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August 31, 2010

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Re: *In the Matter of Intel Corp., Docket No. 9341*

Dear Commissioners:

VIA Technologies Inc. respectfully submits these comments regarding the Federal Trade Commission's proposed Decision and Order in the above-captioned case. VIA designs integrated circuits and other semiconductors and is one of only two companies offering x86-based microprocessors in competition with Intel. As a result, any conduct by Intel that interferes with VIA's ability to compete on the merits affects both competition generally and consumers in the relevant markets. VIA commends the FTC for bringing this action to address Intel's prolonged and pervasive anticompetitive behavior and for attempting to implement remedies that will restore competition to the markets for microprocessors, chipsets, and peripheral chips.

VIA particularly notes the express statement in the FTC's Analysis to Aid Public Comment that **"the Proposed Consent Order does not operate as a safe harbor for Intel"** and that the FTC — and any other injured parties — remain free to challenge Intel's conduct regardless of whether it complies with the provisions of the proposed Decision and Order.<sup>1</sup> As a target of Intel's practices, VIA has repeatedly observed Intel settling cases and then promoting whatever conduct was not explicitly prohibited by the settlement as an "approved" business practice. Deterring such tactics by making this important caveat explicit for customers is therefore particularly helpful.

Although VIA's comments focus on the provisions that require improvement, VIA acknowledges that many parts of the proposed Decision and Order will promote competition. VIA's proposed modifications are intended to advance the goals of the proposed Decision and Order by strengthening the existing provisions and making them more enforceable; they are not intended to change or add new goals.

VIA is concerned that certain provisions of the proposed Decision and Order do not provide objectively verifiable criteria against which Intel's compliance can be assessed. Some provisions rely upon Intel's subjective intent. The enforceability of such provisions must be assessed in light of Intel's extensive history of antitrust violations — and, in particular, of signing and evading consent decrees.<sup>2</sup> Provisions with subjective conditions are hard to enforce

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<sup>1</sup> Analysis of Proposed Consent Order to Aid Public Comment at 2, *In the Matter of Intel Corp.*, No. 9341 (Aug. 4, 2010), <http://www.ftc.gov/os/adjpro/d9341/100804intelanal.pdf> [hereinafter "Analysis to Aid Public Comment"].

<sup>2</sup> See Complaint ¶¶ 2 (noting violations in current case date back to 1999, immediately after previous consent decree), 49–55 (describing effective exclusive-dealing contracts), 56–61 (describing use of compiler to artificially



and likely will require time-consuming investigation before an enforcement action can be brought, which will encourage Intel to test the limits of the Decision and Order and may bring relief too late to avert anticompetitive consequences. Accordingly, VIA's proposals are aimed at improving the verifiability of the conditions imposed on Intel so as to foster clarity, rendering them more conducive to swift and effective enforcement, and inspiring confidence in market participants that Intel will abide by the Decision and Order.

To the extent that Intel resists these proposals — which do nothing more than provide objective metrics for evaluating Intel's compliance with the proposed decree — the FTC may legitimately question Intel's commitment to ceasing the challenged conduct and the efficacy of the currently proposed remedies.

## **I. License Assignment Upon Change of Control**

VIA's, AMD's, and NVIDIA's ability to raise capital and to combine with other firms having complementary technologies and products is critical to competition in the relevant markets. Designing and manufacturing CPUs and other semiconductors is capital intensive.<sup>3</sup> Effectively competing with Intel requires unfettered access to capital markets for development funds and the ability to partner with third parties to create a more formidable competitor. Existing change of control provisions in x86 licenses deter potential investors by creating uncertainty about whether Intel will use the change-of-control provision as a justification to terminate the license after an investment.<sup>4</sup> The FTC therefore correctly recognized the need to prevent Intel from exercising these clauses anticompetitively to protect its monopoly, rather than to protect any legitimate interests as a licensor.<sup>5</sup>

Section III.B tries to remedy this anticompetitive potential by requiring that Intel not file a patent-infringement suit for thirty days after VIA, AMD, or NVIDIA undergoes a change of control, and then offer a mutual one-year standstill agreement to the licensee while the parties negotiate an assignment of the license rights "in good faith."<sup>6</sup> Although aimed at the right problem, this provision is insufficient to protect access to investors. First, the "good faith" negotiation standard is highly subjective. Second, requiring negotiations after a change of control (rather than before) does nothing to alleviate the chilling effect of uncertainty on procompetitive investments. Finally, Intel can drag out any negotiation for a year and then terminate the license agreement with the slightest pretext. Therefore, despite the FTC's warning that it "takes seriously Intel's commitment under these provisions,"<sup>7</sup> the contemplated provision does not go far enough.

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slow software execution on other processors), 62–71 (describing manipulation and misrepresentation of benchmarks), 75–91 (describing denial of interoperability), 92 (describing manipulation of industry standards), *In the Matter of Intel Corp.*, No. 9341 (Dec. 16, 2009), <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>.

<sup>3</sup> See Complaint ¶¶ 43–44.

<sup>4</sup> Analysis to Aid Public Comment at 8.

<sup>5</sup> See Complaint ¶ 93; Analysis to Aid Public Comment at 8.

<sup>6</sup> See Proposed Decision and Order § III.B, *In the Matter of Intel Corp.*, No. 9341 (Aug. 4, 2010), <http://www.ftc.gov/os/adjpro/d9341/100804inteldo.pdf>.

<sup>7</sup> Analysis to Aid Public Comment at 8.



To provide an effective remedy, the Decision and Order should give the vague term “good faith” substance by specifically enumerating the limited situations in which Intel can deny an assignment. Given the very few legitimate business reasons for denying an assignment, Section III.B should require Intel’s consent to an assignment after a change of control unless one of these exceptions, such as a financially unstable acquirer, is met. This approach would recognize that, absent anticompetitive intent, Intel should have no objection to the overwhelming majority of potential changes of control. It would also foster the clarity that potential investors need by focusing on the objective conditions of the change of control, rather than on Intel’s subjective intent.

Of particular importance is precluding Intel from denying consent to a license assignment simply because the acquiring firm has a substantial patent portfolio relevant to current or future Intel products. Without an acquisition, Intel would be subject to such an acquirer’s intellectual property (“IP”). There is no legitimate reason why Intel should be free to withhold its consent to a change of control on this basis. It is not a legitimate concern that VIA would have an unfair competitive advantage by being able to use the investor’s IP in competition with Intel. Even without a change of control, VIA could negotiate for a license to such IP independently of an equity investment. There is therefore no justification for using the change of control provision to interfere with VIA gaining access to such rights through other means. In any event, because its agreement with Intel is a cross-license of relevant IP, Intel would generally be protected by the symmetric nature of the rights licensed.<sup>8</sup> Thus, there is no justification for withholding an assignment to the acquiring party.

Accordingly, VIA proposes substituting the following language for Section III.B of the proposed Decision and Order:

- B. In the event a 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 or will undergo (based on a signed definitive agreement) a change of control, then:
1. from the date of notice through a period of thirty (30) days after 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;
  2. within ten (10) days from the date of notice, Respondent must consent in writing to an assignment of the rights and licenses granted in the relevant Designated Intel Competitor Patent Agreement to the

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<sup>8</sup> Under the license between VIA and Intel, each company gains a perpetual license to any patent reading on x86-instruction-set-compatible CPUs obtained by the other company during the capture period. As a result, if Intel is concerned that an acquirer could bring an infringement suit with its own portfolio after the period expires, Intel could offer to extend the period to extend its protection.



Acquiring Entity, except where

- a. the Acquiring Entity is in severe financial distress such that Respondent's consideration under the Designated Intel Competitor Patent Agreement would be impaired; and
- b. Respondent concurrently informs the Designated Intel Competitor and the Acquiring Entity of the reasons for denying consent based on this provision.

During the remaining time in the standstill period, the Designated Intel Competitor and Acquiring Entity may seek the FTC [Monitor Trustee]'s review of Respondent's refusal and the FTC may take action pursuant to this Order, as appropriate.

3. Respondent waives any provision in a Designated Intel Competitor Patent Agreement that restricts a Designated Intel Competitor's right of assignment after a change of control, other than in the circumstances identified in Section III.B.2.

## II. Verification of Licensed Rights

The threat of Intel bringing patent litigation against computer manufacturers that use competitors' chips — or fabricators that manufacture them — is a powerful deterrent to competition. The FTC therefore correctly recognized the competitive importance of VIA's (and AMD's and NVIDIA's) ability to disclose the terms of its license with Intel to assure customers and suppliers of its rights to produce, have produced, and sell x86-compatible chips.<sup>9</sup>

Section III.A of the proposed Decision and Order attempts to remedy this anticompetitive threat by requiring Intel to permit VIA, AMD, and NVIDIA to disclose the have-made terms in their licenses to fabricators or customers and to confirm those terms upon request.<sup>10</sup> However, the remedy provided is insufficient to end the "fear, uncertainty, and doubt" that Intel has fostered through its prior conduct in an effort to deter customers and foundries from working with its competitors.<sup>11</sup> Seeing only a specified subset of the paragraphs in the license agreements will not give fabricators and customers confidence in the competitor's underlying license rights. Moreover, Intel can continue to voice its subjective interpretations of the agreements and to threaten IP litigation, even if the plain text appears to be clearly to the contrary. This uncertainty is enough to scare off fabricators and customers who are dependent on Intel for their continued

<sup>9</sup> See Complaint ¶ 93; Analysis to Aid Public Comment at 8.

<sup>10</sup> Intel may require these third-parties to sign a confidentiality agreement. Proposed Decision and Order § III.A.

<sup>11</sup> See, e.g., Rich Brown, *Intel takes Chipset Dispute with NVIDIA to Court*, CNet, Feb. 18, 2009, <http://news.cnet.com/intel-takes-chipset-dispute-with-nvidia-to-court/?part=rss&tag=feed&subj=Crave>; Don Clark, *Intel and AMD Squabble over Patent Pacts*, Wall St. J., Jan. 23, 2009, <http://blogs.wsj.com/digits/2009/01/23/intel-and-amd-squabble-over-patent-pacts/>.



existence, particularly given Intel's position that it may cut off supplies of its monopoly chips to customers against whom it is litigating.

To provide an effective remedy, the Decision and Order must give fabricators and customers more information and additional protections. First, it should permit disclosure of the complete relevant license agreement and require that Intel cooperate with each licensee to prepare a concise, plain-English statement explaining the licensee's rights to fabricators and customers. Until Intel and the licensee agree on this statement, the Decision and Order should prohibit Intel from telling customers or fabricators that a licensee's product infringes Intel's patents. Second, as specified in the Notice of Contemplated Relief in the Complaint, the Decision and Order should prohibit Intel from bringing an infringement suit against a customer or fabricator unless it has first obtained a judgment against the licensee.<sup>12</sup> This approach fully protects Intel's legitimate IP interests, because Intel can still sue the licensee rather than threatening the licensee's customers and suppliers. Unlike fabricators and customers (who are not well positioned to evaluate Intel's claims and are generally beholden to Intel for significant portions of their business), licensees have all the relevant information and greater incentives to defend questionable infringement actions in court.

Accordingly, VIA suggests substituting the following language for Section III.A:

- 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 that Competitor's Designated Patent Agreement(s), so long as the Customer or foundry agrees in writing to keep those terms confidential;
  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 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 Customer or foundry agrees in writing with Respondent to keep such content confidential;
  3. Respondent and the Designated Intel Competitor shall work in good faith to prepare a statement to be provided to customers and suppliers

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<sup>12</sup> See Complaint ¶ 23 ("Prohibiting Intel from suing or threatening to sue its competitors' third-party fabricators.").



explaining the Designated Intel Competitor’s rights to design, make, have made, and sell the relevant products in clear language so as to resolve any ambiguity and to facilitate the customer’s and supplier’s cooperation with the Designated Intel Competitor;

4. until Respondent and the Designated Intel Competitor agree to the statement required under Section III.A.3, Respondent may not state, express, or otherwise suggest that a Designated Intel Competitor’s product infringes Respondent’s intellectual property rights or is otherwise unlawful unless Respondent has obtained a judgment against the Designated Intel Competitor to that effect from a court of competent jurisdiction; and
5. Respondent shall not sue for infringement, contributory infringement, or other indirect infringement or torts related thereto of its intellectual property rights against third parties in connection with their production or use of a Designated Intel Competitor’s relevant products unless Respondent has first obtained a judgment of infringement against that Designated Intel Competitor from a court of competent jurisdiction.

### III. Interoperability

Intel’s CPU is a dominant, must-have core product. Accordingly, the ability “to interoperate fully, freely, and in a nondiscriminatory manner” with Intel’s CPU is crucial to innovation and competition in the markets for complementary products and alternative computing architectures.<sup>13</sup> Yet Intel has repeatedly demonstrated its intent to extend its dominance to the entire motherboard by limiting bus connectivity, which has prevented the emergence of technologies that reduce the importance of the CPU and lower barriers to entry into the CPU market.<sup>14</sup> Although Intel has occasionally allowed interoperability (particularly when it was unable to supply technology comparable to its competitors’), it has closed interconnection to its monopoly CPU to eliminate competition in peripheral chips whenever it detected a threat.<sup>15</sup> The FTC therefore correctly recognized the need for interoperability to protect innovation in adjacent markets and to provide the conditions for CPU competition.<sup>16</sup>

Section II of the proposed Decision and Order attempts to remedy this anticompetitive potential by requiring that Intel maintain a PCI Express interface on any combination of CPUs and chipsets it offers together for six years.<sup>17</sup> Section V also prohibits Intel from making an engineering or design change to a CPU or GPU if the change degrades a competing product’s performance and has no “actual benefit.”<sup>18</sup> However, the proposed remedies do not effectively

<sup>13</sup> See Complaint ¶ 23.

<sup>14</sup> See Analysis to Aid Public Comment at 7; Complaint ¶¶ 75–91.

<sup>15</sup> See Complaint ¶ 20.

<sup>16</sup> Complaint ¶¶ 18–20, 86; see also Complaint ¶¶ 17, 22; Analysis to Aid Public Comment at 7.

<sup>17</sup> Proposed Decision and Order §§ I.HH, II.

<sup>18</sup> The provision also shifts the burden of demonstrating compliance to Intel. *Id.* § V.





prevent Intel from continuing to extend its monopoly to other areas of the motherboard. First, the provisions do not require Intel to implement the latest version of PCI Express. This oversight allows Intel to implement an already obsolete version of PCI Express, maintaining its proprietary DMI protocol as the “must have” connection.<sup>19</sup>

Second, the provisions do not require publication of *all* the information necessary for a third-party chipset to connect to an Intel CPU, such as protocols to connect to main memory and pin-compatibility information.<sup>20</sup> CPU competitors (including new entrants) have a substantial interest in a healthy third-party chipset market, because bundling the chipset and CPU forces two-tier entry: Without chipsets that can interchangeably be used with Intel’s or a competitor’s CPU, a customer adopting and stocking VIA’s CPUs also must adopt and stock a discrete and separate set of chipsets to be used with VIA’s CPUs, doubling the customer’s inventory risk. Customers must also choose a processor six to nine months earlier in the development process (i.e., in the design stage rather than the assembly stage), because OEMs must commit to a chipset very early in the design process. If there are chipsets compatible with both Intel’s and competitors’ CPUs, customers can use one third-party chipset for each computer model and still offer the end user a choice of an Intel or competing CPU, to the benefit of CPU competition.

Third, the provisions do not clearly specify how Intel must implement the PCI Express interface. For example, the provisions do not clearly specify that Intel must provide a PCI Express interface that directly connects to the CPU or north bridge. As a result, it is arguable that Intel could comply with this provision by only offering a PCI Express interface on the south bridge and reserving the faster north-bridge and direct CPU connections — connections that GPUs need to be useful — for its proprietary protocols. Similarly, the provisions do not clearly require Intel to provide a sufficient number of PCI Express communication channels for any peripheral other than a GPU. As a result, it is arguable that Intel could comply with this provision by offering only enough PCI Express-enabled communication channels for the GPU and reserving connections to all other peripherals for its proprietary protocols. These defects allow Intel to nullify the benefits of the already limited proposed provisions.

Fourth, the provisions do not promote the FTC’s goal of maintaining innovation incentives. Innovation by its very nature is unpredictable. As described above, even today there are a number of potential connection points for peripherals. With access to *all* of these connection points, peripheral makers can continue to develop and innovate in their products by making use of these various connections. Requiring Intel to maintain interoperability of only a particular bus precludes this type of innovation; indeed, forcing the use of a bus doomed to obsolescence will retard innovation. By allowing Intel to use preferred buses while relegating its

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<sup>19</sup> See Jon Stokes, *Day of Chipset Reckoning Arrives for NVIDIA*, Ars Technica, Oct. 8, 2009, <http://arstechnica.com/hardware/news/2009/10/day-of-nvidia-chipset-reckoning-arrives.ars> (describing Intel Nehalem’s use of DMI to connect the CPU to all peripheral components other than the GPU and main memory).

<sup>20</sup> VIA understands that some industry participants have asserted that there is no longer a discrete north bridge. VIA views this issue as one of semantics. Although Intel’s Nehalem integrates the memory controller into the CPU, it still needs to connect to main memory, and it does so through a proprietary protocol called QuickPath Interconnect or QPI, formerly known as Common System Interface. VIA’s position is that the CPU’s external interfaces should be disclosed, regardless of the functionality Intel integrates into the CPU.



peripheral-chip competitors to inferior connectivity, the proposed order does not achieve the objective of protecting competition on the merits in the peripheral-chip markets.

Finally, Section V of the proposed Decision and Order allows the creation of incompatibility so long as Intel shows an “actual benefit.” Without a clear expression that Intel must demonstrate an inextricable link between the incompatibility and the benefit, it is arguable that the Order will be satisfied even if the benefit could have been achieved without introducing incompatibility.

To provide an effective remedy, then, the proposed Decision and Order must require full and open interoperability. It should require that Intel publish enough information for other companies to be instruction-set, bus, and pin compatible with Intel’s CPUs. Intel should be prohibited from asserting intellectual property rights over this information when used to connect peripherals to an Intel CPU and should be required to offer FRAND terms to connect competing CPUs to peripherals designed for Intel CPUs (with a royalty based only on the actual incremental benefit of any new protocol relative to other existing options). Intel should be prohibited from using agreements with third parties to obfuscate interconnection information, a technique that Intel has used with manufacturers of voltage regulator modules, an essential component to connect the CPU with main memory. Finally, Intel should be prohibited from making any engineering or design change that introduces incompatibility unless the incompatibility itself is necessary to achieve clear benefits and cannot be avoided by disclosing or licensing the change.<sup>21</sup> This approach will not reduce Intel’s legitimate incentives to innovate, as any genuine improvement in interconnection enhances the value of the CPU, which Intel can capture through the pricing of its CPUs. Rather, opening and maintaining full CPU interoperability would recognize that Intel’s CPU is a must-use product, would prevent Intel from extending its monopoly into adjacent markets by controlling interfaces, and would foster the desired innovation in peripheral products and competing architectures to the benefit of consumers.

Accordingly, VIA suggests substituting the following language in Sections II and V:

## II.

IT IS FURTHER ORDERED that:

- B. Respondent shall not assert any claim of patent, copyright, trademark, or trade secret protection over the information necessary for full hardware and software communication and interoperability with any Intel x86 Microprocessor.
- C. Respondent must offer a fair, reasonable, and non-discriminatory license to any Designated Intel Competitor CPU implementing the same interfaces.

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<sup>21</sup> Even if the FTC were to reject VIA’s other suggestions in this regard, the FTC should at the very least clarify that Intel must show that the incompatibility introduced by an engineering or design change is necessary to achieve the proffered benefit.





1. The reasonableness of any royalty in such a license shall be determined by the incremental benefit of the interface over alternatives, including the previous versions of the interface.
  2. Designated Intel Competitors shall have standing to enforce this provision.
- D. Within ninety (90) days after entry of this Decision and Order, Intel shall publish all information necessary for full hardware and software communication and interoperability with any Intel x86 Microprocessor currently in production and otherwise make such information available to any interested party. For the avoidance of doubt, this shall include, but is not limited to, the following protocols:
1. QuickPath Interconnect (QPI) (or Common System Interface (CSI)), in both its cache-coherent and non-cache-coherent versions; and
  2. Direct Multimedia Interface (DMI).
- E. Starting one year before the first sale of any Intel x86 Microprocessor not currently in production, Intel shall make available to any third party all information necessary for full hardware and software communication and interoperability with that CPU, to the satisfaction of the Commission.
- F. Intel shall not enter into any agreement with a third party that prevents that person from sharing information necessary for full hardware and software communication and interoperability with any Intel x86 Microprocessor. Respondent shall waive any existing agreement that would have such an effect. For the avoidance of doubt, this includes any non-disclosure or confidentiality agreement with a designer or manufacturer of voltage regulator modules.

V.

- A. IT IS FURTHER ORDERED that Respondent shall not make any engineering or design change to any product if that change causes incompatibility with or degrades the performance of a Relevant Product sold by a competitor of Respondent, unless (1) the change provides a benefit, in that it renders the hardware, software, or protocol clearly superior to alternative designs which permit interoperability; and (2) any incompatibility or degradation is necessary to achieve such benefits. For the avoidance of doubt, if interoperability can be maintained by disclosing or licensing the change to persons seeking to interoperate, the incompatibility is not necessary to achieve the benefit.
- B. Provided, however that incompatibility arising from a “bug” or other inadvertent product defect in and of itself shall not constitute a violation of



Section V.A.1, provided that Respondent corrects the incompatibility as soon as practicable, including through disclosure or licensure. Respondent shall have the burden of demonstrating that any such incompatibility was inadvertent.

#### **IV. Market Development Funds (“MDF”) and Other Conditional Benefits**

Intel’s MDF, supply commitments, advanced technical knowledge, and other conditional benefits have proven to be powerful weapons to enforce *de facto* exclusivity. OEMs’ net profit margins are often smaller than MDF benefits from Intel, allowing Intel to secure exclusivity and future purchases by threatening a customer’s narrow margins and marketing budget. The FTC therefore correctly recognized the importance of stopping exclusivity without deterring discounts.<sup>22</sup>

Section IV.A of the proposed Decision and Order attempts to address Intel’s anticompetitive sales practices by prohibiting Intel from offering or providing benefits to customers on the explicit or implicit condition of exclusivity.<sup>23</sup> The section sets out seven specific prohibitions including barring benefits conditioned on using only Intel’s products in a particular market segment or on purchasing a certain percentage of products from Intel.<sup>24</sup> Section IV.B then carves out an extremely detailed and complex set of safe harbors, including for meeting competition and for providing “extraordinary assistance.”<sup>25</sup>

However, the proposed remedy does not effectively attack the root cause of the problem: Intel’s discretion. Because the proposed provisions lack objective measures for evaluating Intel’s use of benefits like MDF, they permit Intel to continue to exercise broad discretion in awarding benefits to secure tacit exclusivity. For example, Intel can still punish a “disloyal” customer by withholding an MDF disbursement under the pretext that it found a particular marketing campaign to be unsatisfactory. The FTC will have to prove that Intel’s true motivation for denying the disbursement was to punish the customer for failing to use Intel as its exclusive supplier — a potentially insurmountable burden absent careless documentation by Intel.

To provide an effective remedy in light of Intel’s extensive history of manipulating MDF to punish disloyal customers and foreclose the use of competitors’ products, the Decision and Order should simply prohibit Intel from using MDF altogether. This approach does not interfere with discounting in any way, as Intel can easily build discounts into its standard pricing schedule. If Intel needs OEMs to promote its products, it can publish scheduled discounts conditioned on spending specified amounts promoting particular chips. Achieving legitimate marketing support with MDF does not require that the FTC permit Intel to continue to exercise

<sup>22</sup> Complaint ¶¶ 6–7, 49–55; Analysis to Aid Public Comment at 9–13.

<sup>23</sup> Proposed Decision and Order § IV.A.

<sup>24</sup> *Id.* § IV.A.

<sup>25</sup> *Id.* § IV.B.



the type of discretion that turned MDF into the “slush fund” it became under Intel’s monopolistic administration, as evidenced by the SEC’s recent investigations.

If the FTC determines that it cannot insist on eliminating MDF all together, the Decision and Order should at least address Intel’s discretion. The FTC should impose three conditions on Intel’s use of MDF to enhance the enforceability of Section IV:

- MDF must be earned based on actual delivered and paid-for purchases. This approach prevents Intel from using MDF as an immediate payment for a long-term commitment, resulting in effective exclusivity.
- All funds should be paid to customers rapidly — ideally within one quarter — and only for promotion of the specific chip purchased. This approach would help ensure that MDF is used for market development and not as a slush fund to curry favor to the exclusion of competitors. This approach would also prevent cross-subsidization that could circumvent the anti-bundling provisions of the proposed Decision and Order.
- Intel should not adopt any conditions on MDF that allow it to exercise discretion. Once the customer earns a benefit, Intel should not be able to control disbursement based on its approval of the customer’s advertisement.

This approach would give OEMs and other customers greater clarity and confidence in the price that they are paying for Intel products, resulting in greater pass-through to end consumers. Moreover, clear and objectively verifiable conditions on MDF would also greatly enhance the FTC’s ability to enforce these provisions.

Accordingly, VIA suggests substituting the following language for Section IV.B:

- B. If the Respondent provides any Benefit to a Customer or End User, other than a reasonable and uniform volume discount based on the actual volume of that particular Relevant Product purchased from Respondent, then:
1. Respondent shall adopt criteria for attaining that Benefit such that no reasonable person could disagree as to whether a particular Customer or End User meets the criteria;
  2. Respondent shall publish these criteria to all interested parties ninety (90) days before they take effect;<sup>26</sup>
  3. Respondent shall not require the purchase, use, advertisement, or promotion of any Intel product other than the product on which the Benefit is offered (“Benefited Product”);

<sup>26</sup> Note that this provision only applies to *the criteria* and not to the level of the benefit. It does not impose a waiting period for Intel to lower its prices.



4. If the Benefit is related to advertisement or promotion, Respondent shall require that the Customer disperse the Benefit in the same quarter in which the Benefited Product was delivered, or in the next consecutive quarter;
5. Respondent shall pay the Benefit to the Customer or End User no later than one quarter after the Benefited Product is delivered;
6. Respondent shall not adopt any criteria that names a specific Customer or End User, or any proxy for the same; and
7. Failure to timely provide a Benefit to a Customer or End User who qualifies under Respondent's published criteria shall violate this Decision and Order.

## V. Compliance Terms

Intel's willingness to repeatedly evade its commitments to regulators necessitates swift and proactive monitoring of Intel's compliance. The FTC therefore correctly recognized the need for technical assistance in enforcing the proposed Decision and Order in this complex and fast-paced industry.<sup>27</sup>

Section IX of the proposed Decision and Order attempts to provide monitoring by allowing the FTC to appoint technical consultants, subject to Intel's consent and at Intel's expense (up to \$2 million over the life of the decree), to assist in enforcing certain provisions of the decree.<sup>28</sup> Intel may require these consultants to sign customary confidentiality agreements and to certify a lack of conflicts of interest.<sup>29</sup> Additionally, Section IX.C wisely makes any failure to expeditiously respond to the FTC staff's requests a violation of the decree, which will allow the FTC to enforce requests through the contempt process and to avoid the sometimes-lengthy process of issuing and enforcing compulsory process.<sup>30</sup> Given this industry's market dynamics and the rapid pace of innovation, quick, informed responses to Intel's potential violations are vital to stopping anticompetitive behavior and avoiding irreparable harm.

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<sup>27</sup> Proposed Decision and Order § IX.A; Analysis to Aid Public Comment at 16.

<sup>28</sup> *Id.* § IX.A. Given the complexity of this industry and the business practices in question, it is unclear why the FTC can only use technical consultants in enforcing specific provisions of the proposed Decision and Order. In particular, the contemplated provision does not allow the FTC to use technical consultants to enforce Section III of the proposed Decision and Order, regarding the license modifications that Intel is obliged to offer certain third parties. Technical consultants with deep industry knowledge may be particularly valuable in assessing whether the offers that Intel makes are reasonable and, where Intel is obligated to negotiate in good faith, whether Intel's proffered justifications are valid. Similarly, providing Intel with a "veto" of the FTC's choice of technical consultants by requiring Intel's consent seems unwarranted. Intel's legitimate interests are already protected by the budget cap and by the provisions requiring that technical consultants sign a confidentiality agreement and certify that they are free of conflicts of interest.

<sup>29</sup> *Id.* §§ IX.D–E.

<sup>30</sup> Proposed Decision and Order § IX.C.



However, the proposed Decision and Order does not provide for a monitor trustee to supervise Intel's compliance with non-technical aspects of the Order, including its pricing and marketing provisions. Without dedicated monitoring of its commercial practices, Intel is likely to adapt its anticompetitive conduct and thwart the spirit of the Decision and Order. In particular, to avoid permanent harm to the competitive process, Intel needs close and constant monitoring by a trustee who is an industry expert and is devoted exclusively to this matter. Detection and enforcement after the fact are inadequate to prevent irreparable competitive injury during the critical period when new products are launched.

Accordingly, to effectively supervise Intel's compliance, the Decision and Order should provide for a monitor trustee to oversee enforcement of the entire decree. Such a provision is common and generally noncontroversial in FTC consent orders. Although VIA appreciates that the FTC has developed a detailed understanding of Intel's product costs and pricing practices, a dedicated trustee can better monitor Intel's commercial conduct going forward in real time, without the competing priorities facing the FTC staff. As an industry expert, the monitor will be able to rapidly detect violations of the Decision and Order before they permanently injure competition.

Finally, in addition to the other reporting obligations provided in Section X, the Decision and Order should provide for annual pricing reports and detailed accounts of how products are allocated to customers during times of supply shortage. These reports will allow the FTC to proactively monitor whether Intel is conditioning benefits on exclusivity or past or future purchases without having to wait for a complaint.

Accordingly, VIA suggests the following additional language in Section IX and substitute language in Section X.B:

#### IX.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after entry of the Decision and Order, the Commission shall appoint a Monitor Trustee to ensure Respondent fully complies with all of its obligations and performs all of its responsibilities as required by the Decision and Order.
  1. The Monitor Trustee shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.
  2. The Monitor Trustee shall have the ability to retain a reasonable staff to assist in the exercise of his or her duties, subject to the approval of the Commission.
  3. Respondent shall pay the fees and other reasonable expenses for the



Monitor Trustee and the Monitor Trustee's staff. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

4. The Commission may remove and replace the Monitor Trustee at will.
- B. Intel consents to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:
1. The Monitor Trustee shall have the power and authority to monitor Intel's compliance with the terms of the Decision and Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.
  2. The Monitor Trustee shall have full and complete access to Respondent's personnel, books, records, documents, facilities, premises, and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor Trustee may reasonably request. Intel shall cooperate with any reasonable request of the Monitor Trustee. Intel shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Intel's compliance with this Order.
  3. The Monitor Trustee shall have the power to interview Respondent's employees and agents without interference (other than the presence of counsel) on reasonable notice and to attend any meeting of Respondent's personnel without notice.
- C. Upon the complaint of any person that Respondent has engaged in conduct that potentially violates the Decision and Order, or upon his or her own initiative to determine whether this is the case, the Monitor Trustee or the Commission shall issue to Respondent a request for information and relevant documents.
1. Failure of Respondent to comply with such a request within ten business days shall be a violation of this Decision and Order.
  2. Any objection by Respondent to such a request shall be limited to claims of privilege or relevance.
  3. If Respondent raises any such objection to the request for information, Respondent must nonetheless comply with such request except to the extent objected to.

X.





IT IS FURTHER ORDERED that:

- B. Annually on the 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. Respondent shall include (1) any communications from customers raising or identifying potential violations of the Decision and Order; (2) all communications between Respondent and any Designated Intel Competitor that are received during the reporting period regarding compliance with provisions of this Order; and (3) a schedule of the prices charged and benefits given to customers, the schedules used to determine those prices and benefits, and a detailed account of supply allocation if Respondent was unable to fill all customers' orders in full.

## **VI. Extension of the Capture Period in VIA's License**

Although VIA has identified several provisions in the proposed Decision and Order that require improvement for effective enforcement, there are many provisions of the proposed Decision and Order that will promote competition. Among these helpful provisions, VIA would like to highlight the extension of the capture period in VIA's x86 license with Intel. As one of only two x86 CPU competitors to Intel, VIA's future is critical to maintaining competition in the x86 CPU market. In particular, VIA has driven innovation in low-power x86 devices — such as netbooks, lightweight laptops, and lightweight servers — that have changed the way that we live and work. Without VIA's presence this market segment would stagnate. The FTC therefore correctly recognized the need to assure VIA's future and provide “the clear path that [VIA] needs to design and produce its next generation of CPU products” by extending the capture period in VIA's x86 license.<sup>31</sup>

Section III.C.1 requires that Intel offer to extend the capture period in VIA's x86 license until April 7, 2018. Section III.C.4 prohibits Intel from conditioning its offer on any other change to VIA's x86 license. And Section III.E makes it a violation of the Decision and Order for Intel to breach its license with VIA, AMD, or NVIDIA. This extension means that Intel lacks a good-faith basis to bring patent litigation against VIA until at least April 2018, as VIA has a license to all of Intel's intellectual property for x86-instruction-set compatible CPUs. Further, Section III.E means that any non-meritorious litigation by Intel against VIA, AMD, or NVIDIA will violate the Decision and Order. Suppliers and customers should take comfort in these facts and disregard any assertions by Intel disparaging VIA's, AMD's, or NVIDIA's license rights.

VIA particularly notes that the FTC has extended the capture period in VIA's license without conditions. Although VIA addressed the issues specific to change-of-control provisions in x86 licenses in Section I above, the FTC should not let Intel use ambiguous language in the proposed Decision and Order to nullify this unconditional extension of the capture period by

<sup>31</sup> Analysis to Aid Public Comment at 7; see Proposed Decision and Order § III.C.1.



withholding its consent to a change of control. VIA therefore suggests that the FTC make clear on the record that the extension of the capture period remains in force until April 7, 2018 notwithstanding any change-of-control provision or any other limiting condition in the original license. This fixed date for termination of the capture period should provide customers and suppliers with additional certainty about, and confidence in, VIA's license rights.

\* \* \*

VIA again wishes to express its appreciation for the FTC's efforts to bring an end to Intel's unfair methods of competition and to implement remedies that will restore a competitive environment for customers and competitors alike. We encourage the FTC to adopt these measures to create a more enforceable Decision and Order and we look forward to the opportunity to vigorously compete with Intel on the merits.

Sincerely,

Wenchi Chen,  
Chief Executive Officer,  
VIA Technologies Inc.