beyond the parameters of the Sherman Act. In fact, the Court's *Sperry & Hutchinson* holding regarding the broad sweep of Section 5 authority was based in part on the clear legislative history of the statute. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972). For example, Senator Cummins, one of the bill's main proponents, was asked on the Senate floor "why, if unfair competition is in restraint of trade, [are we] attempting to add statute to statute and give a further remedy for the violation of the [Sherman Act]?" Senator Cummins replied that the concept of "unfair competition" seeks:

to go further [than "restraints of trade"] and make some things offenses that are not now condemned by the antitrust law. That is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.³

² See generally, *Rambus, Inc.*, Dkt. No. 9302, slip op. at 2-5 (Aug. 2, 2006) (concurring statement of then Commissioner Leibowitz), available at <http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf>.

³ 51 CONG. REC. 12,454 (1914) (statement of Sen. Cummins).

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Echoing this point, he later described Section 5 as a new substantive law that would involve the Commission in activities beyond the enforcement of antitrust law.⁴ Many other legislators similarly expressed their intent and understanding that Section 5 would extend beyond the Sherman Act. *See, e.g.*, 51 CONG. REC. 14,333 (1914) (statement of Sen. Kenyon, remarking that the proposed federal trade commission “can take hold of matters that not in themselves are sufficient to amount to a monopoly or to amount to restrain [sic] of trade”); 51 CONG. REC. 14,329 (1914) (statement of Sen. Nelson, stating that the FTC Act “can be used in a lot of cases where there is no trust or monopoly”); 51 CONG. REC. 12,135 (1914) (statement of Sen. Newlands, observing that although “[a]ll agree that while the Sherman law is the foundation stone of our policy on [appropriate business conduct], additional legislation is necessary”).

Of course, even though the Commission has broad authority under Section 5, the Commission is well aware of its duty to enforce Section 5 responsibly. We take seriously our mandate to find a violation of Section 5 only when it is proven that the conduct at issue has not only been unfair to rivals in the market but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question. Section 5 is clearly broader than the antitrust laws, but it is not without boundaries, and the Commission will clearly describe and stay within those boundaries if this case comes before it to review.

Finally, the Commission recognizes that lengthy trials create uncertainty in the marketplace, and that this uncertainty has the potential to be particularly disruptive given the rapid pace of innovation in high-technology markets. In addition, Intel itself has a legitimate interest in seeing this matter resolved quickly. The Commission is fully committed to a speedy resolution of this action. We are bringing this case under the Commission’s recently adopted Part 3 rules of practice, and we expect that a trial on the merits will begin within nine months, and a Commission decision will be issued within twenty months. This schedule is substantially more rapid than the far lengthier process usually followed in federal court antitrust litigation.

⁴ *Id.* at 12,613 (statement of Sen. Cummins).

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**CONCURRING AND DISSENTING STATEMENT OF
COMMISSIONER ROSCH****I.**

I concur in the issuance of a Section 5 complaint challenging an alleged course of conduct by Intel Corporation (“Intel”) to maintain monopoly power in the markets for central processing units (“CPUs”) in computers and at least near-monopoly power in markets for computer graphics products. In accordance with Section 5, I have concluded that there is reason to believe that the alleged course of conduct occurred and that issuance of a pure Section 5 complaint challenging that alleged conduct would be in the public interest. See 15 U.S.C. § 45(b) (authorizing the Commission to file a complaint where (1) it has “reason to believe” an antitrust violation has occurred, and (2) where “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public”). The Supreme Court has held that Section 5 is broader than the Sherman or Clayton Acts, which can be enforced by both private and public plaintiffs. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). However, the reach of Section 5, like any other statute, is not unlimited. I think the Commission can and should define those limitations as they apply to this case.

In my view, there are four considerations that warrant the application of Section 5 here. First, this is not a case where harm to competition can easily be segregated from harm to competitors. The markets alleged in this case and Intel’s alleged position in those markets are extraordinarily concentrated: the CPU markets are duopoly markets in which Intel and Advanced Micro Devices (“AMD”) are the only meaningful participants; the graphics products markets are likewise highly concentrated markets in which Intel, AMD, and Nvidia Corporation (“Nvidia”) are the only meaningful competitors. Significantly, Intel has monopoly power in the CPU markets and near-monopoly power in the computer graphics product markets and, judging from the allegations in the complaint, the entry barriers surrounding these markets are remarkably high. Under those unique circumstances, the oft-repeated admonition that the Sherman and Clayton Acts protect competition, not competitors, and the federal courts’ attendant disinclination to protect competitors in cases brought

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under those statutes, do not fit well. If the firm with monopoly or near-monopoly power (here, allegedly Intel) engages in an exclusionary and unjustifiable course of conduct that hurts its only competitor in the CPU markets (here, allegedly AMD) or its only two competitors in the computer graphics product markets (here, allegedly AMD and Nvidia), given the uncommonly high entry barriers, that exclusionary conduct harms competition too, by inhibiting those rivals from constraining the exercise of monopoly power.

Second, although Intel's alleged conduct led to higher prices in the CPU markets, that alleged conduct can still be within the Commission's Section 5 powers even if Intel cannot be said to have caused price increases. To be sure, most conventional Section 2 cases alleging monopoly maintenance or attempted monopolization rise or fall on proof of higher prices – if for no other reason than that kind of injury is easiest to measure. But that is not the only kind of consumer injury with which a law enforcement agency like the Commission should be concerned. The Commission must also be concerned with whether a course of conduct by a firm with monopoly power reduces consumer choice by reducing alternatives. That is true whether the “consumer” suffering the reduction in choice is an original equipment manufacturer (“OEM”) or an end user of computer equipment that buys equipment from the OEM. Thus, if and to the extent that an exclusionary course of conduct by a firm with monopoly power results in that less measurable form of consumer injury, Section 5 is the most appropriate vehicle for the analysis, and the Commission, with its expertise and experience, is the most appropriate plaintiff to make that determination.

Third, the complaint here alleges that Intel engaged in an exclusionary course of conduct. That is a claim with clearly identifiable elements that most logically resides in the Commission's Section 5 authority. Simply put, in my view it is improper to slice and dice each constituent part of the alleged course of conduct to determine whether it, standing alone, had the purpose or effect to hinder competition and injure consumers in violation of Section 2: the constituent parts did not stand alone, and both their effects on Intel's few alleged rivals and their consequent impact on consumer choice can only be assessed by

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examining the effects of Intel's alleged course of conduct as a whole. Although a number of courts have disparaged "course of conduct" claims made under Section 2 as mere "monopoly broth" claims or claims that "0 plus 0 plus 0 equal 1," that militates in favor of the Commission exercising its discretion and expertise to use Section 5 to reach such a course of conduct. Indeed, under those circumstances, a Section 5 "course of conduct" claim may be viewed much as the "invitation to collude" cases that the Commission has pursued as pure Section 5 cases in order to reach conduct that the Sherman Act may not otherwise reach. Lest there be any misunderstanding, Intel must be given the opportunity to show that any injury to competition or to consumers was offset by efficiencies that it reasonably could have achieved only by engaging in the conduct causing those consequences. But that defense does not justify altogether eschewing a course of conduct claim under Section 5.

Fourth, I believe that Intel's intent here is relevant in assessing its liability. The Second Circuit, for example, has held that a respondent's state of mind is not only relevant, but must be taken into account, to determine whether the respondent's conduct constitutes an "unfair method of competition" under Section 5. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-40 (2d Cir. 1984). Properly read, I think that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), holds that such an intent would be relevant in a Section 2 case. *Id.* at 610-11 (defendant's practices "support[ed] an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival"). Yet some Section 2 cases have said that an analysis of the defendant's intent is irrelevant in a Section 2 case. Indeed, it can be argued that the Commission's antitrust expertise and experience makes it a more dispassionate and superior judge of that evidence than a lay jury in a Section 2 case.

II.

Although I concur in the issuance of a complaint based on pure Section 5 claims, I respectfully dissent insofar as the complaint also contains Section 2 "tag-along" claims. To be clear, my reasons for doing so are not based on the fact that I lack

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a “reason to believe” that a Section 2 violation has occurred; instead, I dissent from the addition of the Section 2 claims on public policy grounds.

First, I see no advantage to adding the Section 2 claims. To be sure, there is favorable Section 2 case law that supports each constituent part of the course of conduct that is pled. More specifically, there is Section 2 case law condemning the use of loyalty discounts and kit pricing by a firm with monopoly power, *LePage’s Inc. v. 3M*, 324 F.3d 141, 154-57, 162-63 (3d Cir. 2003) (en banc); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765, *6-8 (9th Cir. Oct. 28, 2009); the use of deception by such a firm, *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (en banc); refusals to deal, *Aspen Skiing Co.*, 472 U.S. at 603-10, including refusals to license by such a firm, *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216, 1218-20 (9th Cir. 1997); raising rivals’ costs, *United States v. Delta Dental*, 943 F. Supp. 172, 179-82 (D.R.I. 1996) (most favored nations clause case brought under the Sherman Act, albeit Section 1); and product degradation by such a firm, *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369-72 (Fed. Cir. 1998). Indeed, there is authority in the Section 2 case law for a course of conduct claim. *Microsoft Corp.*, 253 F.3d at 78; *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1318 (D. Utah 1999). But there is no reason why that case law cannot be invoked to support a Section 5 course of conduct claim where the Commission alleges that a course of conduct by a firm with monopoly power constitutes an “unfair method of competition.”

Second, it cannot be said that including the Section 2 claims (as opposed to a clearly defined Section 5 course of conduct claim) means that the outcome of this litigation will provide more predictability to the business community by somehow providing better notice of the type of conduct that the antitrust laws preclude. See *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (rejecting the use of Section 5 where it would “blur” Sherman Act distinctions that were “well-forged”); *DuPont*, 729 F.2d at 138-39 (expressing concern that application of Section 5 might upset settled antitrust principles and thus lead to unpredictability); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (same). Intel maintains that the Section 2

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case law respecting these constituent elements of its alleged course of conduct is favorable to it. If and to the extent that is true, it cannot be said that the relevant Section 2 case law is settled and predictable. A well-defined Section 5 course of conduct claim can provide just as much guidance.

Third, and most importantly, the collateral consequences of including any Section 2 claims are very unfavorable for both Intel and the Commission. Intel currently faces the treble damage suits filed by the New York Attorney General under Section 2 in the United States District Court in Delaware in addition to a number of Section 2 treble damage class actions that have been filed there. The Commission should not enable those plaintiffs to free ride off of the Commission's work. Nor should it put itself in a position where an unfavorable outcome in those cases may be cited against it. Neither of those consequences can occur if the Commission proceeds solely under Section 5: the Delaware treble damage actions cannot proceed under Section 5 because only the Commission has the power to enforce Section 5. Indeed, it can be argued that where, as here, private litigation is pending under Section 2, as a matter of policy the Commission should not spend public resources on a duplicate claim.

Beyond that, as my colleagues, Chairman Leibowitz and more recently Commissioner Kovacic have pointed out, the Supreme Court has steadily been "shrinking" the ambit of the Sherman Act both procedurally and substantively. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-61 (2007); *Credit Suisse Sec. (USA) v. Billing*, 551 U.S. 264, 281-82 (2007). By all accounts, these changes are, partially at least, due to the Court's concern about the Sherman Act's application by juries and generalist federal district courts. Regardless of whether one shares that concern about private Sherman Act enforcement, it is undeniable that this jurisprudence "slops over" to public enforcement. That is so because insofar as the federal agencies prosecute their cases under the Sherman Act, they must proceed under the same statutes that private plaintiffs invoke. That consequence, however, can be

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minimized – if not avoided altogether – if the Commission proceeds under Section 5 alone. Thus, although I have also concluded that there is reason to believe that the alleged conduct also violates Section 2 the Sherman Act, I have concluded that insofar as this case proceeds on the basis of any Sherman Act “tag-along” claims, the Commission acts contrary to the public interest.

Complaint

IN THE MATTER OF

THE COCA-COLA COMPANYCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. C-4305; File No.101 0107
Filed November 3, 2010 — Decision, November 3, 2010

The consent order addresses allegations that The Coca-Cola Company's ("Coca-Cola") acquisition of its largest bottler, Coca-Cola Enterprises, and an exclusive license from Dr. Pepper Snapple Group, Inc. ("DPSG") would eliminate competition in the U.S. branded concentrate and branded direct-store-delivered carbonated soft drink markets and increase the likelihood that Coca-Cola could unilaterally exercise market power and facilitate coordinated interaction in the industry. Further, the consent order addresses concerns that the acquisition will provide Coca-Cola with access to DPSG's marketing plans by requiring Coca-Cola to establish a "firewall" to ensure that its access to Dr. Pepper's commercially sensitive information is limited. The consent order further requires Coca-Cola to give the Commission 45 days' advance notice of subsequent acquisitions of its franchised bottlers that are licensed to distribute DPSG products.

Participants

For the *Commission*: Michelle Fetterman, Jill M. Frumin,
and Samuel Sheinberg.

For the *Respondent*: Elaine Ewing and Mark Leddy, Cleary
Gottlieb Steen & Hamilton LLP; Abbott B. (Tad) Lipsky, Jr.,
Latham & Watkins LLP; and Jonathan Jacobson, Wilson Sonsini
Goodrich & Rosati.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent The Coca-Cola Company ("TCCC"), a corporation, has entered into agreements to acquire the outstanding voting securities of one its independent bottlers, Coca-Cola Enterprises Inc. ("CCE"), and subsequently obtained a license agreement to continue to produce and distribute