Statement of Chairman Leibowitz and Commissioner Rosch
In the Matter of Intel Corporation
Docket No. 9341

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 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.

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[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.

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]

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

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[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).

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

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.