ADMINISTRATIVE PROCEEDING
FILE NO. 3-544

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of		
BOETTCHER & COMPANY	(8-683)	Private Proceedings
DAVID F. LAWRENCE		
ALFRED A. WIESNER		
BRUCE C. NEWMAN		

INITIAL DECISION

Sidney L. Feiler
Hearing Examiner

Washington, D. C.
December 22, 1967

ADMINISTRATIVE PROCEEDING
FILE NO. 3-544

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 5, 1967

In the Matter of	INITIAL DECISION
BOETTCHER & COMPANY (8-683) DAVID F. LAWRENCE ALFRED A. WIESNER BRUCE C. NEWMAN	ERRATA (Private Proceedings)

The following corrections and changes are hereby made in the Initial Decision heretofore issued by the undersigned:

Page	Delete	Add	Revised Text
15 - line 17	"substantail"	"substantial"	"to place a substantial proportion..."
19 - line 7	"bonds"	"bond"	"par value bond."
19 - line 18	"than"	"in"	"lesser drop in the governments market."
22 - line 13	"on"	"of"	"of the Jeffco..."
29 - line 12	"on"	"of"	"of the discussion..."
30 - line 11	"proceeding"	"proceeded"	"proceeded to acquire..."
36 - line 4	"1954"	"1054"	"Allender Co., Inc., 9 SEC 1043, 1054 (1941)."
41 - last line	"them"	"the"	"the item just below..."
45 - line 6	"unproper"	"improper"	"and therefore improper."
49 - line 12	"that"		"but he wanted..."
50 - line 6		"On September 9, 1963"	"On September 9, 1963, Newman introduced..."
50 - line 10	"exercise"	"exercised"	"it exercised the option..."

Page	Delete	Add	Revised Text
51 - line 3 in footnote	"accertain"	"ascertain"	"to ascertain the prices;;
53 - line 4	"that"	"of"	"of the 1/8..."
57 - line 21	"preliminary"	"primary"	"primary position market."
62 - line 20	"aforemention"	"aforementioned"	"its aforementioned activities..."
64 - line 6	"ot"	"to"	"to adhere to..."

Sidney L. Feiler
Hearing Examiner

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In the Matter of	
BOETTCHER & COMPANY (8-683) DAVID F. LAWRENCE ALFRED A. WIESNER BRUCE C. NEWMAN	INITIAL DECISION Private Proceedings

APPEARANCES: Joseph F. Krys and Robert F. Watson, Esqs.
for the Division of Trading and Markets

Dawson, Nagel, Sherman & Howard,
1900 First National Bank Building, Denver,
Colorado 80202 by Arthur K. Underwood, Jr. and
Jon K. Mulford, Esqs.; Holland and Hart,
Equitable Building, Denver, Colorado 80202
by Josiah G. Holland and Robert H. Durham, Jr., Esqs.
for the respondents.

BEFORE: Sidney L. Feiler, Hearing Examiner

I. THE PROCEEDINGS

These are proceedings instituted by order of the Commission pursuant to Sections 15(b), 15A and 19(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act") to determine whether the respondents violated certain provisions of the Exchange Act and the Securities Act of 1933, as amended ("Securities Act") and, if so, what remedial action is appropriate in the public interest.

The matters put in issue by the allegations in the order, as amended, are:

A. Whether, during the period from about January 1, 1962, to about January 1, 1964, the respondents, singly and in concert, willfully violated and willfully aided and abetted violations of the anti-fraud provisions of the Securities Acts[1/] in connection with the offer, sale and purchase of Jefferson County, Colorado School District No. R-1 bonds, Adams County, Colorado School District No. 50 bonds and United States Government securities, by, among other things, inducing the aforementioned school districts, and persons associated with them, to enter into advance

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1/ Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 (17 CFR 240.10b-5 and 15c1-2) thereunder are sometimes referred to as the anti-fraud provisions of the Securities Acts. The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or interstate facilities in connection with the offer or sale of any security by means of a device or scheme to defraud or untrue or misleading statements of a material fact, or failure to state material facts, or any act, practice, or course of conduct which operates or would operate as a fraud or deceit upon a customer or by means of any other manipulative or fraudulent device.

refunding arrangements, which included the underwriting of new school district bonds and the purchase of United States Government securities ("Governments") by material misrepresentations and statements which were false and misleading and which omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading concerning, among other things:

The relationship between the price at which respondent Boettcher & Company ("Boettcher") would and did furnish Governments to said entities and Boettcher's purchase price for such securities;

the relationship between the price at which Boettcher would and did furnish Governments to said entities and the best prevailing market price for such securities;

the terms on which Governments suitable for accomplishing proposed advance refundings had been and were being offered to Boettcher;

the steps taken by Boettcher to determine the best terms on which the Governments suitable to accomplished the advance refundings could be acquired;

the manner in which respondents would fulfill their fiduciary obligations to entities from whom respondents had solicited and obtained trust and confidence;

the costs incurred by Boettcher and its associates in acquiring Governments purchased for and sold to the said entities;

the costs of underwriting, obtaining and maintaining physical availibility of the Governments purchased for and sold to said entities;

the availability of the Governments at a price lower than that paid by the said entities to Boettcher;

the markups on the Governments intended to be taken and taken by a wholly owned subsidiary of Boettcher; and

statements and representations of similar purport and object.

B. Whether, from on or about March 16, 1966, until the date of the hearing herein, Boettcher, by means of newspaper and radio advertising has violated the aforementioned anti-fraud provisions of the Securities

Acts by misrepresenting to customers the services it furnished in trading over-the-counter securities.

Pursuant to notice, a hearing was held in Denver, Colorado, before the undersigned hearing examiner. All parties appeared by counsel and participated in the proceedings. At the conclusion of the presentation of evidence, opportunity was afforded the parties for filing proposed findings of fact and conclusions of law, together with briefs in support thereof. Proposed findings and briefs were submitted on behalf of all the parties. Upon the entire record and from his observation of the witnesses the undersigned makes the following:

II. FINDINGS OF FACT AND LAW

A. Jurisdictional and Procedural Findings

Boettcher, a partnership having its principal place of business in Denver, Colorado, is registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act, and has been so registered since August 17, 1941. It is a member of the National Association of Securities Dealers, Inc. ("NASD"), a national securities association registered pursuant to Section 15A of the Exchange Act. It also is a member, within the meaning of Section 3(a)(3) of the Exchange Act, of the New York and American Stock Exchanges, national securities exchanges registered pursuant to Section 6(a) of the Exchange Act.

Respondent David F. Lawrence has been a general partner of Boettcher since 1938. Respondent Alfred A. Wiesner has been a general partner of Boettcher since 1961. The respondent Bruce C. Newman has been employed by Boettcher as a registered representative from about January 1, 1962.

At all times here relevant, Lawrence headed the Boettcher Municipal Bond Department, Wiesner held a key position in the Department, and Newman was under their supervision.

Boettcher Investment Co., Incorporated ("Boettcher Investment") is a Colorado corporation and a wholly owned subsidiary of Boettcher.

B. Preliminary Note

Except for the issues raised by the allegation related to the over-the-counter trading practices of Boettcher, this case involves the advance refunding of general obligation bonds of two Colorado school districts, Jefferson County, Colorado School District No. R-1 ("Jeffco") and Adams County, Colorado School District No. 50 ("Adams 50").

Advance refunding, as authorized under Colorado law (set forth in Resp. Ex. 17) and so far as is material herein, is a process by which a school district issues bonds for the purpose of refunding any of its bonded indebtedness even though said indebtedness may not yet be due or callable. The proceeds derived from the issuance of any refunding bonds must immediately be placed in escrow to be applied to the payment of the bonds to be refunded plus accrued interest. Escrow proceeds, pending such use, may be invested or, if necessary, reinvested only in direct, non-callable obligations of the United States, maturing at such times as to insure the prompt payment of the bonds refunded and accrued interest. It is further provided that, when the escrow has been established as set forth above, the refunded bonds "shall not be deemed outstanding bonds" so far as bonded indebtedness limitations are concerned. Because of the provision with respect to the problem of non-callable or non-redeemable bonds as noted above, a school board has freedom to choose an opportune

time for entering into a refunding agreement.

Advance refunding is feasible because of the tax laws. United States Government obligations are generally considered to be the safest, highest-quality securities and thus would normally carry the lowest interest rates. However, because interest paid on Governments generally is subject to the federal income tax, but interest on school district obligations is not subject to federal income tax, the market will accept school district obligations with a lower interest rate than the interest rate the market demands on Governments. When Governments are held in escrow to pay outstanding obligations of a school district, the interest paid on the Governments is not subject to federal income tax. Thus, a school district is able to issue its bonds with an interest rate which is lower than that which it is able to obtain on Governments, and since the school district does not pay a federal income tax on Governments, it is able to make and/or save money by, in effect, borrowing money at one interest rate and earning money on Governments at a higher rate, with essentially no risk worthy of consideration because of the quality of securities issued by the United States Government.

The monetary savings that are achievable as a result of an advance refunding are a function of the price of and interest on the new issue and the price of and interest on the Governments. The total bond interest and/or the principal amount of the debt may be reduced substantially by use of the advance refunding device. Thus, if Governments are selling at a discount a saving in the amount of new principal which must be issued can be achieved. Again, depending on the amount of interest a

school district must pay in the current market for its money as against the return it can attain on Governments in the current market, it may achieve an interest saving. In a substantial issue it is necessary to prepare a pre-computed schedule to show in detail what Governments need to be bought to fulfill outstanding obligations with supporting tables showing how interest charges will be met.

There are other possible advantages not of a monetary character which are possible in an advance refunding operation. Thus, the number of dates on which interest payments must be made to creditors may be substantially cut down and the borrowing capacity of a particular school district may be increased.

Refunding bonds are customarily marketed through underwriters by the use of one of two methods. First, a school district may retain a fiscal agent as adviser and sell its bonds in a public sale by competitive bidding. The fiscal agent would receive a fee for his services and the purchaser or underwriter of the bonds would depend for his profit on the spread between his bid price and the price at which he would sell the bonds to the public. This method was not used in the two refundings involved in this proceeding. The second method, the one that was used here, is by the use of a negotiated sale with underwriters. In such a situation any one or a combination of the following is possible as compensation to the underwriters:

a. A markup on the new issue of bonds, i.e., the underwriters may market the new issue at higher prices than they paid the district for the new issue. An increase in the interest rate of these bonds will increase this source of profit while reducing the anticipated savings to the district.

b. A cash sum paid by the district for certain expenses of the underwriting.

c. A markup on the Governments supplied to the district for the escrow, i.e., the underwriters, if retained to purchase the Governments for the district, may buy the Governments at a lower price than the price at which they sell them to the district.

d. Having the district purchase some of the new refunding bonds from the underwriter at the markup price and bearing lower interest rates than others being issued at the same time.

Other variations are possible but the above are the most commonly used sources of compensation for underwriters. However, in any arrangement certain statutory restrictions must be observed. The refunding bonds must not be sold at less than their par value (there can be no direct or indirect discount), the net effective interest rate cannot exceed that of the bonds being refunded, and the proceeds must be placed in escrow to be applied to the payment of the bonds to be refunded upon their presentation and the costs and expenses incident to such proceedings and for no other purpose or purposes whatsoever until the bonds being refunded have been paid in full (C.R.S. (1963) 123-12-4, 7, in Resp. Ex. 17).

As previously pointed out, advance refunding is a two-step operation in which refunding bonds are sold by a school district to underwriters and the proceeds obtained by the school district are immediately invested in Governments which are retained in escrow. In the refundings involved here the underwriters not only bought the refunding bonds from the school districts but also acquired for the school districts the Governments needed for the escrow. It is undisputed that a markup was taken on the Governments, that is, they were sold to the districts at a price above

their purchase price. The key question in this portion of the case is whether the markups were taken in each instance by use of fraudulent practices and concealment or whether under all of the circumstances Boettcher, which was the leader of the underwriting syndicate in both instances, and the other respondents, who, on behalf of Boettcher, took part in the negotiations of the financial arrangements with the school districts, acted properly.

C. The Advance Refunding of Jefferson County School District No. R-1

1. Negotiations through July 30, 1963

In November 1962, Boettcher approached the Board of Education of Jeffco for the purpose of obtaining authorization to conduct a study of the feasibility of an advance refunding of Jeffco's outstanding general obligation bonds. A written agreement authorizing such a study was entered into between Jeffco and Boettcher on November 20, 1962.[2/]

In the early part of 1963, Boettcher was in large part instrumental in persuading the Colorado Legislature to adopt legislation which authorized Colorado school districts to advance refund their bonds, which legislation is contained in Colorado Revised Statutes, 1963, Chapter 123-12-1, et seq., previously referred to. Thereafter, Newman, acting on behalf of Boettcher, with the help of other members of its staff made a study of the feasibility of advance refunding general

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2/ The findings in this section are based in part on a Stipulation entered into by the parties. Meetings on July 30, September 4 and 9, referred to herein were recorded and the transcripts are in evidence. These transcripts were not complete or wholly accurate, according to the stipulation.

obligation bonds of Jeffco. He discussed the possible refunding with Wiesner and Lawrence. A brochure was prepared entitled "Plan and Proposal for Refunding" (Div. Ex. 1 B), which was presented by Newman to Jeffco at a formal meeting on July 30, 1963. The brochure contains a transmittal letter from Boettcher which points out that the Colorado refunding law was designed by Boettcher, that it had accomplished more than 60 projects of this type in several states, that none of its projects had received more pre-planned attention, demanded greater effort, and none appeared to work as well or require so little of the issuing body than this proposed refunding. It was further pointed out that Boettcher had accumulated extensive experience in this specialty and had pioneered the idea in the region. It was further stated that once the refunding process had been set in motion it would legally and morally assume responsibility from inception to completion.

The brochure was divided into four sections. The first section contained a tabulation of the existing debt, calculated at $40,209,000 as of September 2, 1963, set forth in various forms, including debt service requirements. Next there was a tabulation showing how existing issues would be treated in the refunding. Other sections dealt with proposals for arrangements of refunding issues as well as a detailed analysis for reference of each of 16 outstanding issues. In a memorandum it was claimed that advance refunding would result in a total principal and interest saving of $2,708,523.50, an immediate increase in bonding capacity substantially more than allowed under existing debt requirement arrangements, faster return of bonding capacity than under existing debt

retiring schedules, an average annual reduction of debt service over the present situation, and a reduction of the total number of outstanding issues from 16 to 5 and the number of interest payment dates each year from 8 to 2. Boettcher also promised to try to improve the bond rating of Jeffco and initiate efforts to broaden the market for its securities.

Newman also prepared a formal written proposal on behalf of Boettcher which he presented at the July 30 meeting (Div. Ex. 1 C). It was proposed that Jeffco advance refunding $40,209,000 of its general obligation bonds. The final amount of bonds to be issued would be determined later once the exact date of closing was decided taking into consideration the precise cost of the Governments to be purchased and accrued interest.

Boettcher offered two plans under which it would act for Jeffco. Under its Plan A it proposed to act as a financial consultant to Jeffco in an advertised public sale of the refunding bonds at a compensation of $8 per $1000 of bonds issued for its work as specified in the proposal. Under its Plan B, the proposal that was accepted at the July 30 meeting, Boettcher would be granted the right to form a selling group and would buy the refunding bonds from Jeffco at par and accrued interest. It would have 30 days to confirm its purchase from the date of acceptance of the proposal. Under both plans it committed itself at its own expense to retain recognized municipal bond attorneys for the preparation of legal proceedings and closing certificates; prepare comparative maturity schedules setting forth payments designed to fit requirements; print the necessary blank printed bonds; provide for final approving opinion of recognized municipal bond attorneys; assistance in setting

up the necessary escrow trust account and cooperate with public accountants of Jeffco selection who would verify pertinent aspects of the refunding bond issue; and to prepare an economic survey of Jeffco and to do everything possible to increase its bond rating in the financial market.

The written proposal was read and then explained by Newman to Jeffco and its representatives. Newman explained in detail the experience he and Boettcher had had with other advance refunding issues. He stressed that Boettcher had more experience in advance refunding than any other concern in the area and that it had played an important part in securing enabling legislation. He answered questions from Jeffco Board members and explained why certain approaches were not feasible or were feasible. He indicated that under Plan A there might be a serious problem of complying with statutory limitations on bond interest that could be paid by the district since an agency fee which Boettcher placed at $8 a $1000 bond would have to be added to the interest which would be offered to the public on a competitive bid basis.

There is no dispute that it was made quite clear in the written proposal and in the course of discussions at the July 30 meeting that Boettcher would not take any markup on the Governments it would furnish as part of the advance refunding arrangement. This clause was specifically inserted as an inducement for Jeffco to deal with Boettcher. The idea originated either with Lawrence or Newman and follows the language Newman had prepared in connection with another proposal. The following language appears in the July 30 proposal:

> "It is contemplated that any firm commitment which we may submit to you relative to a refunding bond issue or which we may obtain for you following advertising for public

sale of such refunding bond issue, shall provide that we will buy at the best possible prevailing market price, sufficient obligations issued by the United States Government and fully guaranteed by the United States Treasury to accomplish these payments in accordance with a schedule which we may determine to be the most beneficial to you. Further, any such commitment which we may furnish to you or obtain for you shall provide that you agree to purchase from us at our ~~market~~ [purchase] price on the date of our purchase on the open market plus accrued interest the above mentioned obligations issued by the United States Government with the par proceeds received from the sale of the refunding bond issue and from any other monies which you may have available for this purpose. . ." (Div. Ex. 1 C, p. 2).

Newman, in the course of the discussion over his proposal, made reference to this factor several times and in the following language:

"(a) 'with the proceeds of this refunding issue you will buy U. S. Government Treasury obligations -- * * *. These securities which we would provide ahead of time, we would buy them and sell them, we would carry them. This is our liability in effect on which we don't derive any profit whatsoever.' (Div. Ex. 1 D, pp. 7 and 8). (Underscoring supplied)

"(b) 'As purchaser of government bonds, we would buy them in your behalf and pay accrued interest and then when the transaction is completed you buy them from us at our price and accrued interest, that's all.' (Div. Ex. 1 D, p. 10).

"(c) 'Now, if we buy these at an opportune time and you turn down a bid and the basis for your rejection of the bid can be nothing more than the fact that you can't receive a legal average rate of interest, to complicate these things, we are forced to sell in a down market $40 million worth of government bonds. So that is wherethe risk is. Now, on the other hand, we are not charging a fee for this.' (Div. Ex. 1 D, p. 46). (Underscoring supplied)

"(d) 'Further any such commitment which we may furnish to you or obtain for you shall provide that you agree to purchase from us at our market price on the date of our purchase on the open market plus accrued interest,

> the above mentioned obligations issued by the United States Government with the par proceeds * * *.' (Div. Ex. 1 D, p. 61)." 3/

In the course of the discussion, Jeffco attorney, Harold D. Lutz, suggested the change from "market price" to "purchase price" which appears above. The Jeffco Board decided to accept Plan B as specified in the written proposal. The agreement was then read and approved and signed by the president of the Jeffco Board and Newman, on behalf of Boettcher and its associates. 4/

The respondents contend that at the July 30 meeting and shortly thereafter Boettcher and Jeffco arrived at a modification of the no-profit-in-Governments agreement that Boettcher had put into the July 30 written proposal (referred to by them as the "Clause"). This modification (referred to by them as the "Profit Limit"), it is contended, was discussed, accepted and verified and, subsequently, became the ground rule since the Clause was then unnecessary and became unfeasible due to market changes (Resps. Br., p. 52, et seq.).

It is conceded that in the July 30 proposal and for part of the July 30 meeting the discussion was on the basis of the Clause. However, it is argued that in later discussion it was agreed that there would be

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3/ A mechanical recording was made of the discussion and a transcription of the recording was later prepared by respondents' counsel. It is agreed that what appears in the transcript was said at the meeting but is not necessarily complete. This stipulation applies to transcripts of other meetings, on September 4 and 9, which will be referred to later.

4/ Boettcher's associates were 12 broker-dealers who have offices in Denver, Colorado, and who were members of a syndicate known and referred to as the "Denver Account" organized to participate in various Colorado advance refundings.

a limit on Boettcher's profit -- the gross profit an underwriter would take if he bought at a public sale, but after payment of expenses of preparing the bonds for market. After that, it is asserted, the Clause ceased to have any real meaning. Jeffco did not recognize this due to perhaps an erroneous and secret objection to such a profit, but it is urged that the respondents cannot be held at fault for any such misunderstanding. Respondents concede that this asserted arrangement was not in writing and was not a set figure, but ". . . approximate, in the neighborhood of $16" (Resps. Br., p. 55). The agreement, respondents claim, made the Clause unimportant and put a ceiling on how much profit Boettcher could retain.

The transcript of the July 30, 1963 meeting is 76 pages long. Respondents rely on a portion of the transcript where Newman was discussing with the Jeffco Board the advantages and disadvantages of a negotiated versus a public sale of the proposed refunding bonds. During the discussion Newman pointed out that Boettcher, if there were a negotiated sale with it, might be in a position to place a substantail proportion of the bonds quickly and would make an accounting so that the Jeffco Board could determine whether a fair marketing was accomplished. A Board member then asked him what could be done if the Board concluded that Boettcher had made an inordinate profit. Newman replied that with certain marketing economies that he foresaw, "We could work on the same profit basis as if it went to public sale and we would" (Div. Ex. 1 D, p. 47). When the member stated he still did not know what the normal expectation of profit would be in any kind of sale Newman suggested that he be allowed to study several of the Board's recent issues and determine what had been the Board's experience.

Newman did prepare a study of the underwriting profit experienced in 16 issues where, according to his study, the average underwriting profit had been $16.50 per $1000 bond with additional expenses to Jeffco, resulting in a "gross cost" to Jeffco of $18 and an "Estimated Refunding Gross Profit" of $16.20 (Resps. Ex. 23). He gave this study to Jeffco. The respondents concede that other figures are in the transcript of the testimony but argue that the basis of the understanding was the average of the 16 prior issues -- $16.50 -- but that it appears that $16.20 was the figure relied on.

The difficulty with this contention, at least as of July 30, is that the purported understanding was never reduced to writing so that it is not clear that it ever existed at all or, if there was some understanding, just what were its exact terms. There is nothing in the July 30 transcript or the surrounding circumstances indicating that in the discussion during the meeting there was an attempt to supersede the no-profit-in-Governments clause. In fact, the agreement was signed after the discussion with the Clause kept intact except for a word modification which indicates that the parties did not have in mind striking this Clause. Respondents have spent some time in their brief arguing just what the figure was purportedly agreed on and whether it was after preparation expenses but before distribution expenses. All of this is conjecture in view of the lack of any definite arrangement between the parties covering these topics.

Respondents concede that the alleged Profit Limit was only an approximate limit to which Jeffco could object if the disclosed profit

was excessive. Just what Jeffco could do under the circumstances is not clear. Respondents take the position that Jeffco would then have to discuss matters with Boettcher but it was not clear what, if anything, it could do about it.[5/] It is concluded that as of July 30 there was no agreement superseding the no-profit-in-Governments clause. At the most, there had been a promise by Boettcher that its profits would be reasonable and in line with Jeffco's prior experience. Just what the rights and obligations of the parties were under this understanding are unclear. Certainly, they were never set down in any concrete form.

2. Negotiations in September 1963

The respondents assert that negotiations between Jeffco and Boettcher in September 1963 made it clear that the original proposals made by Boettcher to Jeffco were not fixed and immutable, but were subject to change under certain conditions, including changes in the market for municipals and Governments.

The original option granted to Boettcher was not exercised by August 30, 1963, its terminal date.

Newman, as representative of Boettcher and the Denver Account, appeared at a meeting of the Jeffco Board held on September 4, 1963, at which meeting he presented a further proposal which would give Boettcher

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5/ Respondents rely on the testimony of Jeffco Board member TenEyck to support their position. However, TenEyck's testimony establishes quite clearly that he understood and relied on the continuing existence of the Clause and that, while he expected that Boettcher's profit would be a reasonable one, according to his understanding there was no agreement superseding the written provisions of the July 30 agreement.

and its associates an extension of the July 30 agreement and further grant them an option to "accomplish" the refunding in stages with an initial issue of at least $20 million (Div. Ex. 1 E). There was extensive discussion at the meeting of problems which had arisen which had prevented Boettcher and its associates from proceeding as planned. A transcript of the discussion is in evidence (Div. Ex. 1 F). The Jeffco Board was reluctant to split up the proposed issue but was agreeable to an extension of the original option (Div. Ex. 1 F, pp. 19-22, 32). By unanimous vote an extension was granted until September 30, 1963. A formal agreement of extension was not executed but a minute was made in the records of the Jeffco Board (Div. 1 G).

On September 9, 1963, Owen Moore, a staff member of Boettcher, and Lawrence appeared before the Jeffco Board to further discuss the status of the proposed advance refunding. According to the transcript of the discussion which took place, Lawrence told the Jeffco Board that he had requested the meeting because earlier in the day he and his associates had come to the conclusion that a large refunding by the Government had seriously affected the markets in municipal and government bonds and that it then seemed that it might be necessary to ask the Jeffco Board to make up a "difference" of roughly $120,000 in order for the refunding to proceed. He further stated that since requesting the meeting he and his associates had determined that in view of other developments [6/] it

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6/ A question had been raised as to the legality of a refunding issue in Albuquerque.

would be better to wait for an additional week or ten days, during which time the markets might settle and the refunding could possibly proceed as originally planned. He thought that he would be in a position to finalize negotiations with the Jeffco Board in approximately a week.

In an explanatory discussion Lawrence stated that as originally planned it was assumed that the refunding bonds could be marketed at retail at $102 or $1020 per $1000 par value bonds. As projected, the bonds would be sold to an underwriting group which would retail the bonds at a price which would give them a markup of $12 a thousand for their distribution work. The Denver Account would be left with $8 a thousand, as Lawrence put it, ". . . for the purpose of discharging all expenses and underwriting the purchase of the United States Government bonds that were to go into this project" (Div. Ex. 1 H, p. 4). He explained that in recent market activity the municipal bond market had dropped more than the government bond market so that the refunding bonds, according to his calculations and that of his associates, could not be marketed at 102 but at a lesser figure which was not wholly made up by a somewhat lesser drop than the governments market. He also explained that he and his associates had planned on $20 per thousand total fee as he had indicated and he further stated that in final negotiations, if the Jeffco Board for any reason could not proceed with the advance refunding it would not have taken any risk with reference to any of the Governments which might have been acquired by Boettcher and its associates. He added, "If that should happen [the refunding should not go forward] we would make a deal for a great deal less than we paid for them and it would be

our loss. Conversely . . . but there isn't ever any profits. We agree to deliver over to you at a fixed price." (Div. Ex. 1 H, p. 7.)

In the ensuing discussion some board members indicated dissatisfaction with an additional item of $120,000 being involved in the refunding either as a charge or as a reduction in the estimated total saving. However, it was mutually agreed to put the matter over until such time as Lawrence expected to have a final proposition to submit to the Jeffco Board. Lawrence pointed out that the refunding involved considerations of a fluctuating market and stated that what the Governments would cost Jeffco would be "what the market is on them when we close the deal. And this is subject to ups and downs, and it could very well be, if we came in here next Tuesday and the municipal market is still the same, you can buy the governments more advantageously and you'll have a greater -- or the same that you had before" (Div. Ex. 1 H, p. 12). The meeting concluded with some discussion of the designation of an escrow agent for the Governments. The respondents contend that an analysis of the discussion which took place at the September 9 meeting indicates that the participants assumed that there was no longer any prohibition against a profit on the Governments, and that Boettcher was justified in proceeding on the assumption that such a profit was acceptable to Jeffco. They point out that the fluctuation of the market for municipals and the Governments affected the total benefit financial figure and that within that framework the variables that could be used to divide the total financial benefit were: changing the over-all average interest rate on the refunding bonds; having Jeffco pay some or all of the expenses

directly in cash; changing the interest rate on the bonds to be repurchased; or taking a profit on the Governments. They point to Lawrence's opening remarks in which he indicated that it had been contemplated requesting Jeffco to make up a difference of between $120,000 and $150,000; that he ruled out certain changes, such as those in the coupon rates, thus leaving Governments as a residual base for additional compensation.

Yet it is also true that other statements made by Lawrence at the meeting are consistent with the construction that the no-profit-in-Governments clause was not abrogated and that the Jeffco Board members still understood it was in force and effect.

Respondents have attempted to explain and rationalize those remarks as not inconsistent with their interpretation, but it is apparent, in the opinion of the undersigned, that never during this conference was a clear and unequivocal statement made by Lawrence that a profit might be taken on the Governments. The September 9 meeting was not a contract bargaining session. Lawrence pointed out at the very beginning of it that in view of the decision that he and his associates had reached to postpone taking definitive action on the refunding bonds for a period of time, there actually was no necessity for his meeting with the Jeffco Board that evening. The discussion then proceeded in general terms. What is clear, as the respondents contend, is that at the end of the meeting it was agreed that in view of market developments Boettcher would submit a final proposition to the Jeffco Board. The exact terms were left open.

3. Development Prior to October 10 Meeting of the Parties

Boettcher and the Denver Account did not exercise the option by its extended terminal date of September 30, 1963. However, they continued to work on the refunding proposal for Jeffco's outstanding bonds. Among other things, on October 4, 1963, Newman prepared and transmitted a letter to one of bond counsel, Chapman & Cutler, which stated in substance that as part of the refunding Jeffco would purchase the necessary government bonds from Boettcher and its associates ". . . at our market cost plus accrued interest. . ." (Div. Ex. 5). Prior to this time local bond counsel had sent Boettcher letters addressed to the attention of Newman, in which stress was placed on the fact that care had to be taken that there be nothing in the transaction between Boettcher and its associates and Jeffco which could lead to a construction that there had been a sale on the Jeffco refunding bonds below par. In a letter dated September 19, 1963, among the items requested for examination prior to approval of the bonds the following appears:

> "6. A letter of explanation as to the arrangements for the sale of the federal securities by Boettcher and Company to the District. We have Mr. William Grant's letter of September 18, and want to reiterate our concern that there be nothing which could be construed to be a sale below par. We understand that Boettcher and Company is buying the refunding bonds at par and accrued interest and is receiving no commission or fee of any kind. As you know, it has always seemed to us that a profit on the federal securities could be deemed to constitute a sale of the refunding bonds at a discount since it is all part of a single transaction. You have assured us that there is no such profit, but we do not fully understand Mr. Grant's letter." (Div. Ex. 3, p. 2.)

In a follow-up letter dated October 3, 1963, it was further stated:

> "2. Now that the anticipated closing date of September 30 has passed, we gather that Mr. Grant's letter, to which reference

> was made in our letter of September 19, no longer pertains. We also gather from your remarks that the purchasers' sole profit on the refunding will be on the resale of the refunding bonds, and that they are receiving no payment of any kind from the District except direct reimbursement for the cost of the federal securities together with accrued interest on the federal securities to the date of delivery of the refunding bonds." (Div. Ex. 4, p.1.)

Some time between the latter half of September and the early part of October 1963, but prior to October 8, 1963, Lawrence, Wiesner and Newman discussed the Jeffco advance refunding among themselves. They determined to go forward with the advance refunding but they also decided that the gross profit that the underwriters could make if they proceeded on the terms provided in the July 30, 1963 agreement with Jeffco was unsatisfactory. They decided to increase the probable gross profit to the underwriters by adjusting the average interest rate on the new bond issue upward from 3.25 percent to 3.30 percent. This change would increase the price at which the new bonds could be marketed to the public and yield a higher profit. They further decided to increase the underwriters' probable gross profit over and above that achieved by the aforementioned interest rate adjustment. They considered four alternatives:

a. Adjusting the interest rates of the new bond issue above 3.30 percent (average interest rate of the bonds could have been increased to a maximum limit of 3.34 percent under applicable statutory provisions). This was estimated to be capable of producing compensation of approximately $120,000.

b. Revising the provision that expenses were to be borne by the underwriters and providing instead that Jeffco should bear them. This involved approximately $75,000.

c. Revising the interest rate downward on the bonds that Jeffco might be obligated to buy and thus permitting the underwriters to offer higher interest rates on some or all of the remaining bonds while maintaining the required average interest rate. The amount that could have been involved in this item was debatable but Newman estimated possibly $150,000 additional could have been gained from this source.

d. Taking a markup on the Governments. While a combination of a, b and c might have achieved much of the goal that the Boettcher officials had in mind they decided instead that they would achieve their objective by taking a markup on the Governments. This decision was made solely by them and without consultation with the Jeffco Board or its administrative personnel.

As previously pointed out, Boettcher and its associates had to meet certain statutory requirements and did not have full freedom in setting the amount of the markup for the Governments. Wiesner undertook to deal with this problem.

On or about October 8, 1963, Wiesner telephoned C. F. Childs and Company, Inc. ("Childs"), a New York securities dealer specializing in government securities with whom Boettcher had business relations, and spoke with Thomas J. Hamilton, a vice president. According to Wiesner, he told Hamilton that there was a block of Governments that Boettcher was interested in in connection with an advance refunding; that he wished Hamilton to make a note of a list of Governments that Newman would read to him; and that he wanted a letter from Hamilton evaluating the list of bonds under conditions whereby he would make them available at a specific price for a period from October 14 through November 15 with any immediate pay for the document being minuscule with relation to the total size of the issue.

Weisner further testified that Hamilton spoke of a $12 to $13 markup and that Wiesner told him that that was too high and after further checking

Hamilton agreed to recheck the price he would quote. Wiesner also maintained that he told Hamilton that the letter was needed for bond counsel in connection with justifying a price on Governments and that he wanted the valuation under conditions that Boettcher would be obligated to purchase the bonds if the refunding proceeded to completion. Wiesner stated that he wanted to get from Hamilton an appraisal of market risks in acquiring the bonds and some compensation for expertise that would have to be employed in acquiring the bonds. He also testified that he specified a low cash payment because he wanted to approximate an arrangement that Jeffco might have been able to arrange if it had proceeded directly to acquire a commitment for the Governments. Both Wiesner and Hamilton, according to their testimony, knew that Boettcher did not intend to exercise any rights or option it might obtain through the requested letter. Hamilton testified that the letter he sent pursuant to Wiesner's request was an accommodation to Boettcher as a customer of Childs and that he understood the letter would not be made operative by its terms.

As a result of the aforesaid telephone conversation Hamilton prepared the following letter, signed it on October 9, 1963, and mailed it to Weisner at Boettcher. The letter was received by Wiesner on October 10.

> "We are pleased to offer Boettcher Investment Company, Inc. an option to buy the following United States Government obligations at the prices indicated below for delivery on or before November 15, 1963 for a consideration of $2,000.00. It is understood that Boettcher Investment Company, Inc. must accept the option by 10 A.M. New York time October 14, 1963. It is further understood that the amounts and prices on the securities would be:
>
> [There then followed a list of the securities by amounts, interest rates, maturity dates and quotation.]

[The letter then concluded:]

"It is our pleasure to be helpful in any way. Thank you for past favors." (Div. Ex. 1 I.)

Wiesner, upon reading the letter, concluded that it was not in the precise form he expected, but he did not communicate his conclusions to anyone. Instead, he turned the letter over to Newman who thereupon caused copies of it to be made so that it could be taken to Jeffco and distributed to members of the Jeffco Board and its administrative personnel.

Newman, in addition, made certain calculations with respect to the securities listed in the Childs letter. He proceeded to extend the prices for each of the securities and he determined that the sum total of the product so obtained was $38,862,490.45. Newman knew the October 4, 1963 ask prices for these securities and after going through the necessary mathematical computations he obtained a total figure which indicated that the difference between the Childs exercise prices and the market prices of October 4, 1963 was $345,744.51 higher in the Childs quotations. He made a computation to determine the percentage that this difference was of the $38,710,000, the par amount of the Governments specified in the Childs letter, and determined that it was .893 per $100 of the $38,710,000. Prior to a meeting that Newman had with the Jeffco Board on October 10 he could have ascertained that the ask market for those same securities as at October 8, 1963 was in a sum $387,839.69 less than the quoted prices in the Childs letter, which is equivalent to a difference or markup of $10.02 per $1000 par amount of Governments. Newman was uncertain whether he made those calculations at that time.

4. The October 10 Meeting

On October 10, 1963, Lawrence drafted a written contractual proposal to be presented to the Jeffco Board on behalf of Boettcher and its associates. This agreement, presented by Newman at a special meeting of the Jeffco Board on the evening of October 10 and adopted and executed as of that date, is in evidence (Div. Ex. 1 K).[7/]

The opening paragraph of the proposal is as follows:

> "In accordance with our agreement of July 30, 1963, as a result of which Jefferson County School District R-1 (hereinafter called the District) granted to Boettcher and Company and Associates (hereinafter called the Underwriters) the right to form a selling group and purchase from the District at par and accrued interest an estimated amount of $39,550,000 of the District's refunding bonds, the Underwriters now propose that the District grant to them the option, until the close of business Friday, October 25, 1963, to finalize the transaction on the following terms."

And there followed references to the proposed official Offering Circular describing $38,873,000 refunding bonds to be issued and details concerning the issuance and approval of the legality of the bonds by both Denver and Chicago counsel. The price at which the underwriters would purchase the bonds was set at par and accrued interest.

The written contractual proposal provided that Boettcher and its associates would supply to Jeffco the same list of Governments as is specified in the Childs letter (Div. Ex. 1 I). Each issue is in the amounts specified in the Childs letter. The price specified that Jeffco was to pay for the Governments is for all practical purposes the total

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7/ This exhibit contains two pages, each of which is numbered "3". The difference between the two pages is that the first page obligated Jeffco to purchase $1,000,000 of the new bonds from the underwriters. The final draft reduced that obligation to $550,000.

exercise price specified in the Childs letter plus accrued interest to the closing dates specified in the contract. The underwriters were to furnish the aforementioned Governments in exchange for the refunding bonds and were to receive a cash sum for accrued interest. There followed the details concerning the closing of the transaction and in conclusion it was stated that the refunding bonds would produce a net interest cost of 3.30 percent and result in a reduction in principal and interest payments of $2,616,790 and a reduction of the average life of the Jeffco total debt and a reduction in the average mill levy necessary to retire debt.

In an exhibit attached to the proposal there was a table listing the underwriters and then the following appears:

> "The following summarizes estimated underwriting costs and expenses on the basis of dollar cost per $100 bond issued:
>
> | | |
> |---|---|
> | Gross refunding bond underwriting | $1.376 |
> | Gross U.S. Government bond underwriting | 0.893 |
> | Gross underwriting | $2.269" |

There then followed a list of expenses for a total of $0.758 and a concluding figure of "Net underwriting" of $1.511 (Div. Ex. 1 K, Exhibit B). In the calculation of accrued interest to the anticipated closing date a mistake was made in the calculations of $33,000 in favor of Jeffco. This amount was never recovered by Boettcher.

Newman, sometime prior to October 10, requested the special meeting with the Jeffco Board for further discussion of the proposed refunding. A meeting was arranged for the evening of October 10, even though the

Board could not act in an official capacity before the following Tuesday, October 15, 1963. The meeting had to be on an informal basis, but it was attended by the Jeffco Board and its staff members. The discussion was not recorded.

Newman furnished copies of the proposed option contract and the Childs letter to everyone at the meeting. There followed a detailed discussion of the refunding and the terms of the proposed option contract. This discussion took approximately three hours and no other business was transacted by the Jeffco Board that evening. Newman urged that the Board take action by informal acceptance of the option contract, which then could be ratified at the next formal meeting of the Board. At the conclusion on the discussion the Board did take a vote and agreed to grant the option contained in the written proposal subject to the approval of the attorney for Jeffco, who was not present at the meeting. Newman signed it on behalf of Boettcher and its associates.

The next morning the attorney's approval was obtained after two changes were made in the written proposal to which Newman consented. These were to reduce the amount of bonds that Jeffco would commit itself to purchase, and the addition of a paragraph to the effect that in the event the underwriter chose not to exercise the option afforded them by the agreement Jeffco would be under no obligation to the underwriters. This provision was in the July 30 option. The revised page 3 was substituted for the prior page 3. The October 10 agreement was duly ratified at the formal meeting of the Jeffco Board on October 15, 1963.

Before the Jeffco Board finally accepted the proposal Albert W. Parker, an administrative employee of Jeffco, did extend the prices set out in the Childs letter for the amount of each issue listed in that letter and determined that the total price of the U. S. Government obligation specified in the Childs letter was $38,862,525.64, plus an additional $2000 in "consideration" and got a sum of $38,864,525.64.

Neither Boettcher Investment 8/ nor anyone acting on its behalf paid to Childs the $2000 or any part thereof to which reference is made in the Childs letter (Div. Ex. 1 I). Prior and subsequent to October 10, 1963, Wiesner, acting on behalf of Boettcher and its associates and also Boettcher Investment, proceeding to acquire Governments which could be utilized in performing the agreement. On or about October 25 Boettcher and its associates transmitted to the Jeffco Board a letter confirming the purchase from Jeffco of $38,873,000 General Obligation Refunding Bonds dated September 1, 1963.

5. Completion of the Refunding Operation

On November 1, 1963, steps were taken to complete the advance refunding. Jeffco issued new bonds in the principal amount of $38,873,000 bearing an average net interest cost of 3.30 percent per annum and delivered them to Boettcher and its associates and received for those bonds $39,092,039.85. The premium over par represented accrued interest from September 1, 1963, the date of the bonds. It then caused to be delivered

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8/ Boettcher Investment had been designated by members of the Denver Account to act for them in obtaining securities needed in any of their joint activities. It was entitled to a markup of 1/8 for its services. Boettcher Investment did receive a markup on the Governments which were secured for the Jeffco refunding, but the amount of its compensation is included in the markup charged to Jeffco under the terms of the October 10 agreement.

to Boettcher and its associates funds totalling $39,252,068.02 for the newly constituted list of U. S. Treasury obligations and these obligations were received by its escrow agent.

Boettcher Investment, on November 1, 1963, received the Governments previously purchased on its behalf by the Colorado National Bank, the Jeffco escrow agent. It paid for those bonds $38,449,394.87 plus $408,203.95, representing accrued interest, for a total of $38,857,598.82. Jeffco paid Boettcher and its associates $394,469.20 more for the said bonds than Boettcher Investment paid for them. A markup of $1.25 per $1000 U. S. Government bond, or a total of $48,444.00 was taken by Boettcher Investment and not shared with the associates. This markup is part of the total $394,469 markup. The Governments which were then deposited with the escrow agent varied in some respects from those specified in the October 10 agreement and the price paid by Jeffco to Boettcher for the government obligations received, amounting to $39,252,068.02, exceeds by $3,974.50, the price specified in the contract; that is, it exceeds the sum of the refunding bonds and accrued interest set forth in the October 10 agreement by that amount.

This difference is in large part accounted for by additional accrual of interest on the Governments for one day, inasmuch as the closing took place on November 1 rather than October 31, as specified in the agreement.

Two bond counsel had been selected by Boettcher and the associates to pass upon the validity of the advance refunding bonds. The bond counsel so selected were Dawson, Nagel, Sherman and Howard, Esqs. of Denver, Colorado and Chapman and Cutler, Esqs. of Chicago, Illinois. Mr. Faxon

of the former firm and Mr. Mumford of the latter firm were the attorneys who specifically concerned themselves with the legality of the Jeffco refunding bonds. Wiesner did not discuss with either counsel in advance his intentions to obtain quotations from Childs and the purpose for which they were to be used.

Faxon received a copy of the Childs letter some time before the closing of the advance refunding. Mumford first became aware that a mark-up on the Governments was being taken when he conferred with Wiesner the day before the closing. When he learned of the markup he was concerned that there be compliance with the laws of Colorado which provided that refunding bonds must be sold at no less than par. A hidden discount to the purchaser of the refunding bonds would raise a serious question as to the legality of the issue. Mumford testified that he was concerned that there be some evidence that the markup on the Governments was attributable to costs which Jeffco might pay. In an attempt to meet this condition a letter was drafted by Wiesner and Mumford addressed to Chapman and Cutler and signed by Wiesner on behalf of the parties to the Denver Account setting forth the costs that were incurred in supplying the Governments. The statement included the following item: "Additional costs of underwriting, obtaining and maintaining the physical availability of the Government obligations, not less than $394,469.20." (Div. Ex. 1 0.) A copy of the Childs letter was attached to this letter. Mumford further testified that he relied on Wiesner's statement that this was a proper cost item.

As previously mentioned, the closing of the advance refunding took place on November 1, 1963. Confirmations on the sale of the Governments were prepared by Boettcher which showed the sale of the Governments in gross amounts without any separate breakdown evidencing a markup on each issue. An employee of Boettcher had previously apportioned the markup among the various issues purchased, in some instances allocating the markup for individual issues on an arbitrary basis. There was no discussion of this at the closing.

Thereafter, Newman, upon request of Jeffco, prepared and mailed to Jeffco a letter dated February 10, 1964, discussing the refunding in detail and supplying additional facts and figures. Jeffco then engaged a firm of certified public accountants to conduct an audit of the refunding and a report was prepared. dated March 19, 1964, which was turned over to Jeffco on or about that date (Div. Ex. 1 Q). Jeffco engaged the accountants to examine further into the matter and two additional reports were prepared, one dated April 22, 1964 and the other May 26, 1964 (Div. Ex. 1 R and S). These reports indicated that there had been a markup on the Governments. Thereupon Jeffco made demand upon Boettcher to refund the sume of the markup. Suit was brought and during the proceedings the parties reached a settlement (Div. Ex. 1 T and 1 T-1).

The Denver Account or Syndicate purchased the refunding bonds initially and sold them to a New York Syndicate which retailed the bonds to the public. The Denver Syndicate sustained a net underwriting loss in the sume of $2329.66. All the members of the Denver Syndicate, including Boettcher but excluding two other brokers, were members of the New York

Syndicate. The New York Syndicate sold the refunding bonds at a markup and netted a profit.

The gross underwriting profit achieved by the underwriters was $16.70 per $1000 bond ($651,850.45), which included markup on the Governments over costs of $10.10 per $1000 bond ($394,469.20) (Resp. Ex. 9).[9/] The net underwriting profit was $14.60 per bond ($568,133.93). Boettcher received $90,666.50 as its share of syndicate participation, fees earned by Boettcher Investment on purchase of the Governments, and management fees.

6. Relationship of the Parties

The Division contends that Boettcher was a fiduciary, at least as to certain aspects of the refunding transaction, and that it did not fulfill special affirmative obligations of disclosure to Jeffco. The respondents contend that there was no fiduciary relationship, that Boettcher fulfilled all its obligations to Jeffco, and that, if there were in fact, any misunderstanding between the parties, it was due to carelessness and negligence on the part of Jeffco in not recognizing what should have been apparent.

The respondents point out that they were not retained as fiscal agent for Jeffco but entered into a negotiated private sale as underwriters with Jeffco. They further point out that there was nothing illegal or contrary to Colorado law in the arrangement. The also urge that it is extremely

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9/ This figure is to a certain extent an estimate because the exact price at which each Syndicate member retailed bonds to the public is not known. This figure represents a markup that the members intended to take.

questionable whether the Commission should undertake to characterize the relationship between a municipal issuer and a municipal underwriter as fiduciary.

The Division relies on a line of cases in which the Commission found that a special relationship of trust and confidence had been established between a broker and his customers of a fiduciary nature which placed special obligations on the broker, including that of full disclosure of profits he was deriving from his dealings with the customer. In Arlene W. Hughes, 27 SEC 629(1948), aff'd sub. nom Hughes v. SEC, D. C. Cir. 1949, 174 F. 2d 969, the Commission found that a registered broker-dealer acting as investment adviser to certain customers occupied a fiduciary relationship and was under a duty to make a full and complete disclosure of her costs in transactions with her customers so that they would know what profits the fiduciary was realizing in selling securities to these customers, the customers would be in a position to give their informed consent to these dealings, and secret profits would not be obtained. In Herbert R. May, 27 SEC 814, 830 (1948), it was held that a broker who obtained full trust and confidence from uninformed investors by leading them to believe that he was acting as their agent and not solely as principal on his own behalf was under a duty not to deal with them for his own account without their express consent and, in addition, was obligated to obtain for them the best possible prices and to divulge all profits he made. The Commission found that the broker had taken secret profits and charged customers prices greatly in excess of current market prices, without any disclosure of these facts, and thereby violated the anti-fraud

provisions of the Securities Acts. Similar holdings were made by the Commission in Moore and Company, et al, 32 SEC 191, 196 (1951); Mason, Moran & Co., 35 SEC 84, 91 (1953); and Allender Co., Inc., 9 SEC 1043, 1954 (1941).

The respondents contend that these cases are not in point because they involved either a situation where a fiduciary relationship was initially established, as in the Arleen W. Hughes case, or instances where brokers took advantage of unsophisticated investors after promising that they would act specifically in the interest of the customers while taking secret profits. Here it is contended a fiduciary relationship was not established and the respondents were dealing with a knowledgeable school board which had experts of its own and carefully followed the progress of negotiations.

A fiduciary "is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous."[10/] Authorities are agreed that there is no touchstone for determining when a broker-dealer assumes the obligations of a fiduciary. The fact that the firm confirms as a principal is not conclusive as to the relationship of the parties. The answer must depend upon all the surrounding circumstances, including the degree of sophistication of the parties and the course of conduct between them. As Loss has put it,

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10/ Scott, "The Fiduciary Principle," 37 Calif. Law Review 539, 540 (Dec. 1949).

"The answer must depend upon all the surrounding circumstances, including the degree of sophistication of the parties and the course of conduct between them. The law must operate on the habits of people. Typically there is no express meeting of the minds as to the nature of the relationship. The two Hughes doctrines really blur into each other. More often than not, when a fraud is found it is based on violation of the two doctrines in the alternative. All that can be said is that, when a salesman does not content himself with the normal amount of incidental investment advice, but instills in the customer such a degree of confidence in himself and reliance upon his advice that the customer clearly feels -- and the salesman knows the customer feels -- that the salesman is acting in the customer's interest, there is nothing resembling an arm's-length principal transaction, regardless of the form of confirmation. There is in effect and in law a fiduciary relationship. 104/ Whether or not it is technically agency is of little consequence, because the obligations are the same."

104/ Cf. Haley & Co., 37 SEC 100, 106 (1956). As has been said with respect to a trustee's dealing with the trust estate, "the old line should be held fast which marks off the obligation of confidence and conscience from the temptation induced by self-interest. He who would deal at arm's length must stand at arm's length. And he must do so openly as an adversary, not disguised as confidant and protector." Earll v. Picken, 113 F. 2d 150, 156 (D. C. Cir. 1940)." 11/

The written proposals submitted by Boettcher to the Jeffco Board as wells as the transcripts of the meetings between the parties, especially their initial meeting, establish quite clearly that Boettcher asserted it had special competence in the field of advance refunding, that the Jeffco Board members freely admitted that they had had no experience in this field and would have to rely on Boettcher, and that such a relationship

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11/ Loss, Securities Regulation, 2d Ed., Vol. 3, pp. 1507-08. See also Corpus Juris Secundum, Vol. 36A, p. 381 -- The term fiduciary "... . connotes the idea of trust or confidence, contemplates good faith rather than legal obligation, . . . and has been held . . . to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations."

was essential in working out the details of the transaction, and that the Jeffco Board relied heavily on the technical information supplied by Boettcher and their information on the progress of efforts to arrange for the marketing of the refunding bonds.

It is true, as respondents point out, that the Jeffco Board had had experience in bringing bond issues to market and that Parker had had extensive experience in that field. Parker, on behalf of the Board, engaged in correspondence with various sources in an attempt to learn as much as he could about the problems connected with an advance refunding. Meetings were held with local bankers and others on this subject. Nor did the Board accept every suggestion made by Boettcher, but made up its own mind on proposals such as the Boettcher proposal of September 4 that it be authorized to split the proposed issue. Nevertheless it is apparent that on the key subjects of the movements in the Governments and municipals market, pricing and possible future developments the Board relied on the expert knowledge of Boettcher.

Boettcher was under no obligation to agree to furnish the necessary Governments at its purchase price or make other pledges aimed to result in material advantages to Jeffco. It undertook this obligation as an inducement to be offered Jeffco in order to obtain consent to the July 30 agreement. However, having undertaken this obligation it placed itself in a special fiduciary obligation over and above that assumed by an underwriter negotiating with a government agency for the purchase of a bond issue. It was free to change the terms of any agreement before the final contract had been reached, but the undersigned concludes

that it was under an affirmative duty to make clear that, as here, it intended to radically change the original understanding and to make a substantial profit on the Governments. Those who are in a fiduciary relationship cannot use their position to make a secret profit from dealings with a principal, but can only engage in profit transactions with a principal if consent has been obtained based on a full disclosure of relevant facts.[12/]

That the Jeffco Board, through Parker or otherwise, as respondents contend, by closely analyzing Lawrence's statements at the September meeting, might have been able to deduce that a markup on Governments might become necessary and that Parker could have deduced from quotation sheets and certain calculations that the prices quoted in the Childs letter and in the October 10 agreement involved a markup over current quotations is not determinative.[13/] The fiduciary relationship places an affirmative duty of disclosure of profits on the fiduciary. The fact that a principal has the basic figures and information from which such a deduction can be made does not relieve the fiduciary of his responsibilities. The undersigned concludes that Boettcher assumed a general fiduciary obligation in advising and counselling the Jeffco Board on the

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12/ Scott, supra, p. 541.

13/ Even if Parker had been able to ascertain that the Childs quotations and the October 10 contract contained a markup over current quotations, he would still not have any information that these figures were not the best quotations Boettcher could obtain for future delivery.

problems connected with the successful completion of the advance refunding, especially on the furnishing of the necessary Governments and any profit it intended to take by way of a markup. The fact that the Jeffco Board chose not to retain Boettcher as fiscal agent in the marketing of the refunding bonds did not foreclose Boettcher from assuming other fiduciary obligations, which it did here.

Even if a strict fiduciary relationship has not been established, a broker-dealer still owes certain obligations to his customers. Basic to the relationship between the broker-dealer and his customers is the representations that the latter will be dealt with fairly in accordance with the standards of the profession.[14/] Boettcher agreed to act in a broker-dealer capacity in acquiring the Governments for Jeffco. Part of its obligation encompassed affirmative disclosure to Jeffco of matters affecting the transaction in important respects.

7. Further Findings; Contentions of the Parties; Conclusions

Jeffco Board members and staff personnel testified that Newman presented the Childs letter as a document which needed prompt action in view of the deadline contained therein, stating that it furnished an opportunity to set up the needed escrow of Governments and that there was no explanation by him that the Childs letter contained a markup on the listed

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14/ MacRobbins & Co., Inc., Sec. Exch. Act, Rel. No. 6846, p. 4 (July 11, 1962), aff'd sub. nom. Berko v. S.E.C., 316 F. 2d 137 (C.A. 2, 1963); Duker v. Duker, 6 S.E.C. 386, 388-89 (1939). Cohen & Rabin, "Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication In Their Development," in "Law and Contemporary Problems," Summer 1964, pp. 703-708.

Governments, or that the option contract contained a markup on Governments in Boettcher's favor, but rather he called their attention to the fact that the Governments contained in the Childs letter were the same as set forth in the October 10 agreement and that the October 10 agreement was approved on his representations. Newman maintained that he told the Jeffco Board on October 10 that the Childs quotations were in the October 10 figures and that he told the Board that the .893 figure in Exhibit B was a markup that the underwriters were taking on the Governments, roughly in the amount of $9 per $1000.

The respondents contend that the October 10 contract was a complete proposal in itself superseding the prior agreement of July 30 and that a markup on the Governments is clearly shown in Appendix B to that proposal. It is pointed out that the evidence establishes that Parker and Newman on September 23 had discussed the price of the escrow of Governments later listed in the October 10 contract, Exhibit A, and in the Childs letter and that it should have been apparent to Parker that there was a significant increase in the price of the escrow in the October 10 contract which, it is urged, should have meant to him that a markup was involved.

It is additionally urged that Exhibit B to the October 10 contract clearly shows a markup on the Governments as a profit item and that denials by the Jeffco Board members and its staff that this was not clear to them are unwarranted. It is further pointed out that the Jeffco Board knew that the item above the one in dispute was a profit item on the marketing of the refunding bonds to the public and they should have realized that them item just below it was also a profit item. Finally, it is contended

that if there was any misunderstanding it was not due to any fault of the respondents and they should not be chargeable with any failure on the part of Jeffco Board members to make themselves aware of the nature and extent of provisions in the contract which were reviewed on October 10

The Childs letter is a key piece of evidence in this proceeding. The Division contends that it is an important link in establishing its allegations of fraud against the respondents. Respondents contend that the letter was only used to obtain an appraisal of what it would cost Jeffco to guarantee the availability of the Governments under the necessary conditions and to satisfy the requirements of bond counsel. It is conceded that the letter is susceptible to interpretation as a call but it is argued this was not intended by the parties, nor so understood by Jeffco. According to Wiesner and Lawrence, they did not know that letter would be shown to the Jeffco Board. Newman testified that he used it merely to verify the figures in the October 10 contract.

It is further denied that the October 10 meeting was called on short notice at Newman's request for the purpose of getting a quick approval of the October 10 contract by pointing to the October 14 deadline in the Childs letter and on the assurance that it permitted the program to go ahead because it assured the availability of Governments at the stated prices. The respondents concede that the meeting was called on short notice so that Jeffco could accept the October 10 proposal but only for the reason that Boettcher intended to move ahead in organizing a distribution group immediately and that Newman was going to be out of town the following week. It is also argued that Jeffco misunderstood Newman's

statements because of certain erroneous assumptions. These, it is urged, included a mistaken belief that no-profit-in-Governments clause was still in effect, it did not have in mind the part the Childs letter had in satisfying bond counsels' requirements; it misunderstood the deadline for acceptance by October 14 and the need to hurry; it misconstrued the term "option' contained in the letter; and was completely indifferent to the Childs letter.

What Newman did not tell the Jeffco Board is perhaps more significant than the actual discussion. He did not tell the Board the background negotiations leading to the formulation of the Childs letter, which he furnished the Board on October 10. He did not tell them that its purpose was to justify a profit item to be charged Jeffco for furnishing the Governments -- something which Boettcher had expressly ruled out in its original negotiations with the Jeffco Board as a specific inducement for obtaining consent to the July 30 agreement. He did not state that Boettcher had no intention of making any use of the Childs letter except as an appraisal. He did not state, nor according to the evidence, was he ever told by Wiesner that the letter was not in the form which Wiesner desired. Newman had made detailed calculations by which he arrived at the extent of the markup contained in the Childs letter and this figure found its way into the October 10 contract. Newman did not reveal any of this material to the Jeffco Board.

The respondents place emphasis on contentions that the Jeffco Board and its staff or some of them knew on October 10 that a profit was being taken on the Governments and that they did not care about this circumstance

or pay any attention to it. They also urge that even if there was no such knowledge, Boettcher was not responsible for this erroneous belief. It is contended that witnesses from Jeffco fell into three categories -- those that did not care in 1963 about a profit on the Governments but later in 1964 came to believe they really had been concerned about such a profit in 1963; those who were concerned in 1963 that such a profit not be taken but were handicapped by their own erroneous beliefs and could not see the clear evidence that such a profit was being considered and was finally included in the October 10 proposal; and lastly, a group which did recognize the profit on the Governments on October 10 but came to believe in 1964 that they had always opposed it and did not know it was being taken on October 10. They also state that all the witnesses from Jeffco might fall into a category of those not really concerned in 1963 about a profit on the Governments and who also did not notice it on September 9 or October 10.

It is argued that the human mind is suceptible to faulty observation and recollection and many of the elements causing this were present in 1963 and subsequently to influence Jeffco. They point out that there are factors which affect human observation and memory such as incorrect original observation by a witness, the distorting effect both on original observation and subsequent recall of the interest, attitude and anticipation of a witness, the effect of time lapse, and the effect of specific suggestions and other external stimuli.[15/]

15/ Respondents rely on the analyses and discussions contained in Marshall, Law and Psychology in Conflict (1966), especially pp. 8-14, 21, 24-25, 29-30, 33-37, 41-42, 96 and 103-107.

They contend that the evidence establishes that Division witnesses were mistaken in parts of their testimony, that these witnesses missed indications that Boettcher might take a profit on the Governments, and that they attached a special significance to the no-profit clause in the July 30 agreement because they mistakenly thought that a profit on the Governments was easy and unjustified and therefore unproper.

While they concede that members of the Jeffco Board and its staff had no personal interest in the case they do argue that these witnesses having taken a position about the merits of their actions would be reluctant to admit error or any conduct that might be construed as incorrect or careless. Here, the respondents point to Parker's testimony that in early 1964 there were rumors that Boettcher had taken a huge secret profit on the Governments. They also maintain that a synopsis prepared by Parker for the information of the Board members was inaccurate and misleading in part and could have misled Board members who read it prior to their testimony. It is also urged that Division witnesses, especially Parker, had vague recollections of what occurred at the meetings.

The Jeffco Board may have made certain erroneous assumptions of respondents' intentions, as it is argued, but these misconceptions were due primarily to the conduct of the respondents. The October 10 contract was the culmination of extensive negotiations over a period of months and cannot be considered in a vacuum. The no-profit-in-Governments clause played an important part in the negotiations leading up to the July 30 agreement and was specifically incorporated therein. Certain statements at the September 9 conference justified the assumption of

the continuance of that arrangement; at the least, not its cancellation.

The terms of the Childs letter do not negative the implied condition that the figures contained therein are cost items to Boettcher and that, while they might contain a markup over current market quotations, they were the best prices that Boettcher could obtain under conditions stated in the letter. Certainly, Parker's checking the sum of the quotation contained in the Childs letter as against the figures contained in the October 10 contract was consistent with that belief on the part of the Jeffco Board.

Newman testified that he revealed the markup to Jeffco in the course of the discussion on October 10. Dr. Forbes Bottomly, then Superintendant of Schools for Jeffco, testified that he had had a discussion with a state senator about the proposed refunding and the legislator warned him that transactions in Governments by the underwriters could be a source of easy profits. Bottomly passed this information on to the Jeffco Board. Under these circumstances it is very doubtful that Jeffco would have remained silent if there had been a clear disclosure that Boettcher intended to take a markup on the Governments of approximately $400,000. It might very well be that some or all of the Jeffco Board members had a misconception of the work necessary in the determination of the composition of the escrow and arranging for its acquisition. Perhaps a full explanation would have convinced them that the terms of the October 10 contract were fair and they would have agreed to go ahead. However, the record is barren of any evidence that there was such an open discussion at any time through the closing. Jeffco never had a full opportunity to discuss and take action on this question in its official capacity on the

basis of complete knowledge of the background circumstances.

While some of the Division witnesses were not clear on details of the discussion between Boettcher and Jeffco, their testimony is inherently consistent on the markup question and, moreover, that testimony is supported by the evidence of what was left out of the October 10 discussion and not revealed subsequently.

The testimony of the Jeffco Board members and its staff, which is credited, reveals very clearly that Newman presented the Childs letter to them as a document which needed prompt action by the Board because of the deadline involved and that it was an option which Boettcher could make use of to guarantee itself that the Governments which it needed for the escrow would be available at the proper time. While he may not have stated in express language that Boettcher intended to pay over the $2000 specified in the Childs letter, he left no doubt that Boettcher did intend to make use of the Childs letter to complete one part of the work that needed to be done to make the refunding successful.

Under all the circumstances the undersigned concludes that when the final refunding proposal was accepted there was no clear revelation of the fact that Boettcher and its associates intended to take a markup on the Governments and that the amount involved was almost $400,000.

The term "material" has been defined in the Exchange Act as,

> ". . . when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered." 16/

16/ 17 C.F.R. 240.12b-2. A similar definition is contained in the Securities Act (17 C.F.R. 230.405).

The substantial charge on markups on Governments contained in the October 10 agreement certainly was a material fact of which a prudent investor would want to be informed. The respondents claim that Jeffco was not interested in the markup, but only the total charge of Boettcher and the associates on the refunding. As previously concluded, the evidence does not support this contention.

The undersigned concludes that the respondents violated the antifraud provisions of the Securities Acts by inducing Jeffco to enter into an advance refunding agreement by material misrepresentations and statements which were false and misleading and which omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading concerning the markup on Governments furnished Jeffco; the market price for the Governments; the costs incurred by Boettcher and its associates in acquiring Governments purchased for and sold to Jeffco, including the asserted costs of underwriting, obtaining and maintaining physical availability of the Governments supplied Jeffco; the availability of Governments at prices lower than those paid by Jeffco; and the markup intended to be taken by Boettcher Investment. The respondents engaged in transactions, acts, practices and a course of conduct which operated as a fraud and deceit on Jeffco. The aforementioned violations were willful within the meaning of the Securities Acts.[17/]

17/ Tager v. S.E.C., 344 F. 2d 518 (2nd Cir. 1965); Harry Marks, 25 S.E.C. 208, 220 (1947); George W. Chilian, 37 S.E.C. 384 (1956); E. W. Hughes & Company, 27 S.E.C. 629 (1948); Hughes v. S.E.C., 174 F. 2d 969 (C. A.D.C. 1949); Shuck & Co., 38 S.E.C. 69 (1957); Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959); Ira Haupt & Company, 23 S.E.C. 589, 606 (1946); Van Alstyne, Noel & Co., 22 S.E.C. 176 (1946); Thompson Ross Securities Co., 6 S.E.C. 1111, 1122 (1940); Churchill Securities Corp., 38 S.E.C. 856 (1959).

D. The Advance Refunding of Adams County, Colorado School District No. 50

When Newman met with the Jeffco Board on July 30, 1963, Kenneth A. Pearson, director of business services for Adams 50, along with a member of the Adams 50 Board attended the meeting as interested spectators.[18/] At the conclusion of the meeting Pearson spoke with Newman and asked him for a proposal to advance refund Adams 50 outstanding obligations. Adams 50 was aware of the negotiations between Boettcher and Jeffco and wanted to work out an advance refunding similar to the arrangements made with Jeffco.

Newman attended a meeting of the Adams 50 Board on August 13, 1963, at which the proposed refunding was discussed. Newman estimated that savings to Adams 50 by a refunding would amount to $400,-450,000, but that he wanted an agreement with that Board to permit Boettcher to handle the financing before he made the necessary detailed calculations. Pearson summarized the discussion that had taken place at the Jeffco meeting on July 30 and the president of the Adams 50 Board indicated interest in a similar proposal.

Later that day Newman prepared a written proposal to advance refund $7,735,000 of general obligations of Adams 50. This proposal was modeled after the one submitted to the Jeffco Board on July 30. It contained the provision that Boettcher and its associates, if the option contained therein was accepted by Boettcher within one month, would purchase the

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18/ Part of the findings herein are based on a stipulation between the parties (Div. Ex. 1, pp. 13-16).

necessary Governments at the best possible prevailing market price and would be purchased by Adams 50 from Boettcher and the associates ". . . at our market price on the date of our purchase on the open market plus accrued interest. . . ." [19/] The proposal was accepted by the Adams 50 Board. Newman and Dunn Krahl, a municipal bond salesman for Boettcher, met with the Adams 50 Board. Newman introduced Krahl to the Board as the person who would continue to represent Boettcher directly in the refunding. Thereafter Newman had no direct contact with the transaction except on a tax question unrelated to the issues in this case. Boettcher notified Adams 50 that it exercise the option granted to it by Exhibit 1 U.

On September 30, 1963, the refunding transaction was consummated whereby Boettcher and its associates acquired $7,735,000 principal amount of new refunding bonds of Adams 50 and supplied to the escrow agent for Adams 50 the necessary Governments. Boettcher and the associates charged Adams 50 $7,760,100.04 for the Governments and received payment in that amount. These Governments had, in fact, been acquired by Boettcher Investment on or about the closing date for the total consideration, including accrued interest, of $7,751,068.86. These Governments were resold to the underwriting syndicate at the price charged Adams 50 which price reflected a markup of 1/8 of a point, or $9031.18.

19/ Div. Ex. 1 U, pp. 2-3. The word "market" was not changed to "purchase" as was done in the Jeffco agreement.

At no time prior to the closing, including the date of the closing, was it disclosed to Adams 50 that it was intended that a markup of 1/8 of 1 percent would be taken on the Governments by Boettcher Investment, nor was disclosure made at or before the completion of the transaction that Boettcher Investment intended to and did mark up the Governments supplied to Adams 50.

Some time subsequent to the closing, Adams 50 and its representatives learned of the markup.[20/] Thereafter Adams 50 informed Boettcher that its position was that the markup by Boettcher Investment to effect the advance refunding was an improper charge to it. On or about April 30, 1966, Boettcher settled the claim of Adams 50 by paying the full amount of the asserted overcharge.

During the hearing a question arose as to whether Boettcher had delivered confirmations for the purchase of the Governments to Adams 50. Pearson could not recall receiving them and, apparently, they were not in the files of Adams 50. The originals of the confirmations were in the files of Boettcher, but it was contended on Boettcher's behalf that these originals or conformed copies would have been available at the closing and that these documents may have been left by Adams 50 when the closing was completed. In any event, and whether or not Boettcher was obligated to furnish confirmations for the Governments, it is agreed that Boettcher

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20/ The Governments had been acquired initially by the First National Bank of Denver for Boettcher Investment at its direction. Adams 50, on rechecking, was able to accertain the prices at which the Bank had supplied the Governments to Boettcher Investment.

did furnish Adams 50 at the closing with a tabulation headed "Escrow Account -- Governments Tabulation @ Boettcher & Company's Cost," which contained a listing of the bonds furnished and the price which Adams 50 was called on to pay (Div. Ex. 16). The 1/8 markup was included in the total.

Newman testified that when he prepared the contract for Adams 50 he did not contemplate that the 1/8 markup, which Boettcher Investment as a matter of Syndicate agreement, added to the price of the Governments when it sold them to Boettcher as representative of the Syndicate, would be passed on to Adams 50. He considered the 1/8 a Syndicate expense and felt that it was inadvertent when the markup was passed on to Adams 50 (Tr. 2294-95). However when he turned over negotiations to Krahl on September 9, he did not give him any instructions on how to handle the contemplated markup.

Krahl testified that he interpreted the contract to mean that Adams 50 would purchase the Governments at the Syndicate's cost, including the 1/8 which would be charged the Syndicate by Boettcher Investment (Tr. 2486-87). He further testified that in discussions with the Adams 50 Board he did tell them that Boettcher could not buy the Governments itself but would have to borrow the credit of someone else, paying a charge therefore, and that the charge was included in the price to Adams 50 (Tr. 2488, 2490). Pearson corroborated his testimony on this point but stated that he could not recall whether there was any mention of any cost for this service (Tr. 1374-76).

Wiesner supervised the purchase of the Government bonds for the Adams 50 closing and he was the partner in charge of that transaction. He testified that he approved the calculation of figures for the closing, but did not have specifically in mind at that time that the 1/8 being passed on to Adams 50 (Tr. 2549-52). He also stated that there was no specific decision to pass on the markup but that "[i]n the process of handling this issue it came out that way" (Tr. 2571).

Contentions of the Parties, Conclusions

Respondents contend that at the most there was a mere unintentional breach of contract based on Krahl's interpretation of the contract and the fact that his intention to pass on the 1/8 markup did not come to the attention of anyone else in the Boettcher organization and that the markup was passed on to Adams 50 as a result of his interpretation and instructions to the staff.

It is further urged that here there was a promisory undertaking to turn the Governments over at the underwriters cost, which is not the equivalent of a misrepresentation of a material fact. It is also asserted that any misrepresentation here was not knowingly or negligently made.

Boettcher had agreed to supply the necessary Governments to Adams 50 ". . . at our market price on the date of our purchase on the open market" (Div. Ex. 1 U). This statement clearly indicated that Adams 50 would receive these securities without the intervention or interpositioning of another concern. In all their dealings, Boettcher representatives never fully revealed to Adams 50, the part Boettcher Investment would play in in the acquisition of the Governments, its charges, the fact that these

charges would be passed on to Adams 50, and that Boettcher, as owner of Boettcher Investment, would receive additional profit from the markup charge.[21/] There was some mention of use of a line of credit, but again no information was furnished as to whether there would be any charge for this, the amount, and the justification. The undersigned concludes that the markup of the Governments was violative of the agreement between the parties.

A broker's obligation of fair dealing negatives his use of hidden charges to increase his profit in dealing with customers. In view of its original obligation, it was Boettcher's duty to fully inform its customer when it intended to take additional profit from the transaction. This was not done. At the closing the only information Adams 50 had was that the original contract would be carried out according to its terms. This agreement did not include a markup charge.

A violation of the Securities Acts may be committed by a failure to state material facts as well as a direct misrepresentation. The additional charge was a material fact of which a prudent investor would want to know. It may be, as respondents contend, that the $9000 charge would not have affected the decision of Adams 50 to proceed with the refunding, but that it was interested primarily in its savings. However, it was entitled to make up its own collective mind on this with full knowledge of the facts. It did not have any such opportunity. The undersigned

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21/ Pearson had a vague recollection of Boettcher Investment being mentioned in a discussion but was unsure about it. In any event there is no evidence that the details set forth above were given to Adams 50.

concludes that the failure to notify Adams 50 that it would be charged a markup over its original obligation was violative of the anti-fraud provisions of the Securities Acts.

Respondents urge that the violation was not willful or negligent. However, Newman had an opportunity to clear up any problem by giving instructions to Krahl. Krahl was experienced, but not with the type of agreement used here. Wiesner had an opportunity to take appropriate action before the closing, but neglected to do so. Lawrence, as head of the Bond Department, had an opportunity to act also, but did not do so. The undersigned concludes that the conduct of Boettcher and the individual respondents was marked by such carelessness and negligence in this instance as to amount to a willful violation.

E. Boettcher Publicity on its Over-the-Counter Activities

It is alleged in the Amended Order for Proceedings (II D) that from on or about March 16, 1966 to November 8, 1966, respondent Boettcher represented to the public by newspaper and radio advertising that it would obtain for members of the public the best available price for over-the-counter securities. Thereafter, it is asserted, that Boettcher traded those securities as principal with customers to whom the aforesaid representations were made, disclosing its principal capacity, but not disclosing on confirmations, or otherwise, its full adverse interest including markups and markdowns taken by it. In some instances these were considerably greater than New York Stock Exchange minimum commission rates. It is also alleged that Boettcher did not disclose to customers

what efforts it had made to determine the best available independent market price and from whom such market price was available. It is charged Boettcher, by the aforementioned activities, violated the anti-fraud provisions of the Securities Acts.[22/]

On March 6, 1966, Boettcher caused an advertisement, which had been prepared by its advertising agency, to appear in the Denver Post. Before the advertisement appeared Boettcher sought and obtained approval of the advertisement from the New York Stock Exchange. A copy of this advertisement is attached hereto as Exhibit V. This proceeding was instituted on March 7, 1966. Boettcher caused the advertisement to appear on March 9, 1966 and on March 16, 1966, in two Colorado newspapers having national circulation.

Beginning on March 30, 1966 and continuing through October 10, 1966, Boettcher caused an advertisement, which also had been prepared by its advertising agency, to be broadcast over a Denver radio station on several occasions. A copy of this advertisement is attached hereto as Exhibit W. Before this advertisement was broadcast Boettcher sought and obtained approval of it from the New York Stock Exchange. After the advertisement in Exhibit V had been published and the advertisement in Exhibit W had been broadcast Boettcher continued, as it had for many years beforehand, to effect transactions with customers in over-the-counter securities. In connection with those transactions, no special instructions

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22/ This issue has been submitted by the parties by stipulation (Div. Ex. 29).

were given to Boettcher's registered representatives to ascertain whether or not the customers had seen the published advertisement or heard the broadcast advertisement.

The Division, on order from the undersigned, furnished the respondents a list of specific transactions on which it intended to rely (Div. Ex. 2). These transactions, entered into between March 7 and October 18, 1966, represent only a small portion of the total transactions in over-the-counter securities handled by Boettcher on a principal basis during that period since it lists only those principal transactions which involved same-day off-setting transactions as well as a gross profit to Boettcher.

During the period in question over-the-counter transactions handled by Boettcher on a principal basis amounted to approximately half of Boettcher's over-the-counter transactions, the other half being handled on an agency basis.

Of the transactions specifically listed by the Division, in almost all of the cases the off-setting transactions took place at different times during the same day and in an indeterminate number of cases reflect market fluctuations. Of the 34 different over-the-counter securities involved in the transactions set forth, all but eight are securities in which Boettcher made a preliminary position market. In most of the remaining cases Boettcher had a close connection with the issuer.

It is conceded that after the aforementioned publications and broadcasts Boettcher did not give instructions to tell customers or other dealers or banks the actual spreads between the prices of the off-setting

transactions in over-the-counter securities which Boettcher experienced. In some cases there was agreement on the spreads, however, Boettcher's registered representatives were not given instructions to tell the customers or other dealers or banks the best independent market prices for the various securities which Boettcher handled on a principal basis with customers or other dealers or banks, nor were such best independent market prices always disclosed to customers. There also was no specific disclosure by Boettcher to customers with whom it did business on a principal basis that its interests and their's were adverse with respect to the prices at which transactions might be and were effected. In some transactions the undisclosed spreads were in excess of what the minimum commissions of the New York Stock Exchange would have been.

On March 22, 1966, after discussions with a representative of the Division Boettcher refrained from republishing the aforementioned advertisements.

Contentions of the Parties; Conclusions

The Division contends that Boettcher represented to members of the public by means of its newspaper and radio advertising that it would obtain for members of the public the best price for over-the-counter securities. Then transactions were effected on a principal basis without a disclosure to the customer of Boettcher's profit on the transactions or its efforts to determine the best available independent market price for the securities traded. It is asserted that by its repeated representations of obtaining the best possible market price Boettcher placed itself in a fiduciary relationship with customers. Boettcher, it is

claimed, had the duty of disclosing not only its principal position (which it did), but its gross profit and the best independent price in its over-the-counter transactions. This concededly was not done and, therefore, according to the Division, Boettcher violated the Securities Acts as charged.

Boettcher contends that a careful reading of the advertisements demonstrates that there were no misrepresentations contained therein. With respect to the newspaper advertisement (sometimes referred to as the Powell Ad) it is maintained that the reference to Boettcher's traders dealing tenaciously in trying to get the best possible price for customers is a description of what they do only in the event Boettcher does not have the stock and has to go out and secure it elsewhere. In that instance it is agreed that in almost every case an agency relationship is established. It is urged that the use of the term "best possible price" should be interpreted not to relate to instances where Boettcher supplies the security from its own inventory, which it handles as a principal transaction.

As to the radio advertisement it is also maintained that when read in its entirety there is a similar disclosure that one function of the trading department is to try to get the best possible price for customers when it does not already have a stock in inventory and goes out to locate it for the customer. Other activities of Boettcher's over-the-counter capability are pointed out in the ad. The maintenance of an inventory is specifically pointed out.

Respondent also relies on prior approval for these ads having been received from the New York Stock Exchange (as required by its Rules 471 and 473). It is contended that Boettcher conducted its business in the ordinary way and that it had a right to rely on the prior approval it obtained. It is denied that the language of the ads created any fiduciary relationship with potential customers resulting in later agency transactions with requirements for full accounting of markup. It urges that the furnishing of principal confirmations supersedes any inferences of an agency transaction which might have been drawn from the initial reading of the ad. It points to a claimed lack of evidence that any of the customers with whom Boettcher dealt in an over-the-counter security on a principal basis ever saw or heard the ads. It relies on the claim that no evidence was submitted in this case establishing actual trust and confidence of the type that can give rise to a fiduciary duty under the cases previously considered in this decision. It further maintains that Division offered no evidence that any of the customers in the transactions that it specified saw or heard the ads, understood them the way the Division claims they should be understood, or told Boettcher how they understood the ads, or were not informed by Boettcher of the markups or the best available market prices.

Basic to the relationship between a broker-dealer and his customer is the so-called "shingle" theory -- that is, when a broker-dealer hangs out his shingle there is an implied representation that he will deal fairly with the public. The obligation attaches whether the person invoked acts as a broker-agent or dealer-principal. It has been applied

in a variety of cases, including the finding of an implied representation of pricing reasonably related to the market.[23/]

The commitment of fair dealing encompasses the duty to disclose the method of filling orders and the charges applied to a sale. There must be open disclosure. If the necessary information may only be deduced by close reading of material by a knowledgeable investor, it does not satisfy the full disclosure requirement.

The Powell Ad, after the caption, opens with the flat statement that "Every over-the-counter transaction is a negotiating process." The only statement on stock in inventory is "Boettcher traders either have the stock. . . ." Nothing specifically is said about the pricing of stock from inventory, although the next sentence starts, "And they deal tenaciously trying to get the best possible price. . . ."

Similarly, the radio ad initially refers to the many facets of Boettcher's over-the-counter capability, then, it continues, "One is a trading deparntment whose chief job is to try to get you the best possible price on any over-the-counter issue." (Emphasis supplied.) There was a reference to "an inventory of many prominent local issues," but again nothing as to the pricing of those securities. There is nothing in the ads clearly revealing the restrictive interpretation respondent would give to them. Only a knowledgeable investor, based on his own personal experiences, might conclude that Boettcher had a different pricing system

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23/ A review of cases in this field is contained in Loss, supra, V. 3, pp. 1482-1490.

for inventory stock than for orders it could not fill directly. While the undersigned does not agree with the Division's contention that a fiduciary relationship was established with investors by the use of the ads, it is concluded that as presented with the emphasis in one ad on "every over-the-counter transaction" and in the other on "any over-the-counter issue" with the stress on "best possible price," it devolved on Boettcher to clarify its activities and pricing policies in filling stock from inventory. Otherwise, as here, without there being disclosure of Boettcher's interest in the transactions from inventory, its representations were incomplete, and thereby false and misleading.

There is no merit to the contentions that there is no proof that any Boettcher customers saw or heard the ads or understood them the way the Division contends. It is the utterance of a misleading statement which constitutes the violation, not proof of reliance thereon.[24/] The stipulation further provides that Boettcher personnel were not instructed to tell customers in principal transactions of the spreads involved or the best indepndent market price. The approval Boettcher obtained for its ads does not constitute a defense to the violation, but it will be considered on the question of sanctions. The undersigned concludes that Boettcher by its aforemention activities violated the Securities Acts and the violations were willful.[25/]

24/ N. Sims Organ & Co., Inc., 40 SEC 573, affirmed N. Sims Organ & Co. v. Securities and Exchange Commission, 2 Cir., 293 F. 2d 78 (1961), cert. denied, 368 U.S. 968 (1962); Berko v. Securities and Exchange Commission, (2 Cir., 1963) 316 F. 2d 137).

25/ Charles P. Lawrence, Sec. Exch. Act Rel. No. 8213, p. 5 (Dec. 19, 1967).

III. CONCLUDING FINDINGS, PUBLIC INTEREST

The Commission, pursuant to the provisions of Section 15(b) of the Exchange Act, so far as it is material herein, is required to censure, suspend, or revoke the registration of any broker or dealer if it finds such action is in the public interest, and such broker or dealer, subsequent to becoming such, has willfully violated any provision of the Exchange Act, the Securities Act, or any rule or regulation thereunder. Orders of censure, bar or suspension from being associated with a broker or dealer may be entered by the Commission against any person if it finds a person has committed violations of the Securities Acts and the public interest requires such sanction.

It has been found that the respondents violated the anti-fraud provisions of the Securities Acts in the advance refunding of the Jeffco and Adams 50 bonds.[26/] It has also been found that Boettcher violated the anti-fraud provisions of the Exchange Act in its publicity on its activities in over-the-counter issues.

The Division contends that the violations found warrant the imposition of the maximum sanctions. It is contended that the fact that Jeffco and Adams 50, although misled may have profited from respondent's actions

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26/ It has also been alleged by the Division that the respondents violated the confirmation rule in these transactions (Section 15(c)(1) of the Exchange Act and Rule 17 CFR 240.15c1-4 thereunder) in that confirmations were not furnished revealing the markups on Governments furnished. The respondents contend that the confirmation rule cannot be applied to municipal or government bond transactions.

It is unecessary to decide this issue since the question of markups has been dealt with in detail. Any finding of further violation here would not alter the sanction which will be imposed.

is legally irrelevant.[27/] It further asserts that Boettcher had many years of experience to acquaint itself with its responsibilities under the Securities Acts and that Lawrence and Wiesner were experienced and, therefore, should have realized their responsibilities. It also points to the Powell Ad and the radio ad as further evidence of Boettcher's inability ot adhere to its obligations.

On behalf of Boettcher it is urged that it is a firm which has been in the investment banking business for over 50 years and has accounts with approximately 700 brokers and 1000 individual investors in the Colorado and Rocky Mountain area. Approximately 225 persons are employed by it. Over the past ten years Boettcher has participated as manager or underwriter in approximately 350-400 municipal bond issues and, according to testimony presented on its behalf, has been instrumental in securing legislation to assist municipalities with financing problems.

Out of approximately 65 different advance refundings completed by Boettcher complaint has been made only as to Jeffco and Adams 50. Boettcher has never been subject to any disciplinary action and, according to members of other Denver investment banking firms who testified, it has an outstanding reputation for ability and integrity. It is also urged that Boettcher has already suffered considerably due to unfavorable publicity,

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27/ The Division relies on Berko v. Securities and Exchange Commission, 2 Cir. 1963, 316 F. 2d 137, 143; and also Securities and Exchange Commission v. Capital Gains Bureau, 375 U.S. 180 (1963), Estep v. United States, 5 Cir. 1955, 223 F. 2d 19, aff'd., 350 U.S. 863 (1955); Hughes v. Securities and Exchange Commission, supra, 174 F. 2d at 973-974.

that it has settled the claims of Jeffco and Adams 50 with substantial payments, and that it has cooperated in the Commission's investigation.

It is further pointed out that the Municipal Bond Department of Boettcher was greatly overworked in 1963 and during that period Boettcher rose from sixtieth in the nation in terms of numbers of issues handled in 1962 to eighth in 1963. According to Wiesner, procedures of the department have been reexamined since then to provide for closer coordination and better supervision. New contract forms have been prepared to avoid problems which arose in the past.

The undersigned finds merit in the above contentions. Outside of the activities attributable to publicity on Boettcher over-the-counter violations, the violations found here were attributable to one department of Boettcher operations and involved two issues. At least one of them, the Jeffco refunding, was very involved and required detailed planning and calculation in its initial stage and sustained effort thereafter over a period of months to bring the issue to the market. In both refundings the estimated savings goal of $2,500,000 and $500,000 were approximately reached. The Division has pointed out that Boettcher was remunerated for its efforts, but nevertheless both school districts did derive substantial benefits from Boettcher's efforts. With respect to the violation found in Boettcher's advertisements the undersigned take note of the fact that while it was Boettcher's prime responsibility to make sure that these advertisements complied with its obligations, it did receive approval for them from a responsible body.

In view of the above considerations the undersigned concludes that a sanction should be imposed on Boettcher, but limited to censure.

With respect to the individual respondents it must be noted that each played a substantial part in the violations found. The violations would not have occurred if any one of them had taken appropriate action. Newman developed the basic program for Jeffco and was closest to it. He had the best chance to clarify the terms and conditions of the October 10 contract with Jeffco but did not do so. He had the initial contact with Adams 50 and here again he had an opportunity when he was turning over future negotiations to Krahl to avoid any future confusion by giving Krahl a simple instruction.

Wiesner was the responsible partner for both the Jeffco and Adams 50 transactions and had the direct responsibility to see that they were carried on in accordance with Boettcher's obligations. It was apparently his idea to negotiate the Childs letter and set in motion the chain of events which led to the violations found.

Lawrence was head of the Municipal Bond Department and had an overall responsibility for matters under his control, including the two refunding bond issues. He had one meeting with the Jeffco Board on September 9 where he might have been able to clarify the mutual rights and obligations of Boettcher and Jeffco, but he did not do so. He prepared the October 10 contract presented to Jeffco, but did not take care to see to it that a full and adequate presentation of its terms was made to Jeffco.

The undersigned concludes that the activities of the respondents warrant the imposition of a sanction for the violations in which they played a direct and important part. Some of the extenuating circumstances advanced on Boettcher's behalf apply to them also, especially figures on the volume of work handled by the Boettcher Municipal Bond Department in

1963. None of the respondents has been the subject of any disciplinary proceeding. It is concluded that it is in the public interest that they be suspended from association with a broker or dealer for a period of fifteen (15) days.

Accordingly, IT IS ORDERED that Boettcher & Company be censured for its aforementioned violations; and

IT IS FURTHER ORDERED that David F. Lawrence, Alfred A. Wiesner, and Bruce C. Newman are suspended from association with a broker or dealer for a period of fifteen (15) days from the effective date of this order.

Pursuant to Rule 17(b) of the Commission's Rules of Practice a party may file a petition for Commission review of this initial decision within fifteen days after service thereof on him. This initial decision, pursuant to Rule 17(f) shall become the final decision of the Commission as to each party unless he files a petition for review pursuant to Rule 17(b) or the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition to review or the Commission takes action to review as to a party, this initial decision shall not become final as to that party.[28/]

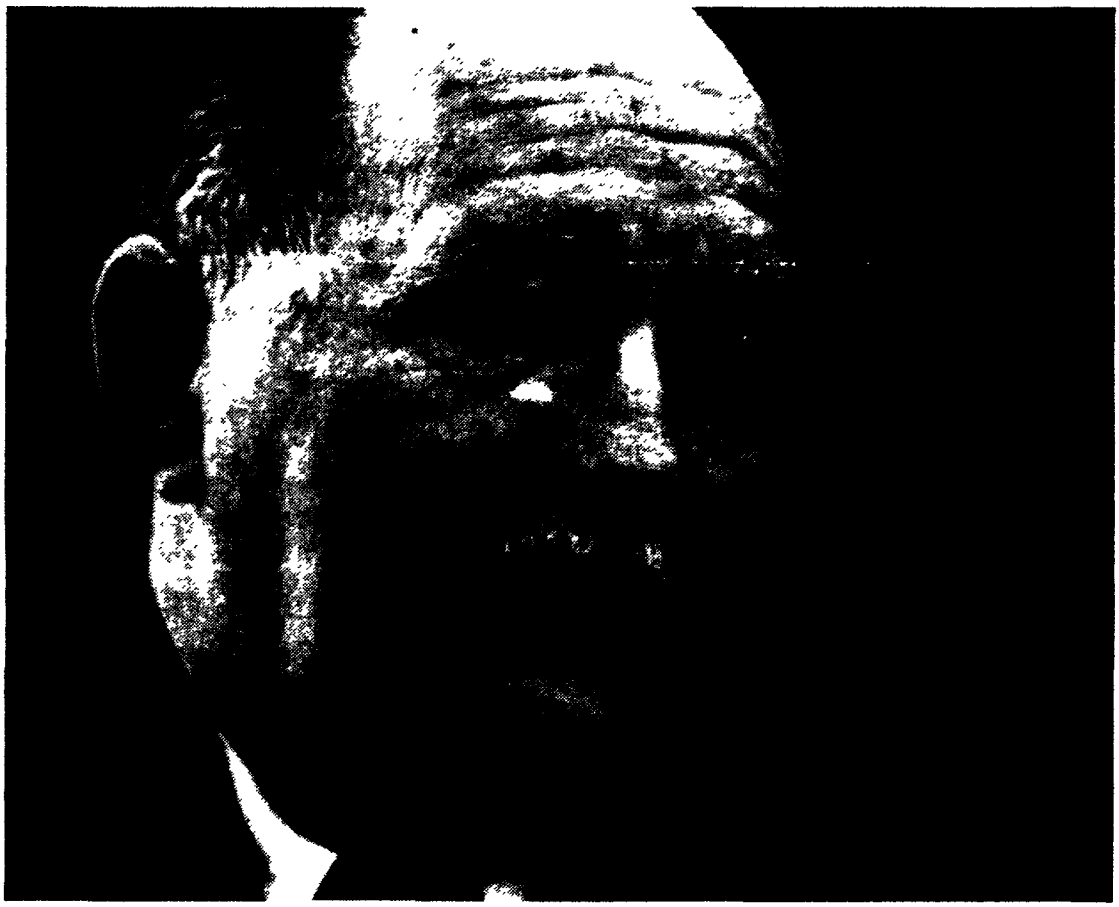
Sidney L. Feiler
Hearing Examiner

Washington, D. C.
December 22, 1967

28/ All contentions and proposed findings have been carefully considered. This initial decision incorporates those which have been found necessary for incorporation therein.

Over-the-counter . . . he drives a hard bargain for you.

• Wednesday, March 16, 1966 •
Denver, Colo. • Cervi's Rocky Mountain Journal



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Boettcher traders either have the stock or know where to get it. And they deal tenaciously trying to get the best possible price . . . with all the judgment and bartering skill at their command.

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Exhibit V

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CLIENT APPROVAL

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There are many facets to Boettcher and Company's over-the-counter capability. One is a trading department whose chief job is to try to get you the best possible price on any over-the-counter issue. Another is Boettcher's continuing, active role in syndicates ... enabling us to offer the Boettcher customer early access to what we consider choice new national issues. Boettcher is also one of the most active Denver firms in the making of primary markets. We keep an inventory of many prominent local issues ... banks, industrials, and insurance companies, for example. But Boettcher's prime OTC asset is still judgment ... judgment built on more than 50 years of experience in the Rocky Mountain West. The more you know about investing, the more you appreciate Boettcher.

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EXHIBIT W.

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