



1985 WL 54285

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Fed. Sec. L. Rep. P 78,152, 1985 WL 54285 (S.E.C. No - Action Letter)

(Cite as: 1985 WL 54285 (S.E.C. No - Action Letter))

(SEC No-Action Letter)

*1 The First Boston Corporation
Publicly Available September 3, 1985

SEC LETTER

1934 Act/s10(b)/Rule 10b-9

August 2, 1985

Publicly Available September 3, 1985

William J. Williams, Jr., Esq.

Sullivan & Cromwell

125 Broad Street

New York, New York 10004

Re: The First Boston Corporation

File No. TP 85-415

Dear Mr. Williams:

In your letter dated July 5, 1985, as supplemented by telephone conversations with myself and other members of the staff, you advised us that First Boston Corporation ("First Boston") proposes to modify the language in its "market out" clauses contained within its standard underwriting agreement ("Agreement"). The clauses are included in the section of the Agreement entitled "Conditions of the Obligations of the Underwriters" and provide that the obligation of the underwriters to purchase and pay for the securities to be offered is subject to certain conditions precedent, including:

(c) Subsequent to the execution and delivery of this Agreement, there shall not have occurred (i) any change, or any development involving a prospective change, in or affecting particularly the business or properties of the Company or its subsidiaries which, in the judgment of a majority in interest of the Underwriters including you, materially impairs the investment quality of the Securities; (ii) any downgrading in the rating of the Company's debt securities [If appropriate, insert--or preferred stock] by any "nationally recognized statistical rating organization" (as defined for purposes of Rule 436(g) under the [Exchange]

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Act); (iii) any suspension or limitation of trading in securities generally on the New York Stock Exchange, or any setting of minimum prices for trading on such exchange, or any suspension of trading of the common stock of the Company on any exchange or in the over-the-counter market, or (iv) any banking moratorium declared by Federal or New York authorities, or (v) any outbreak or escalation of major hostilities in which the United States is involved, any declaration of war by Congress or any other substantial national or international calamity or emergency if, in the judgment of a majority in interest of the Underwriters including you, the effect of any such outbreak, escalation, declaration, calamity or emergency makes it impractical or inadvisable to proceed with completion of the sale of and payment for the Securities.

In your letter and in our conversations, you have set forth your views regarding the character of the First Boston market out clauses and how they are interpreted, particularly with respect to clause (c) (i) above. In essence, you stated that the clauses do not permit the underwriter to terminate the offering because of its inability to market the subject securities; rather, under clause (c) (i), termination could occur only if a material, adverse event occurs affecting the issuer (which would be reflected in a material impairment in the investment quality of the offered securities).

***2 Response:**

Whether an offering is made on a firm commitment basis or another basis is a significant factor from the perspective of the issuer, underwriters, and investors. It is also a significant issue from the perspective of the securities laws. For example, Rule 15c2-4 under the Securities Exchange Act of 1934 ("Exchange Act") applies to any offering other than a firm commitment offering in which brokers, dealers, or municipal securities dealers are participating. Moreover, Rule 10b-9 under the Exchange Act applies to all "all or none" and "part or none" offerings except "any offer or sale of securities as to which the seller has a firm commitment from underwriters or others (subject only to customary conditions precedent, including 'market outs') for the purchase of the securities being offered."

We understand that market out clauses similar to First Boston's are standard aspects of virtually all firm commitment underwriting agreements. The clauses allow an underwriter to terminate its commitment to purchase securities from the issuer before the closing of the offering as a result of the occurrence of one or more specified events. As in the First Boston underwriting agreement, these clauses may be included as conditions to closing the transaction with the issuer, or may specify events the occurrence of which permit the underwriter to terminate its obligation to purchase from the issuer. In either case, the purpose and effect are the same.

The Division of Market Regulation believes that market out clauses (whether or not termed conditions precedent) which permit an underwriter to terminate its obligation to purchase the offered securities from the issuer based upon (1) the

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occurrence of nonmaterial events affecting the issuer or the securities markets in general, or (2) an inability to market the securities, are inappropriate in the context of a firm commitment underwriting. Such clauses effectively place the risk of the success of the offering upon the issuer and result in the underwriter participating upon a "best efforts" basis. As a result, such an offering would constitute a contingency offering and be subject to, inter alia, Rules 10b-9 and 15c2-4. Moreover, irrespective of the particular wording of a market out clause, the exercise of such a provision in a manner that was inconsistent with a firm commitment underwriting also would subject the offering to, inter alia, Rules 10b-9 and 15c2-4.

Without specifically approving or disapproving the terminology of the clauses which you have presented to us, we do agree with your interpretation that a market out provision may be exercised appropriately in the context of a firm commitment underwriting upon the occurrence of a material, adverse event affecting the issuer that materially impairs the investment quality of the offered securities; and that, in any event, a market out clause in a firm commitment underwriting may not permit the underwriter to abrogate his obligation to purchase the offered securities from the issuer based upon an inability to market the securities.

*3 Please contact me if we can be of any further assistance.

Sincerely,

Larry E. Bergmann

Assistant Director

LETTER TO SEC

July 5, 1985

Mr. Larry Bergmann,

Assistant Director (Trading Practices),

Division of Market Regulation,

Securities and Exchange Commission,

450 5th Street, N.W.,

Washington, D.C. 20549.

Re: The First Boston Corporation

Dear Larry:

In the interest of full disclosure and completing the "record", I am writing to

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advise you that First Boston is proposing to expand its "out" clause and am enclosing a copy of the proposed language.

Clause (i) is the language that First Boston has used for 25 years, we discussed and you cleared. Clause (iii) has been used in the last few years in equity offerings only. The other clauses would be new.

Clause (v) deals with impracticality or inadvisability of proceeding with completion of sale or payment but is expressly limited to outbreaks, escalations etc. of the types described. Its inclusion should make it even clearer that clause (i) does not relate to marketing difficulties.

Unless I hear otherwise, I shall assume that you have no problems with First Boston's proposed expanded "out" clause.

Many thanks for your assistance.

Very truly yours,
William J. Williams, Jr.

ENCLOSURE

(c) Subsequent to the execution and delivery of this Agreement, there shall not have occurred (i) any change, or any development involving a prospective change, in or affecting particularly the business or properties of the Company or its subsidiaries which, in the judgment of a majority in interest of the Underwriters including you, materially impairs the investment quality of the Securities; (ii) any downgrading in the rating of the Company's debt securities [If appropriate, insert--or preferred stock] by any "nationally recognized statistical rating organization" (as defined for purposes of Rule 436(g) under the Act); (iii) any suspension or limitation of trading in securities generally on the New York Stock Exchange, or any setting of minimum prices for trading on such exchange, or any suspension of trading of the common stock of the Company on any exchange or in the over-the-counter market, or (iv) any banking moratorium declared by Federal or New York authorities, or (v) any outbreak or escalation of major hostilities in which the United States is involved, any declaration of war by Congress or any other substantial national or international calamity or emergency if, in the judgment of a majority in interest of the Underwriters including you, the effect of any such outbreak, escalation, declaration, calamity or emergency makes it impractical or inadvisable to proceed with completion of the sale of and payment for the Securities.

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