absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.,* 1977–1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States v. BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bethtel Corp.,* 648 F.2d 660, 666 (9th Cir.), *cert denied,* 454 U.S. 1083 (1981)); *see also Microsoft,* 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[5]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest.'' [6]

that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See.* H.R. 93–1463, 93rd Cong. 2d Sess. 8–9 *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[5] *United States v. Bechtel,* 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.* 858 F.2d at 463; *United States v. National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.,* 406 F. Supp. at 716. *See also United v. American Cyanamid Co.,* 719 F.2d at 565.

[6] *United States* v. *American Tel. and Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting *United States* v. *Gillette Co., supra,* 406 F. Supp. at 716) (citations omitted), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *United States* v. *Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: June 29, 2000.

Respectfully submitted,

Mark J. Botti

Michael H. Knight

U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW, Suite 3000, Washington, DC 20530, (202) 307–0827.

Certificate of Service

I hereby certify under penalty of perjury that on this 29th day of June, 2000, I caused a true and correct copy of the foregoing Competitive Impact Statement to be served by telecopier and by mail to:

W. Todd Miller, Esq.

Baker & Miller, PLLC, Suite 1000, 915 15th Street, N.W., Washington, D.C. 20005–2302, Counsel for Dairy Farmers of America, Inc.

Burton Z. Alter, Esq.

Christopher Rooney, Esq.

Carmody & Torrance LLP, 18th Floor, 195 Church Street, New Haven, CT 06509–1950, Counsel for Societe De Diffusion Internationale Agro-Alimentaire and SODIAAL North America Corporation.

Michael H. Knight

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. JDS Uniphase Corporation and E–TEK Dynamics, Inc. Civil Action No. C 00–2227 TEH (N.D. Cal); Proposal Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), that a Proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Northern District of California in *United States* v. *JDS Uniphase Corp. and E-TEK Dynamics, Inc.*, Civil Action No. C00–2227 TEH. On June 22, 2000, the United States filed a Complaint which alleged that JDS Uniphase Corp.'s proposed merger with E-TEK Dynamics, Inc. would violate section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in the production and sale of dense wavelength division multiplexer and demultiplexer modules of 16 or fewer channels (''DWDMs''). The proposed Final Judgment, filed the same time as the Complaint, requires the newly merged firm to divest certain contractual rights in supply agreements the merged entity holds with several thin film filter suppliers. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection in Room 215 of the Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Washington, DC 20530 (telephone: (202) 514–2481) and at the Office of the Clerk of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Christopher S. Crook, Chief, San Francisco Field Office, Antitrust Division, United States Department of Justice, 450 Golden Gate Ave., Box 36046, Room 10–0101, San Francisco, California 94102 (telephone: (415) 436–6660).

Constance K. Robinson,

Director of Operations & Merger Enforcement, Antitrust Division.

Stipulation and Order

It is hereby STIPULATED by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the Northern District of California.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. Defendants shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court, or until expiration of the time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the entry of this Stipulation and Order, comply with all the terms and provisions of the

proposed Final Judgment as though the same were in full force and effect as an order of the Court.

4. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

5. In the event that the plaintiff withdraws its consent, as provided in paragraph 2 above, or if the proposed Final Judgment is not entered pursuant to this Stipulation, or the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continuing compliance with the terms and provisions of the proposed Final Judgment, this Stipluation shall be of no effect whatsoever, and the making of this Stipulation shall be without prejudice to any part in this or any other proceeding.

6. Defendants agree not to consummate their transaction before the Court has signed this Stipulation and Order.

Respectfully submitted,

Howard J. Parker, Esq.,
U.S. Department of Justice, Antitrust Division, 450 Golden Gate Avenue, Room 10–0101, Box 36046, San Francisco, CA 94102, Telephone (415) 436–6660, Facsimile (415) 436–6687, Attorney for Untied States of America.

W. Stephen Smith, Esq.
Morrison & Foerster LLP, 2000 Pennsylvania AVenue, N.W., Washington, D.C. 20006–1888, Telephone (202) 887–1514, Facsimile (202) 887–0763, Attorney for JDS Uniphase Corporation.

Charles T.C. Compton, Esq.,
Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, CA 94304–1050, Telephone (650) 493–9300, Facsimile (650) 565–5100, Attorney for E–TEK Dynamics, Inc.

Dated: June 22, 2000.

So Ordered:

This __ day of June, 2000.

United States District Judge

Final Judgment

Whereas, plaintiff, United States of America (''United States''), filed its Complaint on June 22, 2000, plaintiff and defendants, defendant JDS Uniphase Corporation (''JDS'') and defendant E–TEK Dynamics, Inc. (''E–TEK''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, plaintiff requires defendants to refrain from enforcing or reacquiring contractual rights effecting control over the output of any coating chambers owned by or on the premises of certain merchant suppliers, for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, defendants have represented to the plaintiff that the defendants can and will refrain from effecting such control, as ordered herein, and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the prohibitions contained below;

Now Therefore, before the taking of any testimony, without trial or adjudication of any issue of fact, or law, and upon consent of the parties, it is Ordered, Adjudged and Decreed:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of he parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

A. ''E–TEK'' means defendant E–TEK Dynamics, Inc., a Delaware corporation with its headquarters in San Jose, California, its successors and assigns, and it subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Filter Vendor(s)'' means Barr Associates, Inc., Herrmann Technology, Inc., Hoya Corporation USA, Optical Coating Japan Corporation, and their successors and assigns.

C. ''JDS'' means defendant JDS Uniphase Corporation, a Delaware corporation with its headquarters in San Jose, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. ''Optical Filter(s)'' means dielectric thin film filters used in optical networks for the telecommunications industry, such as, but not limited to, wideband, narrowband and gain flattening filters.

E. ''Rights of First Refusal'' means: (1) The contractual rights held by defendants of first refusal over all other persons with respect to the output of coating chambers for the manufacture of Optical Filters by the Filter Vendors, such as set forth in the Supply Agreements; (2) any right obligating a Filter Vendor to accept a defendant's purchase order for Optical Filters; and (3) any right that effect of which would be to enable a defendant, through unilateral action, to prevent a Filter Vendor from selling Optical Filters to persons other than a defendant.

F. ''Security Interest and Rights of Repayment'' means E–TEK's contractual rights under the Supply Agreements: (1) a priority security interest in the chambers that are subjects of the Supply Agreements; and (2) repayment, through discounts on Optical Filter purchases or otherwise, of funds advanced to the Filter Vendors in connection with the purchase or upgrade of the chambers that are subjects of the Supply Agreements.

G. ''Supply Agreements'' means the following contracts, including all amendments to these contracts: (1) Supply Agreement between E–TEK and Barr Associates, Inc. dated October 8, 1996; (2) Supply Agreements between E–TEK and Herrmann Technology, Inc. dated December 14, 1998, February 11, 1999 (both ''First * * * Agreement'' and ''Second * * * Agreement''), and May 5, 1999; (3) Supply Agreement between E–TEK and Hoya Corporation USA dated July 20, 1999; and (4) Supply Agreement between E–TEK and Optical Coating Japan Corporation dated February 25, 1999.

H. ''Transition Period'' means the ninety (90) days following the filing of the Complaint in this matter.

III. Applicability

This Final Judgment applies to JDS and E–TEK, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Prohibition on Enforcement of Rights

A. After the expiration of the Transition Period, defendants shall not enforce the Rights of First Refusal in the Supply Agreements.

B. After the first thirty (30) days of the Transition Period, defendants shall not enforce the Rights of First Refusal in the Supply Agreements with respect to thirty (30) percent of each Filter Vendor's Optical Filter manufacturing capacity subject to those Rights. After the second thirty (30) days of the Transition Period, defendants shall not enforce the Rights of First Refusal in the Supply Agreements with respect to sixty (60) percent of each Filter Vendor's Optical Filter manufacturing capacity subject to those Rights. During the Transition Period, and unless the

plaintiff otherwise consents in writing, defendants shall refrain from making or enforcing any purchase orders to the Filter Vendors unless the period for deliveries of Optical Filters under the purchase orders is not longer than thirty (30) days in duration.

C. After the filing of the Complaint in this matter, defendants shall not enforce the Security Interest and Rights of Repayment in the Supply Agreements.

D. Defendants promptly shall notify, by usual and customary means, the firms that defendants have identified to the plaintiff, in response to Second Request Specifications 3(h) and 9, of the prohibitions under the terms of this Final Judgment on the Defendants' enforcement of the Rights of First Refusal and Security Interest and Rights of Repayment.

V. Affidavits

Within forty (40) calendar days of the filing of the Complaint in this matter, and every forty (40) calendar days thereafter, through and including one hundred twenty (120) calendar days thereafter, defendants shall deliver to plaintiff an affidavit as to the fact and manner of their compliance with Section IV of this Final Judgment.

VI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) Access during defendants' office hours to inspect and copy, or at plaintiff's option demand defendants provide copies of, all books, ledgers, accounts, records, correspondence, memoranda, and documents in the possession or control of defendants, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the interviewee's reasonable convenience and without restraint or interference by defendants.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the plaintiff to any person other than a duly authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to plaintiff, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then plaintiff shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII. No Reacquisition

Defendants shall not reacquire, directly or indirectly, any Right of First Refusal over any coating chambers owned by or located on the premises of the Filter Vendors as of the filing of the Complaint in this matter. After the expiration of the Transition Period, nothing in this Final Judgment shall preclude defendants from purchasing Optical Filters from the Filter Vendors pursuant to purchase orders so long as the period for deliveries of Optical Filters under the purchase orders is no longer than sixty (60) days in duration, unless the plaintiff otherwise consents in writing. The provisions of this paragraph shall remain in effect for three years from expiration of the Transition Period.

VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

X. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

United States District Judge

Competitive Impact Statement

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this Civil Antitrust proceeding.

Nature and Purpose of the Proceeding

On June 22, 2000, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of E–TEK Dynamics, Inc. (''E–TEK'') by JDS Uniphase Corporation (''JDS'') would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that JDS and E–TEK are two of the leading manufacturers of components for fiber optic communication systems. JDS competes against E–TEK in the production and sale of dense wavelength division multiplexer and demultiplexer modules of 16 or fewer channels (''DWDMs''). DWDMs are important components that increase the transmission capacity of fiber optic networks. These two manufacturers are each other's primary competitor in the production and sale of DWDMs.

Competition between JDS and E–TEK has benefited customers through higher output, lower prices, increased quality, and faster delivery time. The acquisition of E–TEK by JDS will substantially lessen competition in the production and sale of DWDMs in violation of Section 7 of the Clayton Act. The proposed acquisition will substantially increase the incentive and likelihood for the combined company to engage unilaterally in anticompetitive behavior, such as suppressing output and increasing prices of DWDMs.

The request for relief in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing JDS and E–TEK from merging; (3) an award to the United States of its costs in bringing the lawsuit; and (4) such other relief that the Court deems proper.

When the Complaint was filed, the United States also filed a proposed Final Judgment that would permit JDS and E–

TEK to merge, but would require the modification of certain supply agreements the merged entity will hold with several thin film filter suppliers.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish Violations thereof .

II. Description of the Events Giving Rise to the Alleged Violation

A. Defendants and Proposed Transaction

JDS is a Delaware corporation, with its principal offices in San Jose, California. It designs, manufactures and distributes fiber optic products for communications applications. It is one of the world's largest independent suppliers of passive and active components for fiber optic communications networks. Passive components are composed of optical parts, while active components contain both optical and electronic parts. In 1999, JDS reported net sales of $282.8 million.

E–TEK is a Delaware corporation , with its principal offices in San Jose, California. It designs, manufactures and distributes passive components for fiber optic communications networks. In 1999, E–TEK reported net sales of $172.7 million.

On January 17, 2000, JDS and E–TEK entered into an agreement whereby JDS will acquire E–TEK by exchanging the outstanding shares of E–TEK common stock for shares of JDS common stock. The transactions is valued at approximately $15–18 billion.

B. Revelant Market

The volume of traffic carried by communications networks has increased rapidly over the last several years as a result of the explosion of bandwidth intensive applications such as Internet access, e-mail, remote access for computing, and electronic commerce. In the past, one fiber strand in a fiber optic communications network could carry only a single channel of voice or data traffic. Using a variety of different technologies, dense wavelength division multiplexers and demultiplexers separate the light signal in a fiber optic strand into multiple wavelengths, or colors, with each wavelength capable of carrying a separate communications channel. These multiplexers and demultiplexers enable the simultaneous transmission of multiple channels on a single strand fiber, and thereby increase the total transmission capacity of the fiber optic network.

Thin film filters are a critical component part at the core of the DWDMs that are designed, manufactured and sold by JDS and E–TEK. Thin film filters are made in a vacuum coating chamber by depositing thin alternating layers of two dielectric materials on a polished glass substrate. When packaged with other parts into a DWDM, each thin film filter will transmit a certain wavelength of light and reflect or absorb other wavelengths. The packaged filters are then assembled into modules of up to 16 channels, depending on a customer's desired channel count.

Because dense wavelength division multiplexers and demultiplexers are typically priced on a per channel basis—The higher the channel count, the greater the price of the module—a customer will only purchase the number of channels needed for its network design. A customer desiring a 16 channel multiplexer, for example, would not find it cost effective to substitute a 40 channel multiplexer. A small but significant increase in the price of DWDMS would not cause a significant number of customers to substitute multiplexers and demultiplexers which can achieve channel counts higher than 16 channels. Because there are no good substitutes for DWDMs, the production and sale of DWDMs, whether based on thin filter or some other technology, is a relevant product market, or ''line of commerce,'' within the meaning of Section 7 of the Clayton Act.

JDS and E–TEK produce and ship DWDMs to customers throughout the United States and the world. The world constitutes a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Harm to Competition as a Result of the Proposed Transaction

Upon consummation, the proposed acquisition will substantially lessen competition in the manufacturing and sale of DWDMs in the world market. JDS and E–TEK are the two most significant manufacturers and sellers of DWDMs, with market shares of 41% and 27% respectively. Their combined market share of 68% represents a substantial increase in concentration in the market. As measured by the commonly used Herfindahl-Hirschman Index (HHI), concentration in DWDMs will rise by about 2100 points to an HHI of about 4700 after the acquisition.

Customers view JDS and E–TEK as next best alternatives for DWDMs. During individuals purchase negotiations, customers compare product offerings from one company with offerings from the other to ensure that they are obtaining competitive prices, product specifications, and timely delivery. After the acquisition, customers will be left with inferior alternatives to the merged entity, with the result that JDS will have greater incentive and ability to reduce output below and raise prices above the levels they would have been had JDS been competing against E–TEK. JDS will also have reduced incentives to meet customer product specifications and delivery requirements without the competitive presence of E–TEK.

Competing firms are unlikely to constrain anticompetive behavior—a price increase, for example—by the merged firm in a timely manner. The DWDM market is characterized by increasing demand and supply shortages. Competing firms are currently operating at or near capacity. To expand output quickly enough to discipline a price increase by JDS would require overcoming time-consuming obstacles. One major obstacle faced by an existing firm or a new entrant is the availability of a sufficient supply of thin film filters. JDS has obtained virtually all of its supply of thin film filters from Optical Coating Laboratories, Inc. (''OCLI''), with which JDS established a strategic alliance in 1997 and which it acquired in February of 2000. E–TEK has obtained its supply of thin filters primarily through supply agreements that have included the acquisition of rights of first refusal over thin filter coating chambers located on the premises of merchant suppliers. E–TEK has also supplied itself with thin film filters produced at coating chambers located on company premises. Together, JDS and E–TEK in 1999 controlled approximately 80% of the world's thin film filter output.

It is a difficult and time consuming process to develop the capability of producing thin film filters cost effectively. Vacuum coating chambers and sophisticated optical monitoring systems to control the thin film deposition process must either be designed and constructed internally or be acquired from commercial venders of such equipment. Once coating chambers are installed, a potentially lengthy trial and error development process is needed to approach the manufacturing yields of the leading incumbents.

In addition to these limitations on the supply of thin film filters, there are further obstacles to timely and sufficient

new entry as a supplier of DWDMs. These obstacles include the need to design a DWDM that can be produced cost effectively in commercial volume and that meets specifications and is acceptable to customers for use in fiber optic communications networks. Customers commonly require rigorous and extensive testing over a substantial period of time before previously untested DWDMs are qualified and accepted for use in such networks. These obstacles are less significant for fringe firms already producing DWDMs.

In the world market for DWDMs, the proposed acquisition threatens substantial and serious harm to purchases of DWDMs. By significantly increasing the market share of JDS in DWDMs, the proposed acquisition will provide the combined company with substantially enhanced control over the output and price of DWDMs. Furthermore, customers of DWDMs will lose the competition between JDS and E–TEK which has resulted in faster product delivery times and improvement in product specifications.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will preserve competition in the market for DWDMs by requiring defendants to eliminate control over the supply of thin film filters by four merchant filter vendors. The proposed Final Judgment effectively eliminates such control by prohibiting the merged firm from enforcing E–TEK's rights of first refusal over coating chambers used by four merchant vendors to produce thin film filters. The elimination of control is intended to ensure that firms other than the merged firm have access to a supply of thin film filters and thereby are able to serve as competitive alternatives to the merged firm in the supply of DWDMs.

A. Modification of Thin Film Filter Supply Agreements

E–TEK currently holds contractual rights of first refusal over a significant portion of the output of the four major merchant vendors of thin film filters. After a 90-day transition period that starts with the filing of the Complaint in this matter, Section IV.A. of the proposed Final Judgment directly requires the merged firm to cease enforcing these contractual rights. The 90-day transition is necessary for the merged firm to readjust settled commercial relationships. The effect of the cancellation of the rights of first refusal is an elimination of E–TEK's control over the supply of filters from the merchant vendors.

JDS, and its current subsidiary OCLI, in 1999 produced over 50% of the 100 GHz and 200 GHz world output of thin film filters. E–TEK produced about 5% of the world output in coating chambers located on company premises. E–TEK controlled an additional estimated 23% of the 1999 world output through rights of first refusal over chambers located on the premises of the four merchant vendors. Under the relief provisions of the proposed Final Judgment, this 23% of the 1999 world output of thin film filters will be released from control by the merged entity and available to other firms and new entrants. Control over this production will transfer to the established merchant vendors, who will be free to use the filters internally or to sell them to new entrants or established producers of DWDMs.

B. Transition Period

During the 90-day transition period specified in Section IV.B. of the proposed Final Judgment, the merged firm's reliance on its contractual control of coating machines at the four filter vendors is gradually phased out. After 30 days, 30% of the rights of first refusal at each filter vendor become unenforceable. After 60 days, 60% of the rights of first refusal become unenforceable. After 90 days, the transition period expires and all of the rights of first refusal are unenforceable.

The transition period will provide an opportunity for the merged firm to being expansion of its internal supply of thin film filters, thus facilitating an uninterrupted flow of thin film filters to the merged firm for production of DWDMs. OCLI is a long established supplier of optical coatings that the merging parties believe has significantly superior technology and significantly superior manufacturing yields in the production of thin film filters for use in DWDMs. Upon consummation of their merger, JDS and E–TEK expect they will be able to expand internal thin film filter capacity at the merged firm by transferring OCLI technology to E–TEK.

The 90-day transition period also provides an opportunity for the merged firm to compete with other potential purchasers for short term purchases of thin film filters from the merchant vendors. Thus, although the merged firms' rights of first refusal are gradually phased out during the transition period, its right to purchase in competition with others for short term purchase orders is not eliminated. Market forces, including competition from the merged firm, will determine the price of, and the customer receiving delivery of, each merchant vendor's thin film filters that are no longer controlled by rights of first refusal.

During the transition period, and under the terms of the proposed Final Judgment, defendants do not have unlimited rights to substitute long term purchase arrangements with the merchant filter vendors in replacement of their abrogated rights of first refusal. There is a 30-day limitation on the length of the period during which the merged firm can receive thin film filter deliveries under a purchase order. Thirty days is a commercially common length of time for thin film filter purchase orders and is the period expressly contemplated for the length of purchase orders under certain of E–TEK's existing supply agreements for thin film filters. The 30-day limitation on purchase orders during the transition period is intended to facilitate implementation of the relief by providing competitors and potential competitors of the merged firm with improved and unrestricted access to thin film filters.

C. Rights of Repayment

To reduce the incentive for the merged firm to purchase from these merchant filter vendors, rather than expand internal capacity, Section IV.C. of the proposed Final Judgment prohibits the merged firm from enforcing its contractual rights of repayment for money E–TEK advanced to the merchant filter vendors and prohibits the merged firm from enforcing its security interests in the coating chambers. The prohibition is effective immediately upon filing of the Complaint.

The rights of first refusal over coating chambers on the premises of the four merchant filter vendors commonly arose in connection with advance payments by E–TEK to a filter vendor that were to be repaid over a period of time by means of discounts of up to 20% off the market price the filter vendor otherwise would charge for the filters. The security interests were to secure the repayment of the advances. As of the date of the filing of the Complaint in this matter, the aggregate balance of the amounts advanced or currently due to be advanced to the four filter vendors was under $4 million. The effect of the merged firm having the right to obtain thin film filters from the merchant suppliers at this discounted price would be an incentive to continue to purchase from the merchant suppliers.

The provision of the proposed Final Judgment eliminating the merged firm's right to obtain filters at the discounted price will increase the incentive for the merged firm to expand its own

production capacity, rather than rely on purchase from the merchant filter vendors. Increased production capacity for thin film filters at the merged firm will increase total industry thin film filter capacity and will lower prices for DWDMs. The increased thin film filter capacity will have this effect because the supply of DWDMs is currently limited by capacity constraints in the total industry supply of thin film filters.

D. Notification to Competitors and Potential Competitors

Section IV.D. of the proposed Final Judgment requires the merged firm to notify a set of firms of the opportunity the Final Judgment will provide for improved and unrestricted access to the supply of thin film filters to be available from the merchant filter vendors. The firms to be notified are competitors and potential competitors of JDS and E–TEK who the merging parties have identified to the Antitrust Division.

E. No Reacquisition

For a period of three years from the date the defendants relinquish all rights of first refusal, the merged firm, in accordance with Section VII. of the proposed Final Judgment, cannot reacquire any right of first refusal over any coating chamber located on the premises or owned by the merchant filter vendors as of the date the Complaint was filed. The purpose of the bar on reacquisition is to protect the integrity of the intended elimination of control by preventing evasion of the required relief. This proposed Final Judgment seeks to prevent possible evasion by broadly defining rights of first refusal in Section II, and by specifying in Section VII. that the bar extends to acquisition of rights of first refusal over any coating chambers on the premises or owned by any of the four merchant filter vendors. Such acquisition would be a prohibited reacquisition under the terms of the proposed Final Judgment.

The bar on reacquisition by the merged firm of long term control over the four filter vendors' coating machines is not intended to foreclose the commercial opportunity for the merged firm to compete with other DWDM producers to purchase thin film filters from these four filter vendors on a spot market basis, with purchase orders of a duration for delivery of 60 or fewer days. A safe harbor provision in Section VII. of the proposed Final Judgment makes clear that nothing in the decree is intended to preclude such purchases.

The bar on reacquisition extends for three years. In this case, the evidence indicated that this time period would be sufficient to protect competition.

F. Other Provisions

In order to monitor and ensure compliance with the Final Judgment, Section V. requires periodic affidavits on the fact and manner of defendants' compliance with the Final Judgment. Section VI. gives the United States various rights, including the ability to inspect defendants' records, to conduct interviews and to take sworn testimony of defendants' officers, directors, employees and agents, and to require defendants to submit written reports. These rights are subject to legally recognized privileges, and any information the United States obtains using these powers is protected by specified confidentiality obligations.

The Court retains jurisdiction under Section VIII., and Section IX. provides that the proposed Final Judgment will expire on the tenth anniversary of the date of its entry, unless extended by the Court.

Through the modification of the supply agreements with merchant vendors of thin film filters, the proposed Final Judgment's prohibitions will lower obstacles to entry and expansion by new and fringe DWDM suppliers and thereby improve, enhance and preserve competitive alternatives to the merged firm in the world DWDM market. Absent these prohibitions, the likely result of a combined JDS and E–TEK would be higher prices and lower output than there otherwise would be for DWDMs.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal courts to recover three times the damages a person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the defendants.

V. Procedures Available For Modification of the Proposed Final Judgment

Plaintiff and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to: Christopher S. Crook, Chief, San Francisco Field Office, United States Department of Justice, Antitrust Division, 450 Golden Gate Avenue, Box 36046, Room 10–0101, San Francisco, CA 94102.

The proposed Final Judgment provides, in Section VIII., that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate to carry out or construe the Final Judgment, to modify any of its provisions, to enforce compliance, and to punish any violations of its provisions.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, seeking an injunction to block consummation of the JDS/E–TEK merger and a full trial on the merits. The United States is satisfied, however, that the modification of supply agreements and other relief contained in the proposed Final Judgment will preserve competition in the market for DWDMs. This proposed Final Judgment will also avoid the substantial costs and uncertainty of a full trial on the merits on the violations alleged in the complaint. Therefore, the United States believes that there is no reason under the antitrust laws to proceed with further litigation if the supply agreements are modified in the manner required by the proposed Final Judgment.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the court may consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the United States Court of Appleas for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties See *United States* v. *Microsoft,* 56 F.3d 1448; 1461–62 (D.C. Cir. 1995).

In conducting this inquiry, ''[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [1] Rather.

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F .2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981), see also Microsoft, 56 F.3d at 1460–62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'' *United States* v. *American Tel. & Tel Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom., Maryland* v. *United States,* 460 U.S. 1001 (1983) (quoting Gillette Co., 406 F. Supp. at 716); *United States* v. *Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Moreover, the court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459. Since ''[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that the court ''is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States might have but did not pursue. Id.

VIII. Determinative Documents

There are no determinative materials within the meaning of the APPA that were considered by the Untied States in formulating the proposed Final Judgment. Consequently, the United States has not attached any such materials to the proposed Final Judgment.

Dated this 30th day of June 2000.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES

Joel I. Klein,
Assistant Attorney General.

Donna E. Patterson,
Deputy Assistant Attorney General.

Constance K. Robinson,
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Trial Attorneys, U.S. Department of Justice, Antitrust Division, San Francisco Field Office.

Certificate of Service

United States v. Uniphase Corporation and E–TEK Dynamics Inc.

I, Brenda J. Fautt, declare that I am a citizen of the United States, over the age of 18 years and not a party to the within action.

I hereby certify that a copy of the foregoing:

Competitive Impact Statement

was served today by placing it in Federal Express at San Francisco, California in a postage-paid envelope, sealed and addressed to the attorneys for the parties listed below:

W. Stephen Smith, Esq.
Morrison & Foerster LLP, 2000 Pennsylvania Avenue, NW., Washington, DC 20006–1888.

Charles T. C. Compton, Esq.
Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, CA 94304–1050.

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed at San Francisco, California.

[1] 119 Cong. Rec. 24598 (1973). See *United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93–1463, 93d Cong. 2d Sess. 8–9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

[2] Bechel, 648 F.2d at 666 (emphasis added); see BNS, 858 F.2d at 463; *United States* v. *National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

Dated: June 30, 2000

Brenda J. Fautt.

Secretary, Antitrust Division, U.S. Department of Justice, San Francisco, California.

[FR Doc. 00–18158 Filed 7–18–00; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA #186R]

Controlled Substances: Proposed Revised Aggregate Production Quotas for 2000

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of proposed revised 2000 aggregate production quotas.

SUMMARY: This notice proposes revised 2000 aggregate production quotas for controlled substances in Schedules I and II of the Controlled Substances Act (CSA).

DATES: Comments or objections must be received on or before August 18, 2000.

ADDRESSES: Send comments or objectives to the Deputy Administrator, Drug Enforcement Administration, Washington, D.C. 20537, Attn.: DEA Federal Register Representative (CCR).

FOR FURTHER INFORMATION CONTACT: Frank L. Sapienza, Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, Washington, D.C. 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in Schedules I and II. This responsibility has been delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations. The Administrator, in turn, has redelegated this function to the Deputy Administrator of the DEA pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations.

On February 10, 2000, DEA published a notice of established initial 2000 aggregate production quotas for certain controlled substances in Schedules I and II (65 FR 6635). This notice stipulated that the Deputy Administrator of the DEA would adjust the quotas in early 2000 as provided for in Section 1303 of Title 21 of the Code of Federal Regulations.

The proposed revised 2000 aggregate production quotes represent those quantities of controlled substances in Schedules I and II that may be produced in the United States in 2000 to provide adequate supplies of each substance for: the estimated medical, scientific, research, and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks. These quotas do not include imports of controlled substances for use in industrial processes.

The proposed revisions are based on a review of 1999 year-end inventories, 1999 disposition data submitted by quota applicants, estimates of the medical needs of the United States, and other information available to the DEA.

In addition, in a final rule published in the **Federal Register** on March 13, 2000 (65 FR 13235) gamma-hydroxybutyric acid (GHB) and its salts, isomers, and salts of isomers was placed into Schedule I of the CSA. Applications for quota for this substance were submitted and the aggregate production quota for gamma-hydroxybutyric acid is proposed as listed below.

Therefore, under the authority vested in the Attorney General by Section 306 of the CSA of 1970 (21 U.S.C. 826), delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations, and redelegated to the Deputy Administrator pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations, the Administrator hereby proposes the following revised 2000 aggregate production quotas for the following controlled substances, expressed in grams of anhydrous acid or base:

Basic class	Previously established initial 2000 quotas	Proposed revised 2000 quotas
SCHEDULE I		
2,5-Dimethoxyamphetamine	10,001,000	10,501,000
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2	2
3-Methylfentanyl	14	14
3-Methylthiofentanyl	2	2
3,4-Methylenedioxyamphetamine (MDA)	20	20
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	30	30
3,4-Methylenedioxymethamphetamine (MDMA)	20	20
3,4, 5-Trimethoxyamphetamine	2	2
4-Bromo-2,5-Dimethoxyamphetamine (DOB)	2	2
4-Bromo-2,5-Dimethoxyphenethylamine (2–CB)	2	2
4-Methoxyamphetamine	201,000	201,000
4-Methylaminorex	3	3
4-Methyl-2,5-Dimethoxyamphetamine (DOM)	2	2
5-Methoxy-3,4-Methylenedioxyamphetamine	2	2
Acetyl-alpha-methylfentanyl	2	2
Acetyldihydrocodeine	2	2
Acetylmethadol	7	7
Allylprodine	2	2
Alphacetylmethadol	7	7
Alpha-ethyltryptamine	2	2
Alphameprodine	2	2
Alphamethadol	2	2
Alpha-methylfentanyl	2	2
Alpha-methylthiofentanyl	2	2
Aminorex	7	7
Benzylmorphine	2	2
Betacetylmethadol	2	2
Beta-hydroxy-3-methylfentanyl	2	2