

Clients & Friends Memo

FTC Sues to Block Lockheed's Proposed Acquisition of Aerojet Rocketdyne in Milestone Defense Industry Vertical Challenge

January 26, 2022

The Federal Trade Commission ("FTC") filed suit yesterday to block Lockheed Martin Corporation's proposed \$4.4 billion acquisition of Aerojet Rocketdyne Holdings Inc., announced back in December 2020. Aerojet, the last independent U.S. supplier of critical inputs for missile systems, hypersonic cruise missiles, and missile defense kill vehicles, has only one other competitor—Northrop Grumman—that competes to provide propulsion inputs for missile systems and hypersonic cruise missiles to defense prime contractors. The complaint alleged that the proposed vertical acquisition would give Lockheed "the ability and incentive to deny, limit, or otherwise disadvantage competitors' access to critical propulsion inputs for various weapons systems," according to the [FTC press release](#). The FTC voted 4–0 across party lines to authorize the [complaint](#) and to seek a preliminary injunction to halt the deal pending the administrative trial.

The Department of Defense ("DoD") reviewed the acquisition in collaboration with the FTC, considering the potential impacts of the transaction on national security, the nation's industrial and technological base, competition, and innovation. If the deal is allowed to proceed, the complaint alleges that Lockheed will use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense. The complaint alleges that the acquisitions will give Lockheed the ability to cut off other defense contractors from the critical components they need to build competing missiles. In addition, this advantage would allow Lockheed to raise the price of its services, including to the U.S. government, and affect the schedule and contract terms for developing and supplying the product while delivering "lower quality and less innovation," according to FTC Bureau of Competition Director Holly Vedova. The impact to innovation is also noted in the fact that, as an independent supplier, Aerojet has the incentive to allocate its research and development funds based on the potential return the funds would generate regardless of which prime contractor it supports, which would change if acquired by Lockheed. There is also the concern that, as a subcontractor, Aerojet has access to sensitive information around prime contractors' technological advancements, cost, schedule, and business strategies. The complaint alleges that post-acquisition, Lockheed would have an incentive to exploit the access to its rivals' proprietary information to gain an advantage in competition against them.

[Lockheed](#) and [Aerojet](#) both released statements on January 25 indicating that the traditional merchant supply and firewall behavioral relief proposed by Lockheed—which may have been sufficient in the past to address anticompetitive concerns with vertical mergers—were rejected as insufficient by the current Administration. Lockheed has 30 days to determine whether it will respond to the suit or terminate the deal. On its January 25 fourth quarter earnings call, Lockheed CEO Jim Taiclet indicated that Lockheed was aware of the impending challenge and said the company will review the lawsuit and “evaluate all of our options.”

FTC Chair Lina Khan has made clear her aggressive enforcement agenda for the FTC, [pledging](#) that the FTC will use the “full set of tools and authorities” in its arsenal, as well as her skepticism of antitrust’s traditional presumption that vertical mergers pose less of a concern than horizontal transactions because they may have procompetitive benefits. As [we wrote about in September](#), the FTC in a contentious 3–2 vote along party lines withdrew its support from the Vertical Merger Guidelines, which the majority believes are flawed, particularly its provisions related to the “purported procompetitive benefits (i.e., efficiencies) of vertical mergers.” Chair Khan is now putting her money where her mouth is. The challenge to Lockheed’s acquisition of Aerojet is the second major merger challenge brought by the FTC under her leadership, the first being the FTC’s December 2021 [challenge to Nvidia’s \\$40 billion acquisition of Arm Ltd.](#) Both deals are vertical mergers, which until now have not often been challenged, and both challenges are notable for the FTC’s (until now less common) use of its in-house administrative process under Part 3 of the FTC Act. Also of note is that the complaints against both transactions were authorized by a unanimous 4–0 vote of the Commission, so, despite ideological differences along party lines, Chair Khan has been able to bring the two Republican commissioners around to her way of thinking—or perhaps the two mergers are so problematic that they would have been challenged even under the prior Administration.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Joel M. Mitnick	+1 212 504-6555	joel.mitnick@cwt.com
Ngoc Hulbig	+1 704 348-5282	ngoc.hulbig@cwt.com
Eden Y. Sung	+1 202 862-2338	eden.sung@cwt.com