Before the
Federal Trade Commission
Washington, D.C.

In re Intel Consent Order	Docket No. 9341 (Comment)

COMMENTS OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

CCIA commends the Federal Trade Commission (FTC or "the Commission") for its decision to bring this case and believes this Consent Order[1] ("the Order")—if properly construed—may contribute to restoring competition in a vital sector of the information technology industry that has been grievously harmed by anticompetitive behavior. However, CCIA is concerned that this well-meaning Consent Order contains certain ambiguities and potential loopholes through which Intel may escape the spirit of the settlement. The ultimate success of this Order will therefore depend on the FTC's vigilant enforcement of the conditions outlined in the document. CCIA encourages the FTC to adopt a clear, auditable, transparent and expeditious set of procedures to handle dispute resolution and future complaints.

I. The Commission Wisely Seeks to Promote Existing Competition, Given Current Market Conditions.

High upfront capital costs and huge intellectual property barriers make new entry into the microprocessor sector extremely difficult. Accordingly, CCIA applauds the Commission's

[1] *In the Matter of Intel Corporation*, Decision and Order, Docket No. 9341 (Aug. 4, 2010).

attempt to bolster existing competition by guaranteeing manufacturers' right to employ third party fabrication plants, extending Via Technologies' x86 license and ensuring "good faith" efforts to allow x86 licensing or interconnection rights to pass from the current competitors to potential purchasers of those companies. The FTC will help spur innovation and competition by taking steps to ensure that Intel's competitors can utilize third party fabrication plants without compromising their licensing rights. Doing so will enable Intel's competitors to more easily vary production to match customer demand. However, given the importance of the change of control agreement, CCIA expresses some reservation regarding the inherent ambiguity embedded in the concept of "good faith." The FTC should interpret this phrase aggressively and establish that the burden of proof would lie with Intel to justify rejecting legitimate offers. As a sophisticated market player and negotiator, Intel can take negotiating positions that may appear superficially reasonable, at least as would be judged by a court, but are not in fact in "good faith." Because Intel has significant incentive to prevent current competitors from strengthening their competitive positions by raising additional capital or selling themselves to a better-positioned incumbent, the FTC must align the burden of proof with this incentive.

The Consent Order's "Commercial Practices" provisions have received the most attention and may determine the ultimate success or failure of the Order. CCIA supports the restrictions on Intel's ability to enter into exclusive dealing arrangements with Original Equipment Manufacturers (OEMs) and the prohibition on first dollar discounts. Since these behaviors have already received considerable attention in the many cases against Intel over the last decade, and are generally the easiest of the restrictions to enforce, these comments instead focus on the restrictions on predatory design and the GPU interoperability section—aspects unique to the FTC case and thus particularly important.

II. The Success of the Consent Order Depends on Ensuring Interoperability.

A. The FTC's Technical Consultant will be required to manage complex interoperability issues.

Order provisions pertaining to Intel's approach to interoperability will be one of the more difficult sections to enforce, and great care should be taken to appoint a Technical Consultant(s) with demonstrated experience in this particular set of issues. Nevertheless, CCIA is worried that Intel may attempt to use the language of Section V of the Order to circumvent its spirit, which is designed to prevent Intel from changing product design *solely* to harm its competitors. The FTC and any Technical Consultant should construe Section V to mean that not only must Intel show a positive outcome for any design change, but also that (a) the alleged benefits of any change which in any way harms competitors could not have been achieved without harming its competitors, and that (b) the alleged benefit achieved outweighs the harm.

Any alternative interpretation of Section V of the Order may permit Intel to incorporate anticompetitive design changes into processors anytime updates or improvements are made, as it would only need to demonstrate that the design changes were not done for *solely* anticompetitive reasons. Therefore, it becomes critical how "design change" is defined. If Intel is allowed to define what constitutes a "design change," it could easily package several modifications as one "change" and thus attempt to justify various anticompetitive changes by bundling them with an ostensibly positive modification. Consequently, the FTC or the Technical Consultant(s) should determine what is a "change" for the purposes of complying with this section, and that definition should be targeted as narrowly as possible to encompass discrete product alterations. Similarly, CCIA agrees with the FTC's decision in Section V.B to place the onus on Intel to prove that any "bug" that degrades the performance of competitors' products truly was inadvertent.

B. Ensuring that the PCI Express Bus Interface is properly maintained is critical to burgeoning ancillary market.

CCIA also believes that Section II, which requires Intel to continue to provide and maintain an open PCI Express Bus for six years, is critical to allow innovation to continue in ancillary markets. GPUs have the potential to transform computing by drastically increasing performance at costs that are a fraction of the cost of getting the same performance gain out of a CPU. This section will hopefully provide GPU makers and capital investors the certainty needed to continue innovation and investment in this critical market, at least for the next six years. However, CCIA calls on the FTC and the chosen Technical Consultant(s) to be exceptionally vigilant in this area. The interpretation of what constitutes adequate "maintenance" of the PCI Express Bus Interface may vary drastically between Intel and its competitors and it will be crucial that the FTC and the Technical Consultant(s) pay particularly close attention to this area, as the GPU market has the potential to sow the seeds for future disruptive innovation.

Conclusion

In conclusion, CCIA applauds the FTC and recognizes the huge amount of effort it took to investigate and pursue this case and produce the aforementioned Consent Order. Notwithstanding the concerns addressed above, CCIA has faith that the FTC will enforce the spirit of the Order as laid out in its *Analysis of Proposed Consent Order to Aid Public Comment*.[2] The Commission should design an enforcement regime that is transparent and clear with swift means for aggrieved parties to seek dispute resolution. Furthermore, given the sophistication of the microprocessor market and its ancillary ecosystem, the FTC should frequently consult with

[2] *In the Matter of Intel Corporation*, Analysis of Proposed Consent Order to Aid Public Comment, Docket No. 9341 (Aug. 4, 2010).

interested and knowledgeable third parties, including, but not limited to, competitors directly affected by the Order.

Respectfully submitted,

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