

CLIENT ALERT

FTC Settles Charges That Intel Violated Section 5 of the FTC Act

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On August 4, 2010, the Federal Trade Commission approved a proposed consent order with Intel. This settlement resolved FTC allegations that Intel violated Section 5 of the FTC Act when it used *de facto* exclusive dealing arrangements and market share deals to induce original equipment manufacturers to forgo purchasing non-Intel central processing units ("CPUs") and graphics processing units ("GPUs"). The FTC complaint also alleged that Intel engaged in predatory engineering practices to exclude competitors.

According to the FTC, the proposed consent order is designed to renew competition and prevent Intel from suppressing CPU and GPU competition in the future. To that end, the FTC imposed detailed restrictions on Intel's licensing, engineering and commercial practices.

More specifically, the consent decree requires Intel:

- To assure foundry owners that third parties have appropriate "have made" rights under Intel's licensing agreements
- To modify change in control provisions of its intellectual property licenses to ensure that competitors can partner with third parties, gain access to capital, or be acquired by third parties
- To extend cross licenses to a competitor through 2018.

With respect to engineering and design, Intel must also maintain an open PCI Bus Interface on all CPU platforms for at least six years, and abstain from designing CPUs and GPUs solely to disadvantage competitive or complimentary products. The order also mandates certain disclosures regarding Intel's interface roadmap and the extent to which Intel's compilers and libraries optimize differently for different CPUs.

The FTC also imposed strict behavioral guidelines on Intel's commercial practices. It prohibited Intel from:

- Conditioning benefits on agreements to purchase a CPU, chipset, or GPU exclusively from Intel in any geographic area, market segment, product segment, or distribution channel
- Conditioning benefits on agreements to limit, delay, or refuse to purchase a CPU, chipset, or GPU from a non-Intel supplier
- Retaliating against manufacturers and end users doing business with a non-Intel supplier
- Conditioning benefits on the share of CPUs, chipsets, or GPUs purchased from Intel
- Bundling sales of its CPUs and chipsets when the effective selling price of either piece of the bundle is below Intel's product cost
- Offering a lump sum payment for reaching a particular threshold of purchases from Intel.

While the FTC settlement applies the *Peace Health* test for when bundled pricing will be considered below cost, the FTC explicitly reserves the right to attack bundled pricing under other standards, including specifically the *3M/LePages* standard, representing yet another missed opportunity for the agency to clarify what law should apply to the subject of bundled pricing.

The FTC initially pursued Intel as part of a highly publicized effort to define the outer boundaries of Section 5 of the FTC Act. Today's settlement with Intel, while certainly far-reaching, falls short of some of the relief the FTC sought in its complaint. Whether that is the result of hard bargaining, or reflection by the FTC that more draconian relief could have the effect of chilling innovation, will probably only be fully known over time, as the FTC continues its mission to define the outer boundaries of the reach of Section 5 of the FTC Act. While this closes yet another chapter in Intel's legal battles, others remain open, most notably pending cases by certain state attorneys general, and the European Commission's huge fine against Intel for violation of EU Competition rules.

[Please click here for a fuller antitrust analysis of bundled discounts.](#)

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