UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 29, 2010

Wenchi Chen
Chief Executive Officer
VIA Technologies, Inc.

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

Dear Mr. Chen:

Thank you for your comments regarding the Proposed Consent Order accepted by the Federal Trade Commission for public comment in the above-captioned matter. Your comment reflects the opinion that "many parts of the proposed Decision and Order will promote competition," and offers areas in which you believe the Consent Order could be strengthened.

I. License Assignment Upon Change of Control

Section III.B of the Consent Order will require Intel to offer to modify the change of control terms in Intel's intellectual property licenses with AMD, NVIDIA, and Via. The provisions in the 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 exposure 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.

Your comment reflects concern that the one-year stand still and required good faith negotiations are not sufficient, and suggest that, instead, the Order provide for automatic assignment of the license after a change of control and "specifically enumerat[e] the limited situations in which Intel can deny an assignment." We do not believe such a condition is appropriate. A remedy that would have removed change of control provisions altogether was considered but ultimately rejected due to concerns about the impact it would have on the balance of intellectual property rights between Intel and any potential acquirer of firms like Via. The Consent Order as drafted seeks to strike the appropriate balance by providing Intel licensees with rights beyond those that they previously had while at the same time preserving incentives to innovate for not only Intel, but its competitors as well.

II. Verification of Licensed Rights

Section III.A of the Consent Order will 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 Consent Order will further require Intel to confirm to any foundry or customer that AMD, NVIDIA, and Via licenses confer such "have made" rights. "Have made" rights allow AMD, NVIDIA, and Via to contract out manufacturing to third parties. 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.

Your comment reflects concern that the current provision should: 1) allow licensees to disclose the entire license while Intel and the licensee prepare a "plain-English statement explaining" the licensee's have-made rights; and 2) prohibit Intel from bringing an infringement suit against a licensee's customer or fabricator until after Intel has won a suit against the licensee.

With respect to your first proposed change, disclosure of the entire license is not necessary to assuage foundries and customers about Intel Licensees' rights. The Consent Order as drafted greatly reduces any potential uncertainty that could limit foundries' willingness to deal with Intel licensees. The Consent Order prohibits Intel from engaging in the threatening behavior described in your comment, and the Commission is free to take action against Intel if a problem arises in the future. Requiring Intel to reach an agreement with its licensees on a "plain-English" description of the license would be overreaching. It would also create potential enforcement issues if the parties are unable to reach an agreement, and, in addition, it could impact Intel's valid contract rights.

With respect to your second proposed change, preventing Intel from filing patent infringement actions until it has won a suit against the licensee is unnecessary to allow Intel licensees reasonable access to foundries. Further, such a provision would unreasonably tie Intel's hands with respect to protection of its intellectual property and create a substantial delay in enforcing its legitimate intellectual property rights.

The Computer and Communications Industry Association ("CCIA") also commented on the Section III.A "have made" rights provisions in the Proposed Consent Decree and concluded that

> [t]he 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.

The CCIA did not suggest additional measures would be necessary to provide sufficient notice to foundries and customers that license rights are legitimate.

III. Interoperability

Section II of the 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. Intel's commitment to 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. Comments submitted by the Computer and Communications Industry Association note that the PCIe provisions in Section II will "hopefully provide GPU makers and capital investors the certainty needed to continue innovation and investment in this critical market."

Section V of the Consent Order prohibits 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 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. The burden is on Intel to demonstrate that any engineering or design change complies with the terms of Section V.

Your comment suggests several ways in which the provisions could be strengthened and offers an overhaul of the current terms. Your suggestions entail Intel disclosing significant design information about its CPUs and bus protocols and forgoing enforcement of any patents that are connected to implementation of those technologies; essentially, your proposal would allow Intel's competitors to copy of Intel products without fairly compensating Intel. Such a requirement would strip Intel and its competitors of incentives to innovate.

IV. Market Development Funds ("MDF") and Other Conditional Benefits

Section IV of the 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.

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 nonetheless exclusionary or unfair and result in harm to consumers.

Your comment suggests that the Consent Order does not do enough to remove Intel's discretion in the provision of market development funds or other technological information to its customers. However, these practices are potentially efficient. When properly employed, MDF makes available to consumers new and innovative products that otherwise might not be available. Your recommendation would place limitations on Intel that could potentially hinder its ability to bring such products to market. The Consent Order forbids Intel from offering MDF, or other benefits, that are conditional on loyalty or exclusivity while allowing Intel to engage in vigorous competition.

V. Compliance Terms

Your comment commends the Commission's recognition that effective and swift enforcement of the Proposed Consent Order will require a technical consultant and reporting obligations, but suggests that the Commission should also appoint a monitor trustee to oversee Intel pricing and business practices. Although it is correct that the Commission's use of monitor trustees is "common and noncontroversial in FTC consent orders" in the merger context, monitor trustees are not commonly used in conduct cases. The Consent Order reporting obligations require Intel to, among other things, come forward with any customer complaints that it has engaged in conduct that would violate the Consent Order. The Commission has extensive experience effectively enforcing consent decrees in conduct cases without a monitor trustee, and the conditions of this case do not warrant diverging from that general approach. When circumstances arise that require specialized technical expertise, including cost accounting, microprocessor design, and software design, Section IX permits the Commission to appoint Technical Consultants to assist in assessing Intel's compliance with several provisions of the Consent Order. Intel will 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.

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

The Commission appreciates your recognition that the extended capture period of Via's license "should provide customers and suppliers with additional certainty about, and confidence in, VIA's license rights." The Consent Order 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. Extending Via's license is one of the ways in which the Consent Order seeks to reinvigorate competition, and the Commission is hopeful that Via will be able to capitalize on the opportunity to engage in competition that yields innovative products that benefit consumers.

The Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without the modifications you suggest. A copy of the final Decision and Order is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

It helps the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate your interest in this matter.

By direction of the Commission, Commissioner Kovacic recused.

Donald S. Clark
Secretary