Description of document:	Federal Retirement Thrift Investment Board (FRTIB) Office of General Counsel Memos, 1987-2004
Appeal date:	17-March-2017
Release date:	05-September-2017
Posted date:	18-February-2019
Source of document:	FOIA Request FOIA Officer Federal Retirement Thrift Investment Board 77 K Street N.E., Suite 1000 Washington, DC 20002 Fax: (202) 942–1676 To: "FOIA Officer: FOIA Request" Email: FOIAREQUEST@tsp.gov

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
77K Street, NE Washington, DC 20002

September 5, 2017

This responds to your letter dated March 17, 2017, appealing the action of the Federal Retirement Thrift Investment Board (Board) in response to Freedom of Information Act (FOIA) request for records, 17-TIB-15. You allege that the Agency's decision was erroneous with regard to the application of the attorney-client privilege and attorney work-product privilege of Exemption (b)5.

After carefully considering your appeal, I have determined that certain memos are releasable to you. Please see attached. The parts being withheld are protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5), the attorney-client privilege and the deliberative process privilege, as well as 5 U.S.C. § 552(b)(6), which protects an individual's personal privacy. The attorney-client privilege protects all confidential communications between an agency client and its attorney for the purpose of obtaining and providing legal advice. The deliberative process privilege protects the Agency's decision-making processes.

If you are dissatisfied with my response to your request, the Office of Government Information Service (OGIS) offers mediation services to help resolve disputes. You may contact them by writing to Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road -- OGIS, College Park, MD 20740, by email at ogis@nara.gov, or by calling 1-877-684-6448. You also have the option to contact our FOIA Liaison at FRTIBFOIALIAISON@tsp.gov. Or you have the right to seek judicial review and file a civil action in Federal court. 5 C.F.R. § 1631.10(e).

Sincerely,

Ravindra Deo

Ravindra Deo
Executive Director

FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD
Benjamin Franklin Station, P.O. Box 511
Washington, DC 20044

February 10, 1987

MEMORANDUM FOR: [redacted]

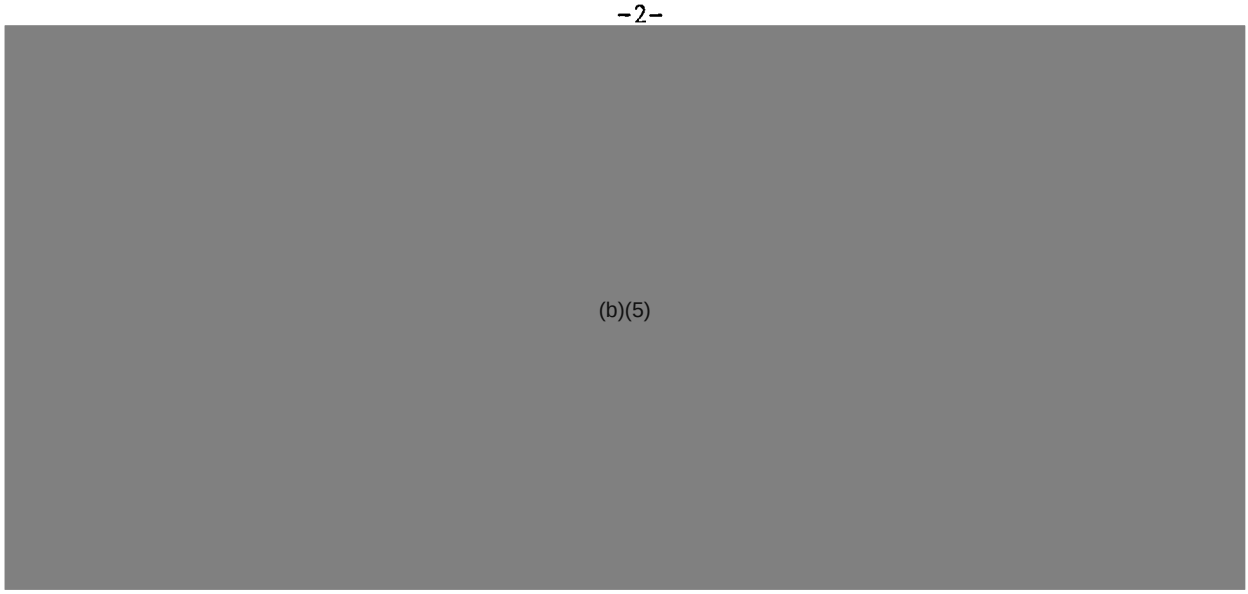
FROM: [redacted]

SUBJECT: Applicability of Conflict-of-Interest Statutes and Confidential Financial Disclosure Form to Members of the Employee Thrift Advisory Council

(b)(5)

[redacted]

(b)(5)


(b)(5)

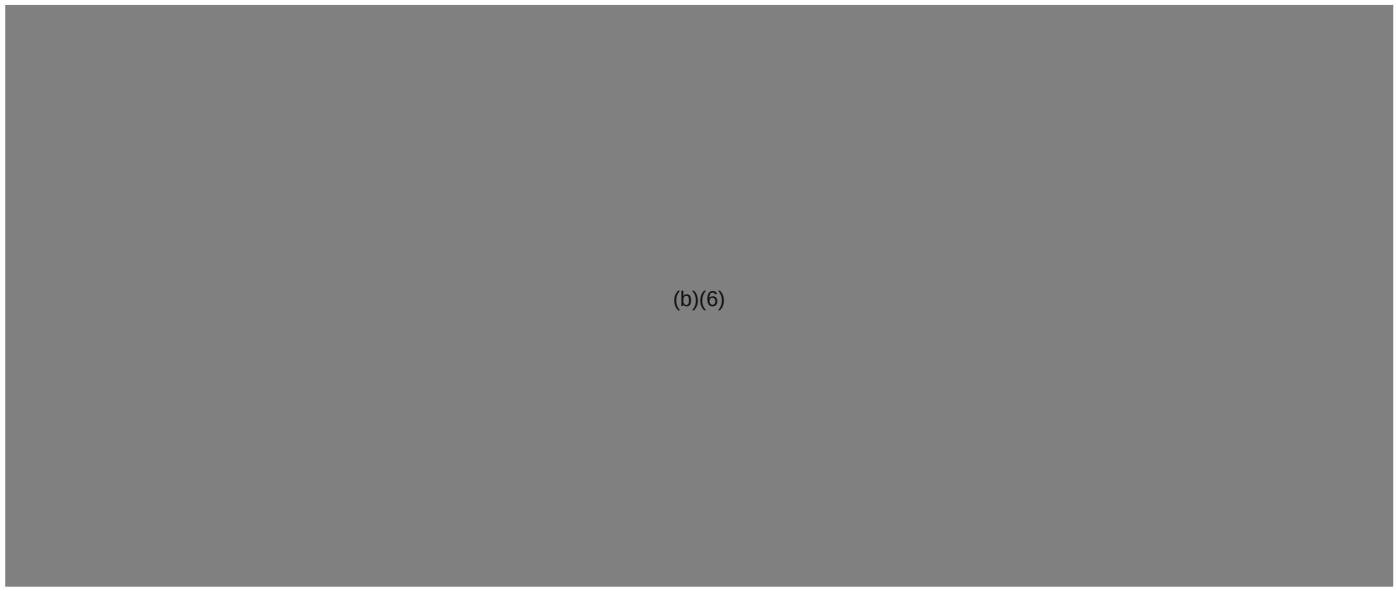
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

November 20, 1995

(b)(5)

SUBJECT: Back Pay and TSP Contributions

(b)(5)



Attachments

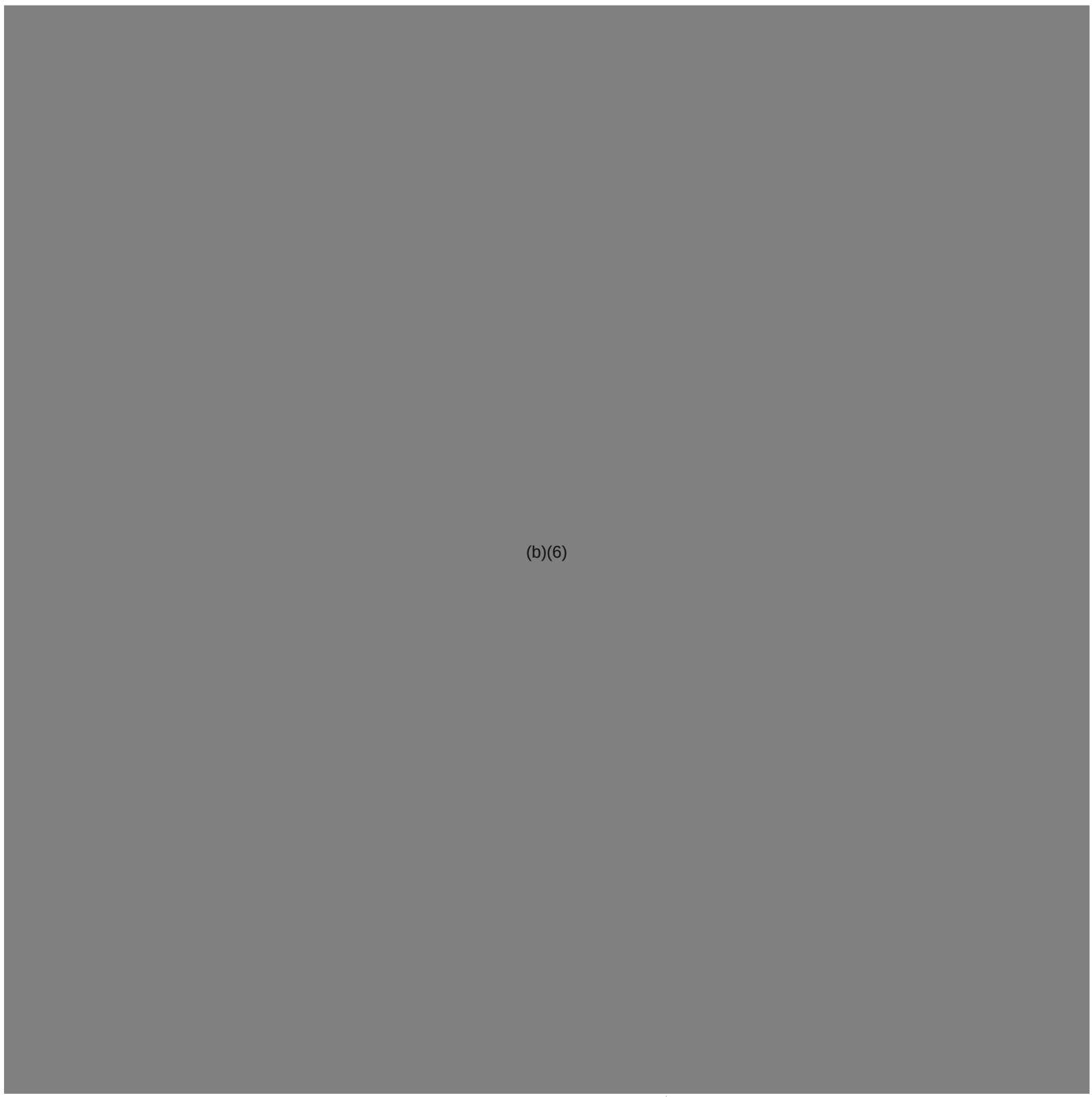
FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD
805 Fifteenth Street, N.W.
Washington, D.C. 20005

October 3, 1988

(b)(5)

SUBJECT: Retroactive Contributions When Earnings Exceed Back Pay

(b)(5)


(b)(6)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

August 20, 2003

[redacted]

(b)(5)

SUBJECT: Whether the Agency Must Comply with the Federal Vacancies Reform Act (FVRA)

[redacted]

(b)(5)

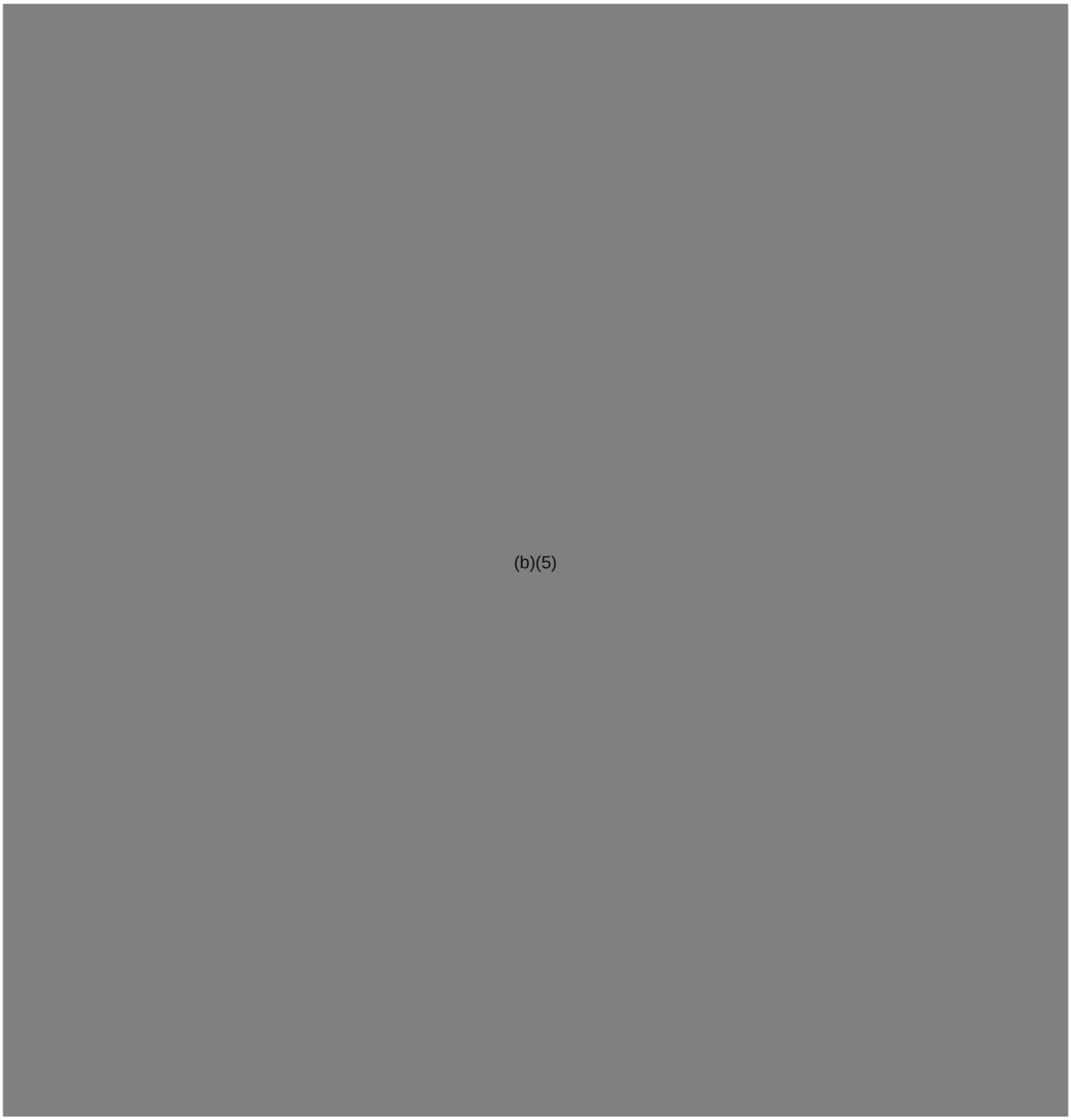
FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD

DATE: September 8, 1995

[redacted]
(b)(5)

SUBJECT: Nomination of a TSP Board Member for a Successive Term Prior to the Expiration of the Member's Term

[redacted]
(b)(5)


(b)(5)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

September 29, 1995

MEMORANDUM [redacted]

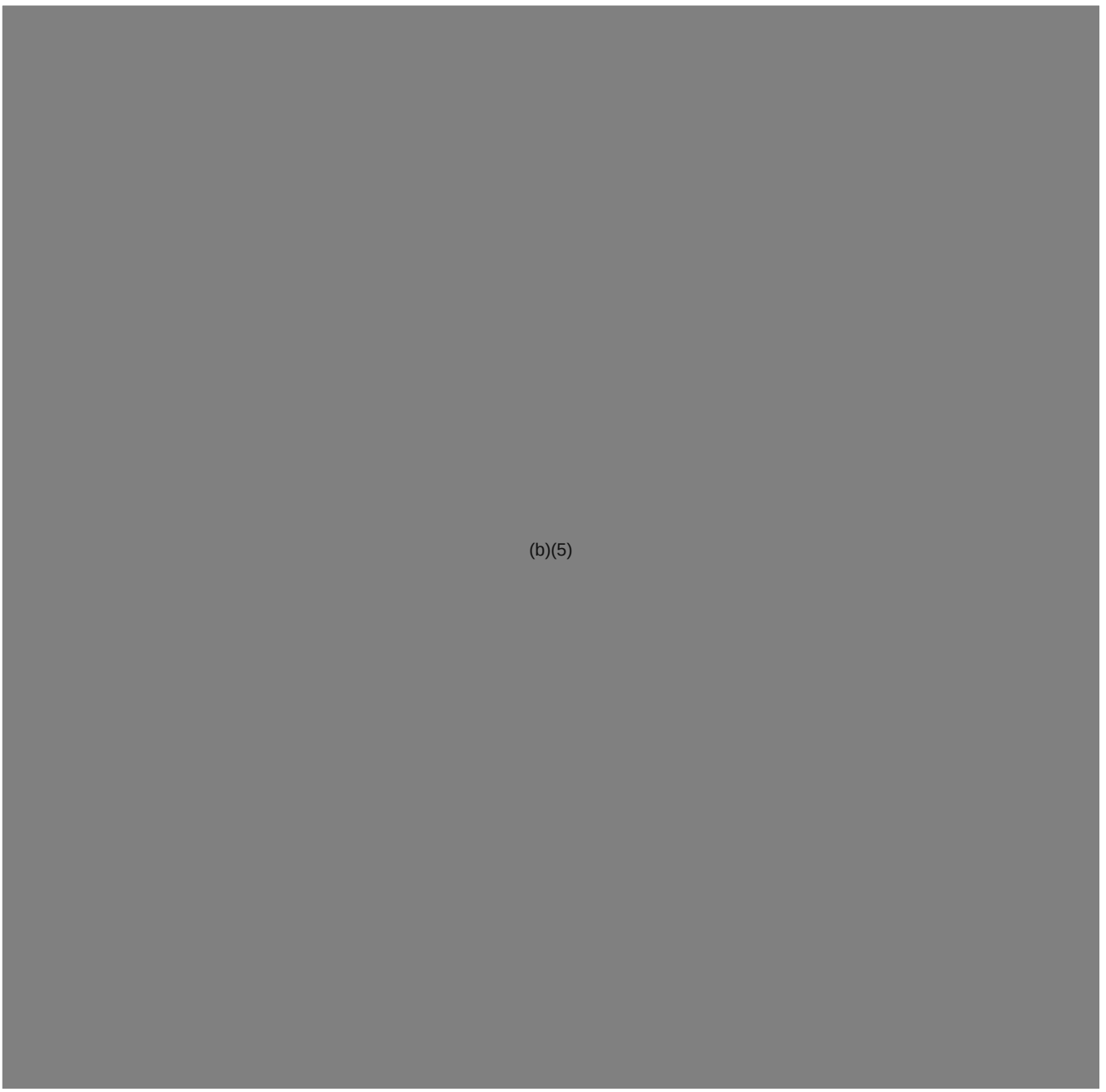
(b)(5)

FROM:

SUBJECT: **Reimbursement for Certain Federal Bureau of Investigation Background Investigations**

[redacted]

(b)(5)


(b)(5)

FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD

DATE: August 9, 1990

MEMORANDUM FOR THE EXECUTIVE DIRECTOR

FROM: ROBERT BLOOM

SUBJECT: Challenged or Conflicting Claims for Benefits; (b)(6) (deceased)

This memorandum discusses certain issues of policy and procedure which have arisen as a result of a challenge by the participant's widow to the payment of the account of (b)(6) (b)(6) to the person designated in a Designation of Beneficiary form TSP-3.

FACTS

(b)(6) was a participant in the TSP. He died on (b)(6) A Form TSP-3, Designation of Beneficiary, (b)(6) (b)(6), as beneficiary of 100% of the account.

Prior to distribution of the account balance (approximately (b)(6), OGC received a telephone call, followed up by a letter, from [redacted] attorney for (b)(6) asserted that there was a question regarding whether (b)(6) had been competent at the time he designated (b)(6) beneficiary of his TSP account and requested that we withhold payment to (b)(6) until that issue was examined. It was determined that payment to (b)(6) should be withheld pending a review of this matter.

(b)(6) set forth the following sequence of events which he asserts supports his contention that (b)(6) competence to designate a beneficiary is an issue worthy of examination: (b)(6) learned that he had terminal cancer. The same month (b)(6) were separated after 20 years of marriage. In addition, at that time, [redacted] prepared a will in which he left (b)(6) her one half interest in the community property (which she is entitled to under (b)(6) law). The other half interest in the community property was left to (b)(6) (b)(6) also changed his TRA beneficiary designation so that one half would go to (b)(6) and the other half would go to (b)(6). Several months later, (b)(6) signed the TSP-3 form designating (b)(6) as beneficiary of 100% of the

sb8/9/90	INITIATOR	REVIEWER	REVIEWER	REVIEWER	REVIEWER	
NAME	Malia	Patrick	Bloom	Clarke	Fiester	Dickinson
(b)(6)				/	/	

account. The week before the form was signed and witnessed, (b)(6) was visited by his mother for several days. She stated to (b)(6) was under heavy doses of narcotics to control the pain associated with the cancer, that he was sleeping most of the time, that he could not read or tell time, and that his confusion was immense. One of the physicians who treated (b)(6) confirmed that (b)(6) was receiving increasingly higher doses of Dilotin, but (b)(6) did not include any statement from the physician concerning the effects of this medication.

ISSUES

This case raises a number of issues which have not been specifically addressed by the Board. Similar issues also could arise in a number of other "challenged" or "conflicting" claim situations; for example, allegations of fraud, forgery, duress, or coercion. They could arise anywhere that we rely upon a signed statement from a participant or a third party, such as a spouse, including a withdrawal, a death benefit payment or a loan.

The first issue, however, relates only to death benefits. It concerns one aspect of our present practice regarding payment pursuant to a Form TSP-3, Designation of Beneficiary. Section 8433(g) provides:

> If an employee or Member (or former employee or Member) dies without having made an election under this section or after having elected an annuity under this section but before making an election under section 8434 of this title, an amount equal to the value of that individual's account (as of death) shall, subject to any decree, order, or agreement referred to in section 8435(d)(2) of this title be paid in a manner consistent with section 8424(d) of this title.

Section 8424(d) in turn provides, in relevant part:

> Lump-sum benefits authorized by subsections (e) through (g) shall be paid to the individual or individuals surviving the employee or Member and alive at the date title to the payment arises in the following order of precedence, and the payment bars recovery by any other individual:
>
> > First, to the beneficiary or beneficiaries designated by the employee or Member in a signed and witnessed writing received in the Office before the death of such employee or Member. For this purposes,

> a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee or Member.
>
> . . . .

As we understand these sections, a participant is permitted to designate someone other than his/her spouse as the beneficiary of his/her TSP account on the Form TSP-3 without obtaining spousal consent. If the participant dies before making a withdrawal election, section 8433(g) of FERSA requires payment according to the TSP-3. There is no provision for, and we do not provide, spousal consent or notice in this situation.[1] This statutory scheme creates a gap in protection afforded current spouses. A separated, married FERS participant cannot withdraw his/her account in a lump sum, equal payments or an annuity other than a joint and survivor annuity without his/her spouse's written consent. But there is nothing prohibiting the participant from executing a Designation of Beneficiary Form naming someone other than the spouse and not making any election before death. As a result, the spouse has no right to claim any portion of the TSP account. It is this provision which allowed (b)(6) to designate someone other than his wife as beneficiary of his TSP account. Because he then died without having made any withdrawal election, he avoided the necessity of obtaining a waiver of his spouse's right to receive a joint and survivor annuity.[2]

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[1]Our current practice is to pay under the TSP-3, even if the participant has made a withdrawal election, including an election to receive a joint and survivor annuity, as long as the account has not been withdrawn as of the date of death. The language of section 8433(g), however, seems to require that if a participant has made an election to receive a joint and survivor annuity prior to death, that election should be honored in lieu of the designation of beneficiary. This is an issue which has been the subject of staff discussion and will be the subject of a future OGC memorandum, but is beyond the scope of the instant memorandum.

[2]This gap in spousal protection may be magnified by the TSP practice and policy of not permitting any withdrawal elections to be made prior to the time a participant separates from service, but at the same time encouraging the filing of Designation of Beneficiary Forms TSP-3 while the participant is in service.

While these provisions do create a gap in protection of current spouses which allows challenges like the instant one to arise, we believe that the statutory language is clear and supports our interpretation. There is no legislative history of this language. However, as other sections of the statute (sections 8435, 8433(i) and 8351) demonstrate, Congress considered those situations in which spousal consent or notice would be required and could have easily imposed such a requirement here. That they did not do so indicates to us that the statute intentionally does not afford the spouse a right to consent or notice in this situation.

RECOMMENDATION

That we continue our present practice of allowing participants to designate someone other than their spouses as beneficiary of their TSP accounts without spousal consent.

Agree (b)(6) ✓ Disagree _____ Other _____ Date 8/10/90

Discussed below are procedural questions related to the handling of cases involving disputed questions of fact or law between two or more claimants.

A. Procedural requirements for reviewing challenged or conflicting claims

There are no procedural requirements under FERSA for dealing with challenged or conflicting claims. Similarly, our regulations do not contain any procedures for processing challenged or conflicting claims other than the procedures for notifying a claimant of a denied claim and entitling the participant to appeal that denial to the Executive Director, see section 1650.50. We therefore need to develop procedures for processing not only the instant claim, but for processing all conflicting claims.

In developing TSP procedures, it may be useful to look for guidance regarding processing claims to the requirements set forth in ERISA and its implementing regulations and to the general requirements of the Administrative Procedure Act (APA). These requirements were recently discussed at length in a memorandum dealing with court order procedures. See attached Memorandum from Michelle Malis to Jim Petrick, dated May 17, 1990, entitled "What standard of review might a court apply to the Board's determinations regarding retirement benefits court orders?" ERISA itself contains a section entitled "Claims Procedure" but that section deals only with procedures regarding denied claims rather than the initial handling of

claims.[3] The Department of Labor's (DOL) regulations, however, contain specific requirements for establishing "claims procedures".[4] Section 2560.503-1 of the DOL regulations, 29 C.F.R. §2560.503 (1988), provides, in relevant part:

> (b) Obligation to establish a reasonable claims procedure. Every employee benefit plan shall establish and maintain reasonable claims procedures.
>
> (1) A claims procedure will be deemed to be reasonable only if it:
>
> (i) Complies with the provisions of paragraphs (d) through (h) of this section, [except in the case of a plan established and maintained pursuant to a collective bargaining agreement or with respect to benefits provided through membership in a qualified health maintenance organization]
>
> (i) Is described in the summary plan description, as required by §2520.102-3,
>
> (ii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation of processing of plan claims, and

---

[3]Section 503 of ERISA, 29 U.S.C. §1133 provides:

> In accordance with regulations of the Secretary [of Labor], every employee benefit plan shall --
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

[4]Those regulations loosely define "claims procedures" to include procedures pertaining to claims by participant and beneficiaries for plan benefits, consideration of such claims, and review of claim denials. See 29 C.F.R. §2560.503-1(a)(1)(19).

(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and subsection (h).

. . . .

(d) Filing of a claim for benefits. For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

. . . .

(e) Notification of claimant of decision. -- (1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e)(1) of this section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

(3) For purposes of paragraphs (e)(1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

(f) Content of notice. A plan administrator . . . shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) Review procedure. (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

. . . .

(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

(h) Decision on review. -- (1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special

circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

. . . .

(2) If such an extension of time for review is required because of special circumstances, written notice of extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

The APA does not contain any specific claims processing requirements that Government agencies must implement; however, it does contain some general requirements regarding agency rules and proceedings. Specifically section 552 of the APA, 5 U.S.C. §552, provides in relevant part:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

. . . .

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

. . . .

As discussed in the May 17 memorandum referred to above, in the absence of specific procedural requirements under the APA, common law requires that what ever procedures are implemented by an agency provide safeguards for constitutionally protected rights. Due process is flexible and calls for such protections as the particular situation requires to assure fairness.

We have contacted some other plan administrators to obtain a sense of what types of claims processing procedures other plans employ when dealing with claims involving a challenge to a designation of beneficiary. Our survey was an informal one, and cannot necessarily be considered a representative sample of other plans. Although a majority of the individuals contacted had never dealt with a similar situation, they did offer some advice as to how their plans might deal with a question of competency. It is likely that they would apply similar approaches in the case of allegations of forgery, duress, fraud, etc.:[5]

1. The Office of Personnel Management (OPM) -- OPM's Office of Disability and Special Entitlement is responsible for dealing with cases like the instant case. Once a challenge is made regarding the capacity/competence of an individual to make a beneficiary designation, OPM requests evidence from all parties involved. OPM has doctors on staff who review the medical evidence submitted in each case. Those doctors' medical opinions form the basis for OPM's decision for disposing of the case. OPM's decisions are appealable to the Merit Systems Protection Board.

2. Federal Deposit Insurance Corporation (FDIC) -- The individual with whom I spoke could not recall a similar situation but she surmised that the FDIC would make payment to the designated beneficiary unless they received some type of court order which precluded them from doing so.

3. Federal Reserve Board -- They have no set procedures for dealing with such a situation. The individual with whom I spoke stated that he thought that the best way to protect the plan was to pay the money into a court and let the court decide.[6]

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[5]It should be noted that under private plans which are subject to ERISA, a married participant may only validly designate a beneficiary other than the spouse if a spousal waiver has been obtained. Therefore, the specific type of situation with which we dealing here would not likely arise in an ERISA plan.

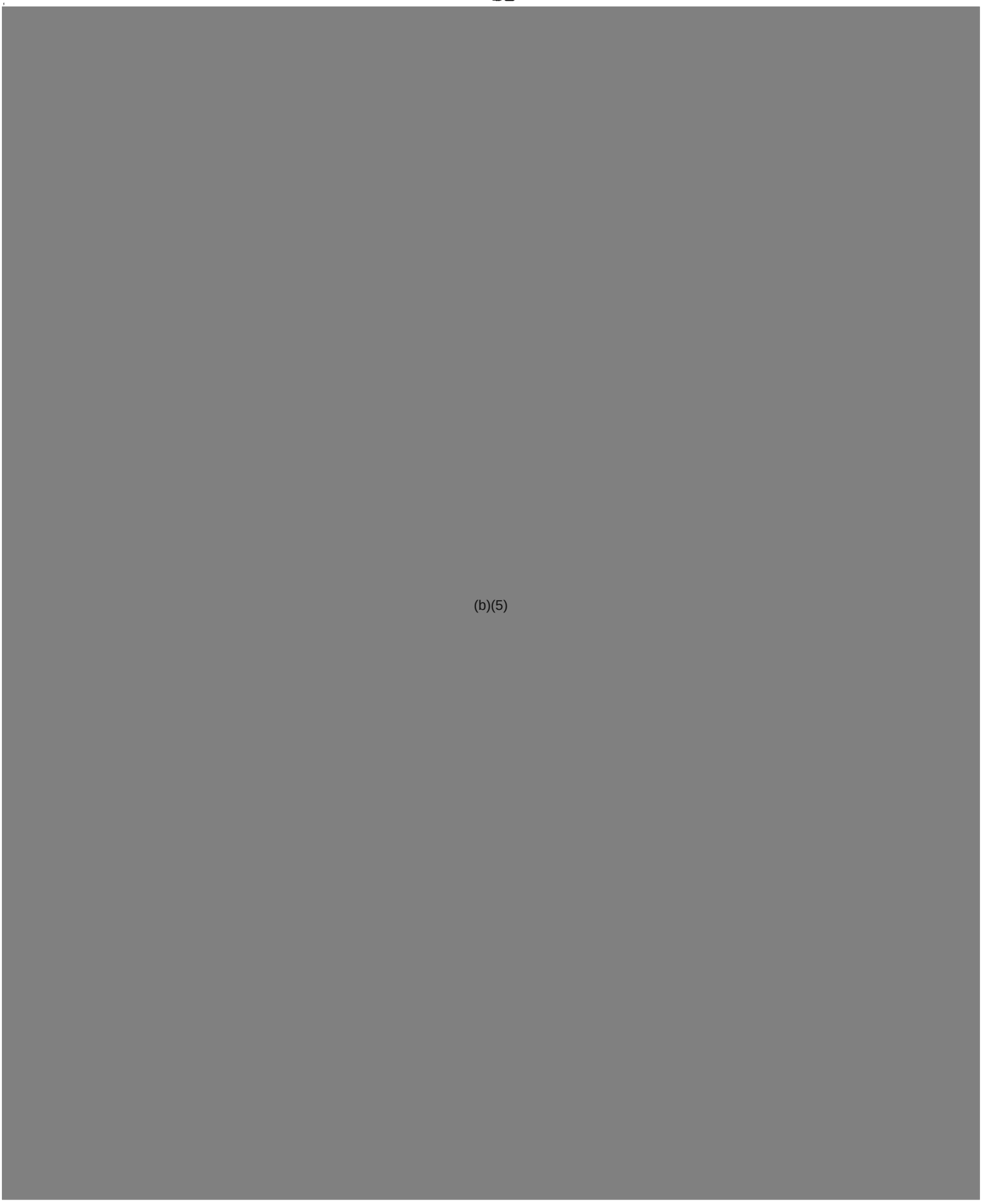
[6]This may be easier said than done where there is no court action pending. If the parties are not already in court the initiation of proceedings by TSP may raise difficult questions of jurisdiction and expense.

4. Boeing Co. -- Their plan requires that payment be made in the first month after death. If a challenge to the disbursement arises within that period of time, the plan advises the interested parties that it will pay the money to the designated beneficiary unless the parties obtain a court injunction or the parties enter into an agreement for some other solution. They presently have a case where the participant had designated his wife as beneficiary but two weeks before his death they became divorced. The participant's children are challenging the payment to the "ex-wife". The parties agreed that the plan should pay the money into the court and the court could decide who would be the appropriate beneficiary. Although this does get the plan out of the dispute between the parties, the plan administrator indicated that it does create a number of tax problems which this plan has yet to resolve.

5. Bell South -- Like many of the other plan administrators who were contacted, the individual could not recall a similar situation. She stated, however, that if faced with such a situation, the plan would disburse the monies unless the plan received some type of court order which would preclude such a distribution.

6. Sears Roebuck -- Although they have not dealt with a similar situation, they have a very strict policy of paying out to a designated beneficiary. They do not acknowledge any challenges to the designation of beneficiary.

While the requirements of ERISA and the APA, as well as our informal survey of other plans, provide some guidance for determining what type of procedures should be implemented by the Board for processing conflicting claims, it is clear that it is up to the Board to establish the specifics of those procedures. The following discussion presents the advantages and disadvantage of two approaches -- the first being an approach which would allow the Board to collect and review evidence upon which to render a decision; the second being an approach which would allow the Board to pay under the TSP-3 without engaging in any fact finding unless the parties obtain a court order prohibiting such a pay out.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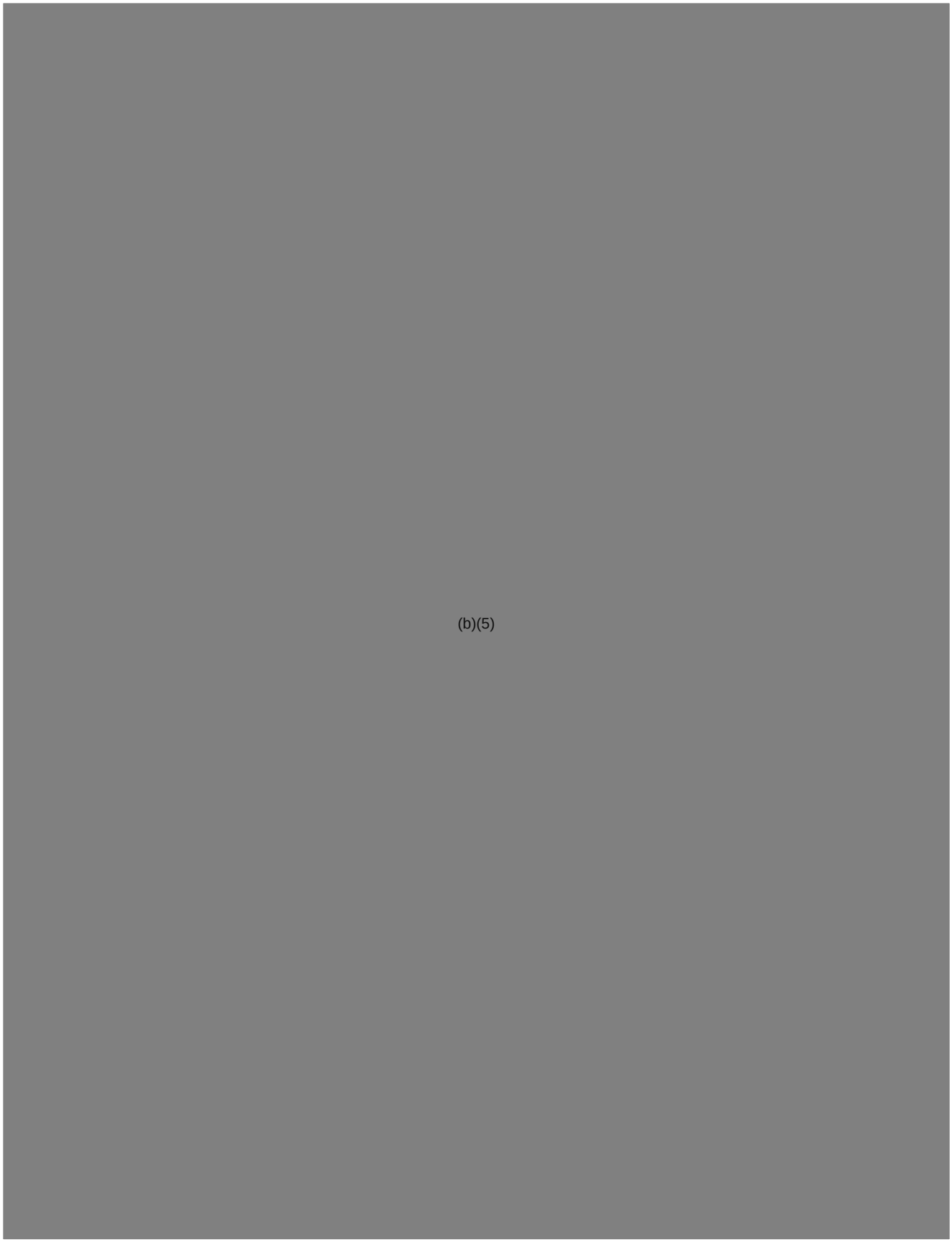
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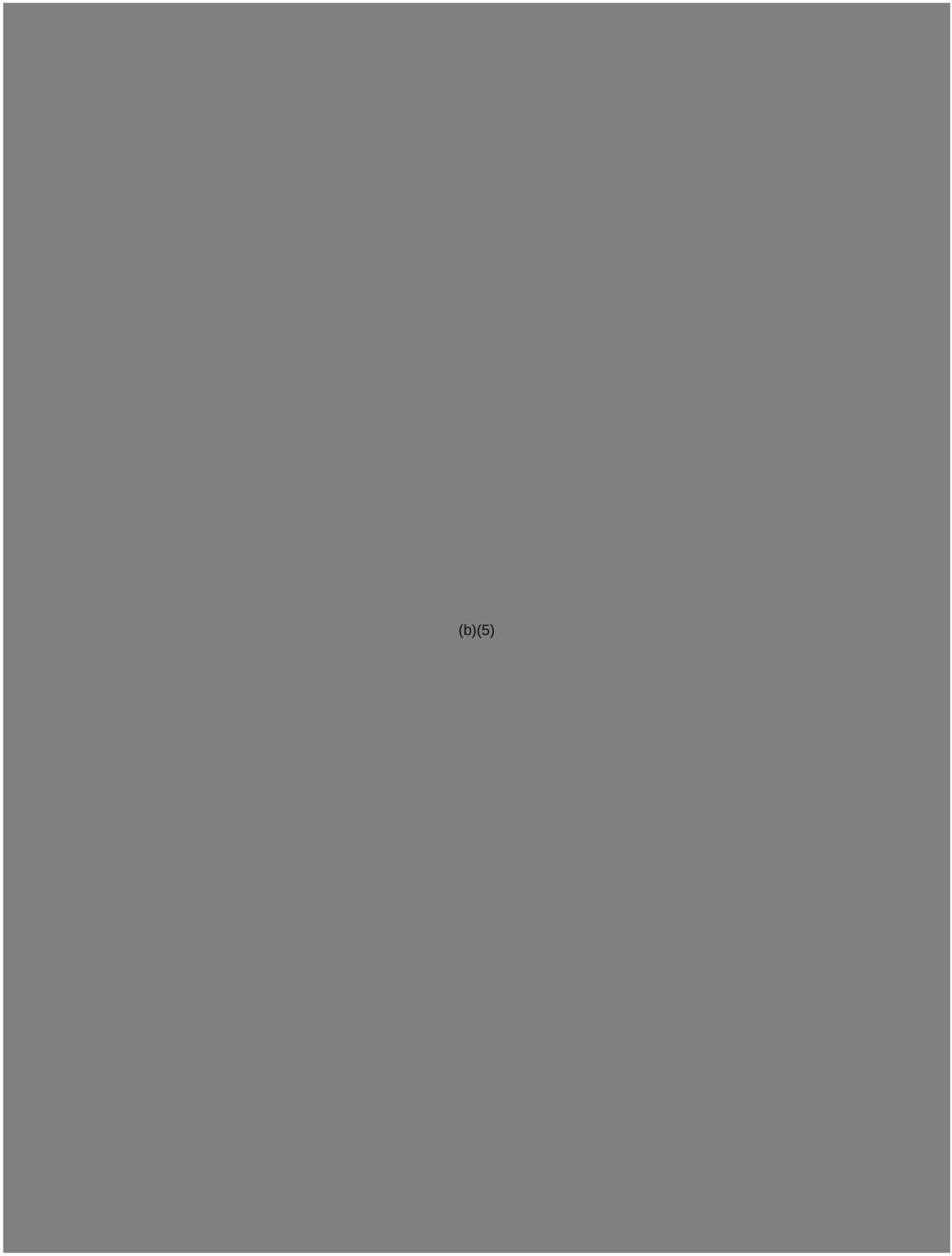

(b)(5)

FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD

See p. 4

DATE: February 10, 1997

MEMORANDUM FOR THE EXECUTIVE DIRECTOR

FROM: JOHN J. O'MEARA (b)(6)

SUBJECT: Designation of Beneficiary by Court Order

Section 1651.3(e) of the draft death benefit regulations provides that "[b]eneficiary(ies) of a participant's TSP account may be named in a court decree of divorce, annulment, or legal separation or any court order or court-approved property settlement agreement incident to such a decree." Proposed § 1651.3(e) also provides that to be enforceable against the Board, such an order or agreement must expressly relate to the TSP, clearly designate a beneficiary or beneficiaries of specific portions of the account, and be received before the account has been paid out. You asked for an analysis of the legal basis of proposed § 1651.3(e) and asked whether it would be consistent with FERSA to reject a domestic relations court order that expressly designates a TSP death benefit beneficiary.

Statutory Basis for § 1651.3(e)

Section 1651.3(e) is based on 5 U.S.C. § 8433(e) (1994), which provides that if a participant dies before making a withdrawal election, his or her account balance "shall, subject to any decree, order, or agreement referred to in section 8435(c)(2) of [title 5] be paid in a manner consistent with section 8424(d) of this title."[1] The proposed regulations interpret the "subject to" language of § 8433(e) as making a death benefit subject to disposition by a court order described in § 8435(c)(2).

A "decree, order or agreement referred to in section 8535(c)(2)" is a court decree of divorce, annulment or legal separation or a court-approved property settlement agreement incident to such a decree that:

> (A) . . . expressly relates to any portion of the balance in an employee's or Member's (or former employee's or member's) account; and

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[1] Section 8424(d) sets forth an order of precedence for the payment of the balance in a TSP account upon the death of the participant.

2/6/97	INITIATOR	REVIEWER	REVIEWER	REVIEWER	REVIEWER
NAME	FORREST	WOODRUFF			
(b)(6)					

(B) notice of the decree, order, or agreement was received by the Executive Director before--

(i) the date on which payment is made, or

(ii) in the case of an annuity, the date on which an annuity contract is purchased to provide for an annuity,

in accordance with the election, change, or contribution referred to in paragraph (1).

5 U.S.C. § 8435(c)(2) (1994), as amended by the Thrift Savings Plan Act of 1996, § 204, Pub. L. No. 104-208, 110 Stat. 3009, 3009[1116]-[1117].

To be a "court order" at § 8435(c)(2), a court order or agreement must meet three requirements: First, it must be a decree of divorce, annulment, or legal separation, or a court-approved property settlement agreement incident to such a decree. Id. Second, it must "expressly relate" to the TSP account of a participant. Id. § 8435(c)(2)(A). Third, it must be received before payment is made pursuant to a withdrawal option. Id. § 8435(c)(2)(B). Accordingly, proposed § 1651.3(e) provides that an enforceable death benefits court order must be a decree of divorce, annulment, or legal separation, or a court-approved property settlement agreement incident to such a decree, that expressly relates to the TSP and which is received before the account is paid out. The proposed regulations also provide that an enforceable court order must clearly designate a beneficiary or beneficiaries of specific portions of the account. This is a practical requirement that is analogous to § 1653.2(b)(3) of the court order regulations, which requires a qualifying retirement benefits court order to describe unequivocally an ascertainable award amount. The Board has never made a death benefit payment pursuant to a court order.

Court Orders That Require a Future Payment

Unlike proposed death benefit regulation § 1651.3(e), the Board's retirement benefits court order regulations do not permit future payment.[2] That is, the proposed death benefit regulations provide that a court order could award to a spouse or former spouse of a participant the right to receive all or a portion of

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[2]The Board will honor one type of retirement benefits court order that requires a future payment from the TSP. Under 5 U.S.C. § 8435(d)(1) (1994), a former spouse of a deceased participant is entitled to a survivor annuity from the TSP if "any court decree, order, or agreement (described in subsection (c)(2), without regard to subparagraph (B) of such subsection) which relates to such deceased [participant] and such former spouse expressly provides for such survivor annuity." See 5 C.F.R. § 1653.2(b)(3)(iv).

the participant's account upon his or her death; in contrast, the Board would reject a court order that purports to require the Board to pay a portion of the participant's TSP account to a payee in the future. Id. § 1653.2(c)(2).

The Board will make a present payment from a participant's account pursuant to a retirement benefits court order under 5 U.S.C. § 8467(a), which, in relevant part, provides that:

> (a) Payments under this chapter which would otherwise be made to an employee, Member, or annuitant (including an employee, Member, or annuitant as defined in section 8331) based on service of that individual shall be paid (in whole or in part) by the Office or the Executive Director, as the case may be, to another person if and to the extent expressly provided for in the terms of -
>
> (1) any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to such a decree of divorce, annulment, or legal separation; or . . .

5 U.S.C. § 8467(a)(1994).

Section 8467(a) addresses the court-ordered disposition of payments which "would otherwise be made to a [participant]." Under FERSA, payments are not made to a participant until he or she separates from Federal service. Nevertheless, it has been Board policy since 1990 to make a court-ordered payment immediately if its present value could be calculated, even if the court order provides for a future (rather than a present) payment. From 1990 to 1995 the Board's regulations provided that the TSP would honor a court order that required payment in the future only if the payee's entitlement could not be computed until the occurrence of the future event.

The Board changed this policy in March 1995 and announced by regulation that it would make no future court order payments and would therefore not honor a court order that purports to require a future payment unless the present value of the future entitlement could be paid immediately. The relevant language of the Board's current court order regulations follows:

> (c) The following retirement benefits court orders will not be considered qualifying:
>
> . . .
>
> (2)(i) Orders that award an amount to be paid at a future specified date or upon the occurrence of a future specified event unless:
>
> (A) The amount of the entitlement can be currently calculated; and

(B) The award provides for the payment of interest or earnings from the date of calculation to the specified date or event for payment.

(ii) If an order meets the requirements of paragraphs (c)(2)(i)(A) and (B), a current payment will be made in accordance with the procedures set forth in § 1653.5, rather than a payment at the future date stated in the order.

5 C.F.R. § 1653.2(c)(2)(1996).

For example, if the Board receives on January 15, 1997, a court order that purports to require the payment of $25,000 from the participant's account as of January 15, 1999, we would reject the court order because we cannot compute the present value of the future award. However, if the payee held the same court order and submitted it to us on January 15, 1999, we would honor it (assuming the participant still possessed an account) because the order would not require a future payment.

Court Orders That Designate a Death Benefit Beneficiary

The language of § 8433(e) does not require the Board to adopt a regulation that permits the designation of a TSP death benefit beneficiary in a court order. For the same reason that the Board no longer permits future payment under domestic relations court orders, the Board may refuse to permit court orders to substitute for, or take priority over, the Form TSP-3, Designation of Beneficiary, or the rest of the order of precedence found at § 8424(d). This policy would also be consistent with the Board's interpretation of § 8435(c)(1) and (e)(2). Section 8435(c)(1) provides that an "election or change of election shall not be effective under this subchapter to the extent that the election, change, or transfer conflicts with any court decree, order, or agreement described in paragraph (2)." 5 U.S.C. § 8435(c)(1) (1996), as amended by the Thrift Savings Plan Act of 1996, § 204, Pub. L. No. 104-208, 110 Stat. 3009, 3009[1116]-[1117]. Section 8435(e)(2) provides that an application for a loan or withdrawal shall not be approved if it would be inconsistent with a court order described in § 8435(c)(2).

The Board interprets the requirements that a withdrawal not "conflict with" or that a loan not be "inconsistent with" a domestic relations court order only to require the TSP to freeze a participant's account for loans and withdrawals upon receipt of a pendente lite order from a domestic relations court or a document that purports to be a qualifying retirement benefits court order requiring payment under § 8467. See 5 C.F.R. §§ 1653.2(b)(2) and 1653.3(c)(1996). The Board does not interpret § 8435(c)(1) and (e)(2) as requiring it to honor a court order that specifies a particular type of loan or withdrawal.

Given the interpretation applied to § 8435(c)(1) and (e)(2), and the Board's policy against future court order payments, I believe that § 8433(e) could be read to require a payment made pursuant to a qualifying court order merely to take precedence over a death benefit payment. Section 8433(e) need not be read to require the Board to honor a court order that designates a death benefit beneficiary, as long as the participant is alive.

Once the participant has died, a court order that designates a death benefit beneficiary no longer would require a future payment and would meet the requirement of Board regulations that a court order award an ascertainable award amount. For example, a court order that makes an individual the death benefit beneficiary of one-half of the participant's account is essentially awarding that individual one-half of the amount in the deceased participant's account at the time of payment. This language would qualify under 5 C.F.R. § 1653.2(b)(3)(ii) of the Board's court order regulations, which provides that a court order can award a "stated percentage or stated fraction of the account." Under this interpretation, all court orders that purport to designate a beneficiary of a TSP account would be rejected unless, at the time the General Counsel decides the matter, the participant is no longer living.

RECOMMENDATION:

That the death benefit regulations provide that a court order that purports to designate a death benefit beneficiary of a TSP account be rejected unless the participant is deceased at the time the General Counsel makes his decision on the order.

Approve: (b)(6) Disapprove: _____ Other: _____ Date: 3/11/97

cc: A. Clarke
J. Witters
J. Petrick
P. Moran

FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD

DATE: April 13, 1992

MEMORANDUM FOR THE EXECUTIVE DIRECTOR

FROM: JAMES B. PETRICK (b)(6)

SUBJECT: Cause of Death - Homicide

This memorandum discusses a policy question which has arisen as a result of the murders of two participants, allegedly by their spouses. According to the order of precedence (the participants did not file Forms TSP-3), the spouse would be the beneficiary of each participant's TSP account.

FACTS

The cases which have been brought to the attention of the Board involve (b)(6) SSN: (b)(6) and (b)(6) (b)(6), SSN: (b)(6) was murdered by her husband on February 9, 1991. The Board was originally contacted by the retirement coordinator from (b)(6) personnel office, (b)(6) advised that (b)(6) had been killed and that her husband had been arrested and charged in her death. We have learned that (b)(6) has pleaded "guilty but mentally ill" to the charge of first degree murder of (b)(6)

The Board has received copies of a completed Form TSP-18 for (b)(6), a Form TSP-17 filed by (b)(6) a death certificate listing the cause of death as homicide, documents relating to the custody of the Evans children (b)(6), and a newspaper article regarding the incident. (b)(6) did not complete a Form TSP-3, Designation of Beneficiary. Therefore, according to our order of precedence, (b)(6) husband would be the beneficiary of her TSP account.

(b)(6) was allegedly murdered by her husband in early April 1991. (The exact date of death is not known.) The Board was originally contacted by (b)(6) of (b)(6) personnel office to inquire about the proper procedure with regard to filing a Form TSP-18 and whether (b)(6) next of kin should file a Form TSP-17. The Board has received copies of a completed Form TSP-18 for (b)(6) a Form TSP-17 filed by (b)(6) brother, a death certificate listing the cause of death as homicide,

sb4/13/92	INITIATOR	REVIEWER	REVIEWER	REVIEWER	REVIEWER	
NAME	Malis	Petrick/Bloom	Clarke	S. Smith	Morton	Dickinson
INITIAL/DATE		(b)(6)				JQ 4/30

a marriage certificate, a copy of the police arrest report listing the charges against (b)(6) husband as "murder I w/armed", and several newspaper articles relating to (b)(6) death. (b)(6) did not complete a Form TSP-3 and therefore according to our order of precedence, (b)(6) husband would be the beneficiary of her TSP account.

Because the Board has not established any formal policies or procedures for dealing with cases where the potential beneficiary of a participant's TSP account has been charged with the participant's murder, OGC requested that (b)(6) and (b)(6) accounts be frozen pending review of the legal implications.[1]

ISSUE AND DISCUSSION

The Board has not yet adopted a policy concerning payment of TSP accounts to beneficiaries who are charged with or convicted of murdering a TSP participant. (The procedural aspects of dealing with these types of cases will be addressed in a future memorandum.) Because there is no specific statutory provision in FERSA which would prohibit the Board from paying benefits to persons who murder participants, we can look to OPM practices, state law and common law for guidance.

I. OPM Practices

There is no Federal statutory prohibition against paying benefits to the employee's murderer. However, OPM has adopted the approach that it is against public policy to allow an individual to profit from his or her own wrongdoing. Thus, an

---

[1]NFC has established a procedure for determining whether a potential beneficiary is being investigated in the death of a participant. According to (b)(6) upon receipt of a death certificate which indicates that the cause of death was homicide, NFC sends a letter to the appropriate law enforcement agency requesting information regarding whether a potential beneficiary was "charged or otherwise implicated in the case." In that letter, NFC also requests information regarding whether the individual was "convicted, acquitted, or cleared of the implication." A letter is also sent to the potential beneficiaries of the account advising that NFC has requested the above information and that disbursement of the account will not take place until the information is received. When asked what NFC would do if it was determined that a potential beneficiary was charged or implicated in the death of the participant, Ms. Suarez replied that she was not sure since, to her knowledge, that situation had not arisen.

individual who is found guilty of the murder of a member of the basic retirement system administered by OPM can never become entitled to benefits accruing by reason of that member's death. OPM's policy appears to be set forth only in an internal procedural manual and has not been codified in their regulations. Under that policy, OPM defines murder as the "killing of one individual by another with malice aforethought." This definition would generally encompass only the crime of first degree murder. Voluntary and involuntary manslaughter are not included in the class of unlawful acts which would preclude an individual from becoming entitled to benefits.

II. State Law

In all 50 states and the District of Columbia, murderer beneficiaries are prohibited from taking or inheriting from the decedent. A majority of the states (38) and the District of Columbia have adopted statutes regarding this issue but each of the statutes is somewhat different. Most prohibit the person from taking only if he/she intentionally killed another person (murder). A few states prohibit if convicted of manslaughter. Under most of the state statutes, a criminal conviction of some degree of murder is not required to establish that the beneficiary may not inherit from the deceased, but where such a conviction has been obtained it is deemed conclusive evidence that the person committed an intentional killing. Proof of the intentional killing may be established in a civil proceeding if a criminal conviction has not been obtained. Because of the different standards of proof applicable to criminal cases ("beyond a reasonable doubt") and civil cases ("preponderance of the evidence"), it is possible that one acquitted of murder in a criminal trial may nonetheless be barred from inheriting in a civil proceeding based on the same murder.

A majority of the statutes provide that for purposes of determining who should inherit or take the property at issue, the murderer is treated as if he/she predeceased the decedent. A few statutes create a "constructive trustee" situation whereby the murderer is considered the constructive trustee of the property for the benefit of other potential heirs.

The IRS has taken the position that state "killer statutes" or, in the absence of a statute, a state's common law in the area, apply to qualified plans under some situations. In a 1983 IRS General Counsel's Memorandum (GCM), the IRS interpreted the antialienation provision of 26 U.S.C. § 401(a)(13) as having an implied exception for purposes of "applying the common law principle that a killer should not benefit from his or her crime." The IRS stated that state law, either statutory or common law, would be determinative in a particular factual situation. According to the GCM, a plan

will not lose its qualified status if it distributes benefits in accordance with a court determination regarding the proper distribution of benefits. The GCM indicated that the plan may pay the benefits to a state or Federal court in an interpleader action for distribution by the court, but that the plan need not do so. 5 Pension Plan Guide (CCH) para. 17,488.

III. Common Law

The common law approach to the treatment of murderer beneficiaries evolved before most states had established statutes addressing this issue. The states seem to have established statutes to deal with what were viewed as unsatisfactory results of the approaches being taken by the courts. The common law is divided into three different approaches to the treatment of beneficiary murders. See Scott and Fratcher, The Law of Trusts, Vol. V (Fourth Edition 1989); Bogert and Bogert, The Law of Trusts and Estates, Sec. 478 (Revised Second Edition 1984); 79 Am. Jur. 2d § 170; 26A C.J.S. § 47; 94 C.J.S. § 104.

The first approach was that in the absence of a statutory prohibition, payment must be made to the murderer. According to this approach, whether payment can be made to a murderer is a matter of public policy which must be established through the legislative process. These courts felt that it was not within their authority to create public policy and in the absence of legislation to the contrary, could not justify declining to pay the murderer.

The second common law approach was that even if there is no statutory prohibition, a murderer cannot benefit from his criminal act, and therefore cannot be allowed to be paid or inherit. The basis for this approach is the common law notion that "no man shall be allowed to profit by his own wrong." According to the courts that followed this approach, a legislative intent to permit a murderer to inherit from the deceased cannot be implied from the mere failure to adopt a statute specifically forbidding it. Thus, an exception to the general inheritance laws must be implied in the case of a murderer beneficiary.

The third approach, which has been adopted by all of the 12 states that do not have statutes addressing the issue, provides that equity should provide the remedy. The successors of the murdered relative may seek a decree from a court that because the murderer/grantee obtained ownership of the subject property by his unlawful act, the murderer/grantee must act as a constructive trustee and must surrender the property to the innocent successors. Under this approach, title to property does pass to the murderer. Thus, there would be an alienation from the murderer to the beneficiary pursuant to a civil court order.

RECOMMENDATION

OGC recommends adopting an approach similar to that of OPM and the majority of the states. OGC recommends that the Board adopt a policy whereby benefits will not be paid to the beneficiary of a TSP participant if the beneficiary is convicted in a criminal proceeding of the intentional killing of the TSP participant. This would encompass first and second degree murder. We would reject attempting to draw a line between first and second degree murder, since this may vary as a matter of state law and it would require a difficult determination of "malice aforethought." The line between murder and manslaughter is much clearer and can be discerned easily from the court documents. A plea of guilty to such a crime would be the equivalent of a conviction. A conviction of any degree of manslaughter or a finding of not-guilty by reason of insanity would not prohibit the beneficiary from receiving TSP death benefits. In some states, a person may be found or plead "guilty but insane" or "guilty but mentally ill." In such cases, we would have to evaluate the individual state statutory provisions to determine what elements make up such a determination.

Adopting this approach would be consistent with the OPM rule (although they apparently limit their policy to first degree murder) and with what appears to be the majority rule in the United States, and would not likely be challenged. The IRS General Counsel's Memorandum also provides some added support for this approach.

By adopting the requirement that the individual must be convicted of an intentional killing in a criminal proceeding, the Board would have a bright line at which we can decide whether the individual may receive TSP benefits. Although most of the states allow proof of the intentional killing to be established in a civil proceeding if a criminal conviction is not obtained, if the Board adopted such a policy, we would have to maintain the account and track a civil case through the courts possibly for many years. The state courts are equipped to require that the individual turn over any money which the courts ultimately feel was wrongfully paid to the individual.

Agree [redacted] (b)(6) Disagree _____ Other _____ Date 4/30/92

OGC also recommends that under this approach, the Board treat the murderer beneficiary as if he/she had predeceased the TSP participant. Thus, the monies from the TSP account would be paid either to the other beneficiaries listed on the

Form TSP-3 or according to the order of precedence. This would also be consistent with the approach taken by the majority of the states. OGC believes that creating a constructive trust with the murderer beneficiary as the trustee who is required to turn the money over to other beneficiaries would be equivalent to establishing a required alienation, which is prohibited by FERSA. By treating the murderer beneficiary in this manner, there is no alienation of the account from the beneficiary. Rather, the policy against permitting a murderer to benefit from his or her wrongful act prevents title to the account from passing to the murderer in the first place.

Agree (b)(6) Disagree _____ Other _____ Date 4/30/92

Finally, OGC recommends that we make a determination regarding payment of the account based upon the initial trial court determination of guilt or innocence, rather than waiting for the person to pursue his or her appeal rights. In a recent case in Kentucky (the only case found which is directly on point), the court concluded that the proceeds of a life insurance policy should be distributed in accordance with the state's "killer statute" based upon the initial conviction of the potential beneficiary, regardless of whether an appeal is taken. See Roberts v. Wilcox, 805 S.W. 2d 152 (Kentucky 1991). To do otherwise, according to the court, would merely encourage the convicted potential beneficiary to extend the appeals process for years, "if only to prevent the proper beneficiaries from receiving [the] money . . . ." Id. at 153. In addition to the equitable issue raised in delaying payment to other beneficiaries, if we were to delay payment until the person exhausted all of his or her appeal rights, we would incur a great administrative burden in tracking the case on appeal.

Agree (b)(6) Disagree _____ Other _____ Date 4/30/92

Federal Retirement
Thrift Investment Board

To: Executive Director Date: 10/21/94

(b)(5)

October 21, 1994

NOTE TO THE FILE

FROM JIM PETRICK (b)(6)

SUBJECT: Issuan[redacted]rticipant statements for de minimus accounts

(b)(5)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

July 19, 2007

MEMORANDUM FOR PAMELA-JEANNE MORAN
DIRECTOR, PARTICIPANT SERVICES

FROM: THOMAS K. EMSWILER (b)(6)
GENERAL COUNSEL

SUBJECT: Error Correction

This responds to your question whether the Executive Director has the authority to automatically forfeit, from the accounts of CSRS participants, agency automatic (1%) contributions of $25.00 or less and agency matching contributions of $25.00 or less. He does.

FACTS:

Numerous CSRS participants have been incorrectly classified as FERS employees by their employing agencies. As a consequence, their accounts contain agency automatic (1%) contributions, agency matching contributions, or both. Many of these accounts contain less than $25 in agency automatic (1%) contributions and less than $25 in agency matching contributions.

The employing agency must submit a negative adjustment record to retrieve erroneous agency contributions. If the FRTIB receives the negative adjustment record within one year of the date of deposit, the FRTIB will return the erroneous agency contribution. If the FRTIB receives the negative adjustment record more than one year from the date of deposit, the FRTIB will forfeit the erroneous agency contribution.

Sometimes an agency will attempt to recover erroneous contributions as part of a FERCCA correction but will request an incorrect amount. For example, it might request a negative adjustment of $522 in agency automatic (1%) contributions when the account contains $523. When a CSRS participant contains agency contributions, the participant is unable to make a withdrawal, receive a loan, or have a court order processed. Additionally, his or her beneficiary is unable to receive a death benefit. This is true even when the agency contribution is one dollar or less.

We believe the vast majority of these erroneous contributions occurred more than twelve months ago. Therefore, even if the employing agency were to submit a negative adjustment record, the contribution would be forfeited to the TSP.

Both the employing agency and the FRTIB incur costs to fix these de minimis accounts. In view of this, one agency previously asked the FRTIB to run a computer sweep and to forfeit all agency automatic (1%) contributions and matching contributions from the accounts of the employing agency's CSRS participants. The FRTIB complied, thereby saving time and money for both the agency and the FRTIB.

ANALYSIS:

The Executive Director and members of the Board are required to discharge their responsibilities solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Thrift Savings Plan. See 5 U.S.C. § 8477(b)(1).

Erroneous agency contributions do not belong to the participant because the participant was not entitled to receive them.

Misclassified retirement system correction for TSP participants is governed by 5 C.F.R. § 1605.14. For either a FERRCA or a non-FERRCA correction, when a CSRS participant has been misclassified by an employing agency as a FERS participant, the FRTIB:

> [W]ill forfeit all agency contributions that were made to a CSRS participant's account. An employing agency may submit a negative adjustment record to request the return of an erroneous contribution that has been in the participant's account for less than one year.

Id. § 1605.14(a)(2)

Thus, by regulation, the FRTIB has the authority to sweep the accounts of every CSRS participant to determine whether the accounts contain any agency contributions and to forfeit the amounts immediately.

The regulation authorizes employing agencies to request the return of an erroneous contribution that has been in a participant's account for less than one year. It does not entitle the employing agency to the return of these erroneous contributions.

Nevertheless were we to automatically forfeit all agency contributions we would likely encounter resistance from the employing agencies. A computer sweep that automatically forfeits amounts of $25.00 or less would benefit the FRTIB, the employing agencies, and the participants and beneficiaries:

- Employing agencies may only recover an erroneous agency contribution when the contribution was made in the previous twelve months.

- The administrative expense to the TSP and to the employing agency to first determine whether any of these contributions were made in the previous twelve months and then to submit and process a negative adjustment record would greatly exceed $25.00.

- CSRS participants are not entitled to agency contributions.

- CSRS participants and their beneficiaries are not eligible to take withdrawals or loans (or to receive a death benefit payment) when their accounts contain agency contributions. Automatically forfeiting these small amounts will enable CSRS participants and their beneficiaries to resume conducting TSP business.

- No law or regulation requires employing agencies to initiate such forfeitures.

CONCLUSION:

The FRTIB has the authority under 5 C.F.R. § 1605.14(a)(2) to automatically sweep CSRS accounts for agency automatic (1%) contributions and agency employing matching amounts and to automatically forfeit amounts of $25.00 or less. Doing so is in the best interests of the participants and beneficiaries and of the FRTIB and the employing agencies.

abs 10/4

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

October 20, 1997

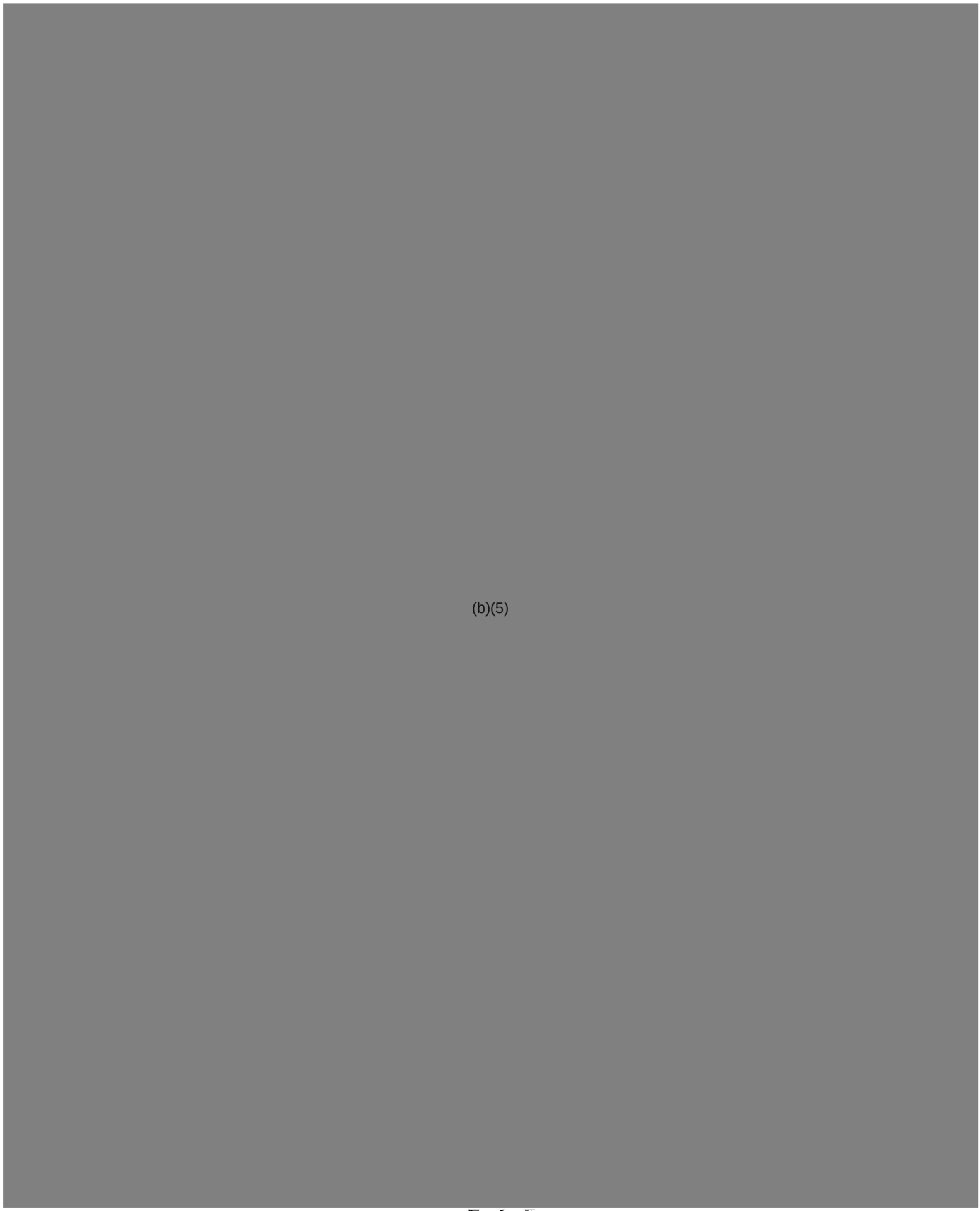
[redacted]

(b)(5)

SUBJECT: Effect of 1996 Amendments on Freedom of Information Act (FOIA)

[redacted]

(b)(5)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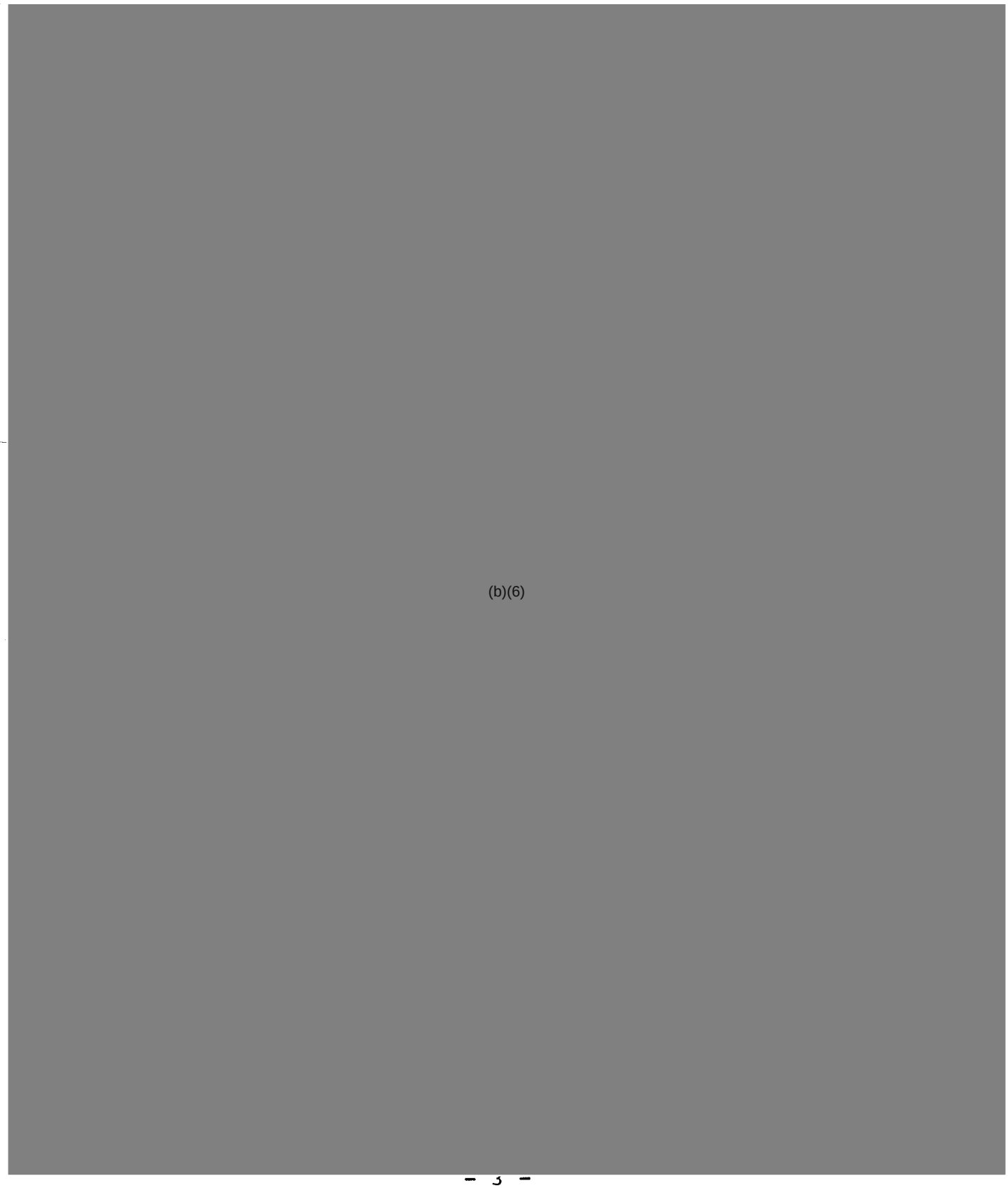
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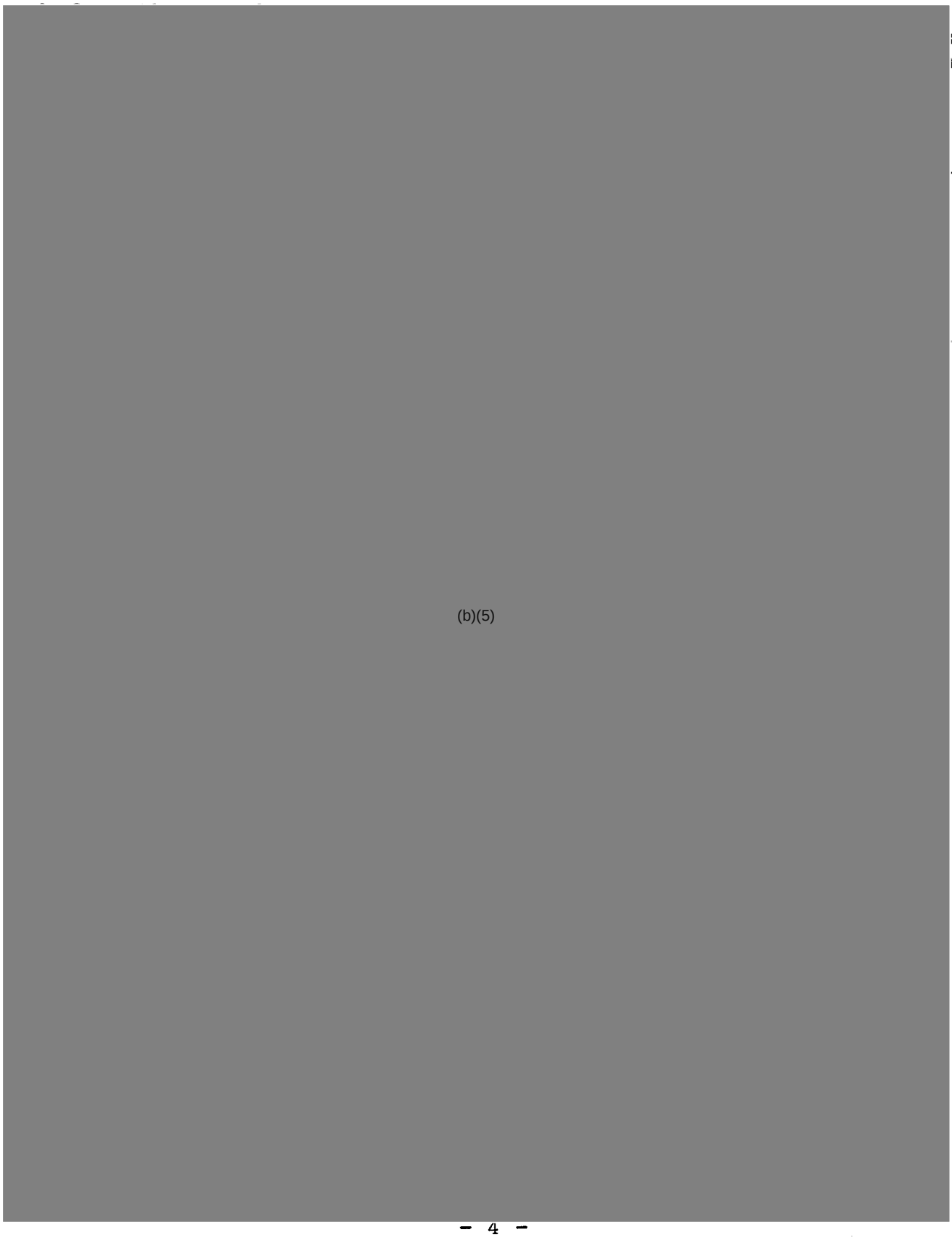
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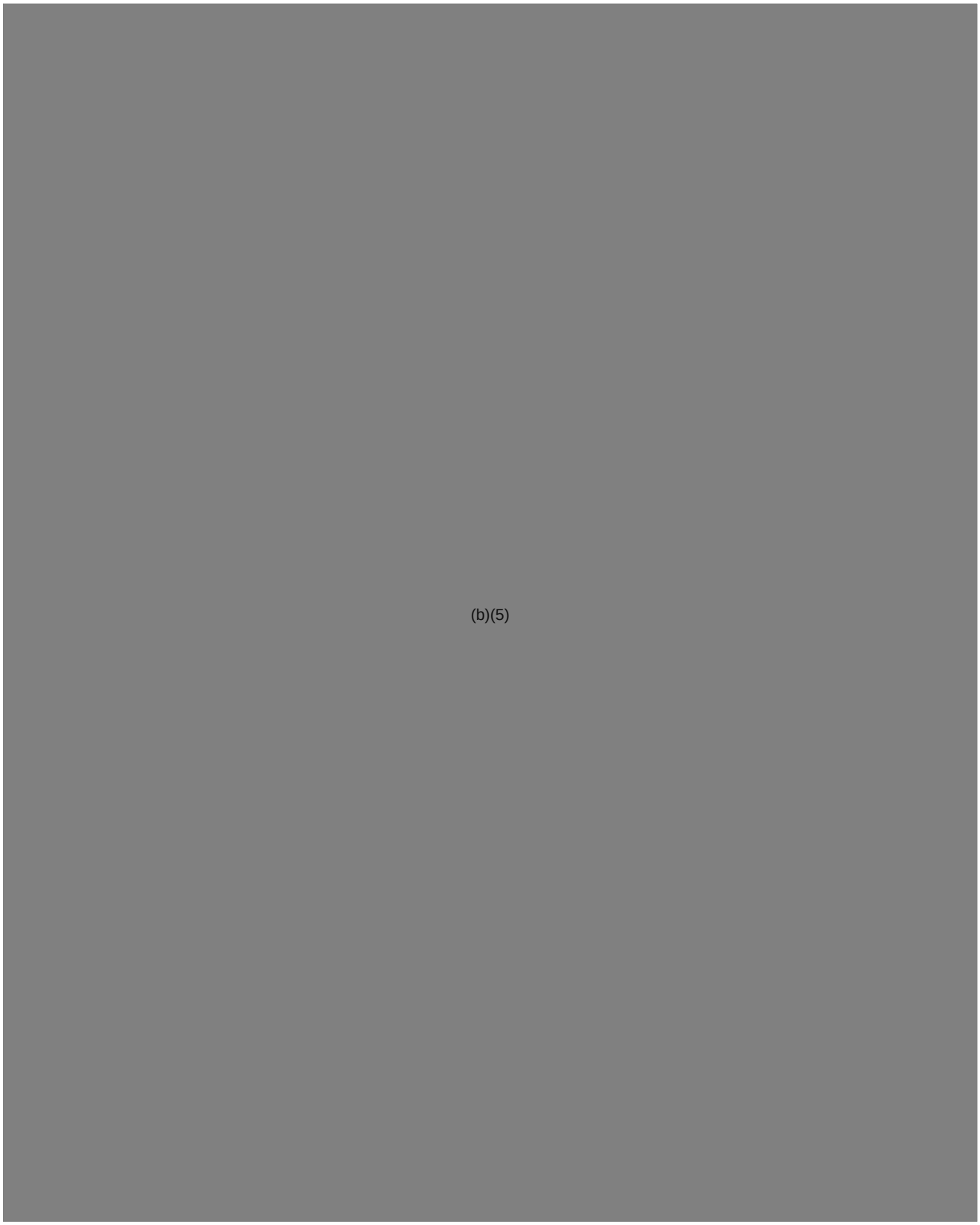
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(b)(5)

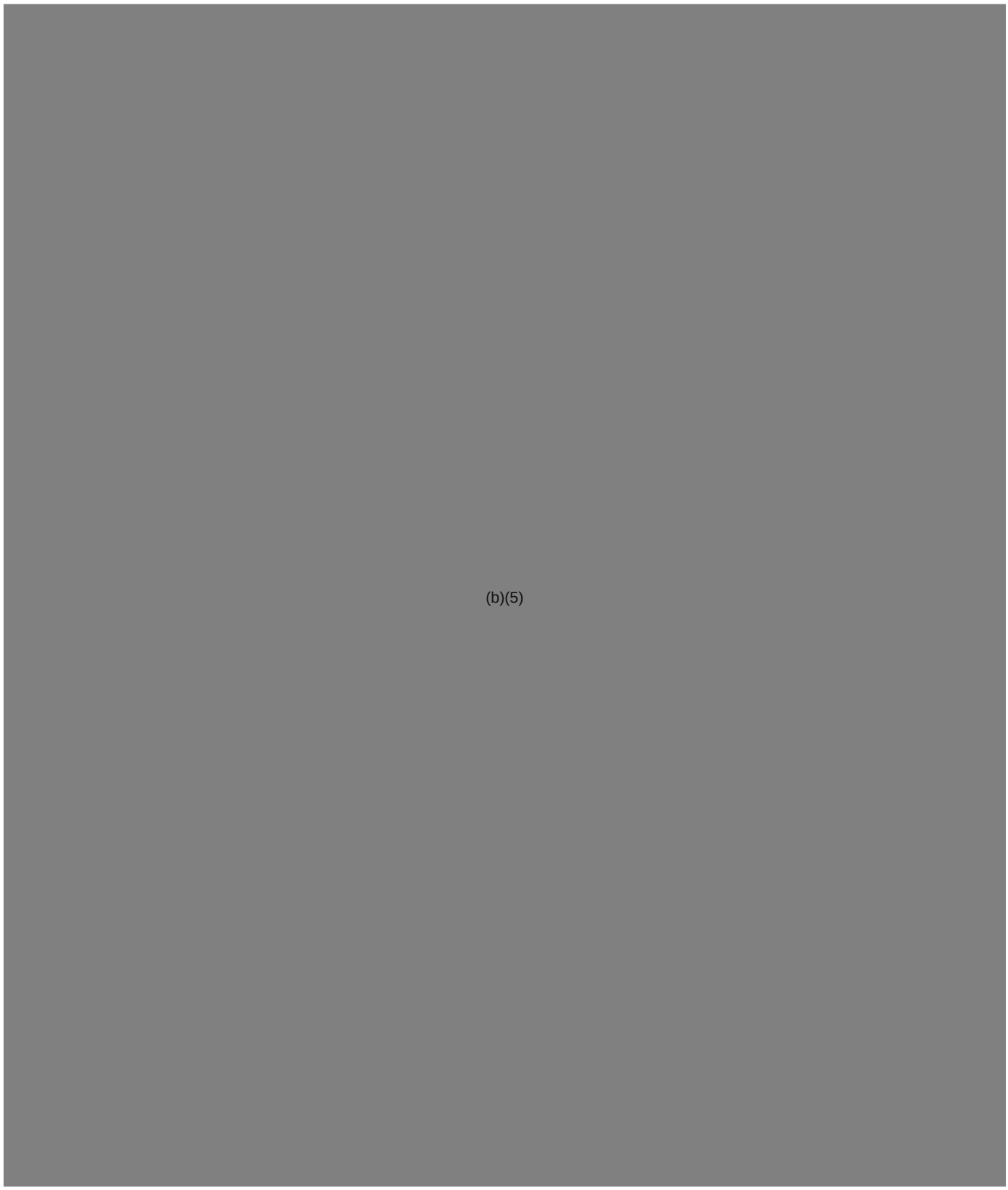
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

April 1, 1998

(b)(5)

SUBJECT: (b)(6) FOIA/Privacy Act Request

(b)(5)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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

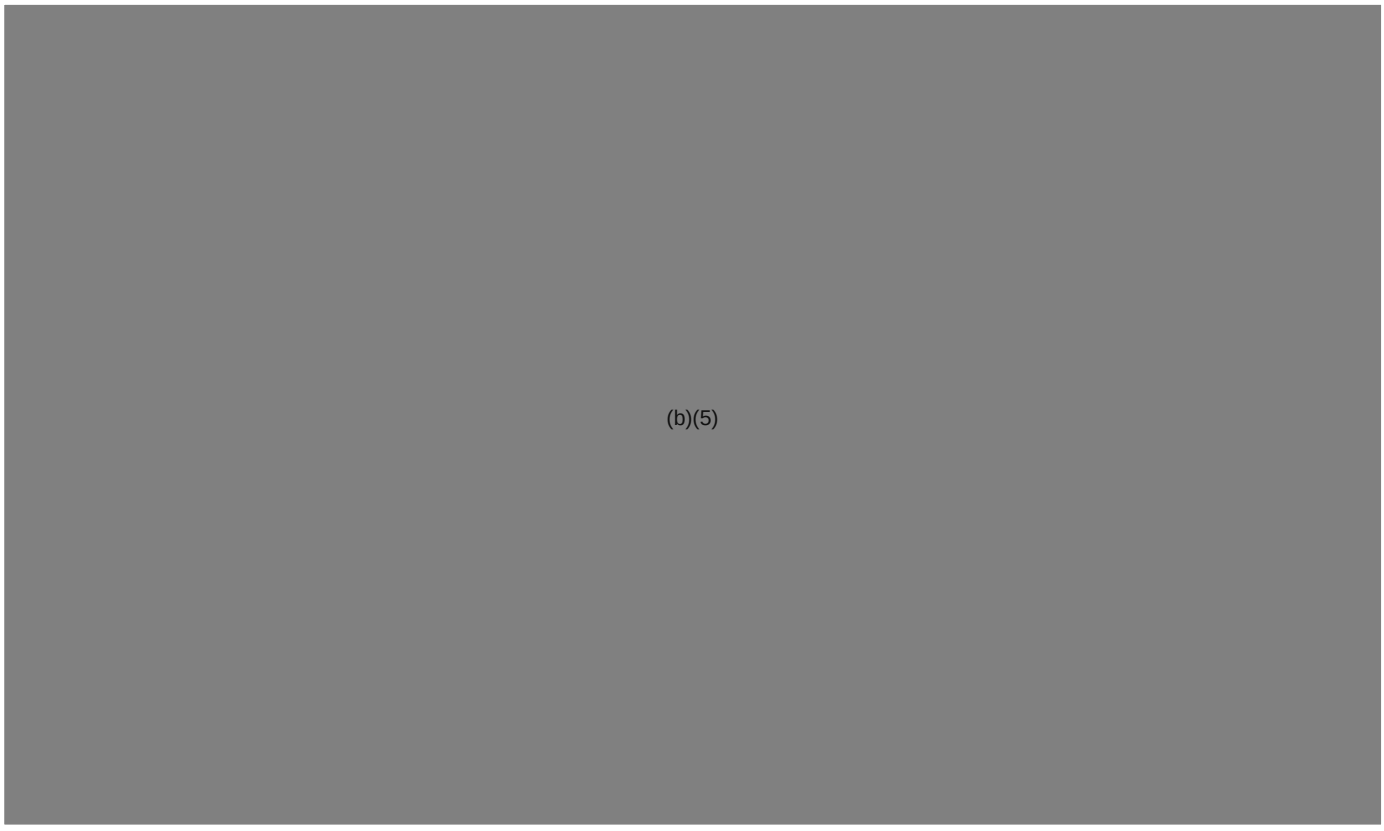
August 10, 2004

[redacted]
(b)(5)

SUBJECT: Senate or House Committee's Request for Procurement-Sensitive Documents

[redacted]
(b)(5)

(b)(5)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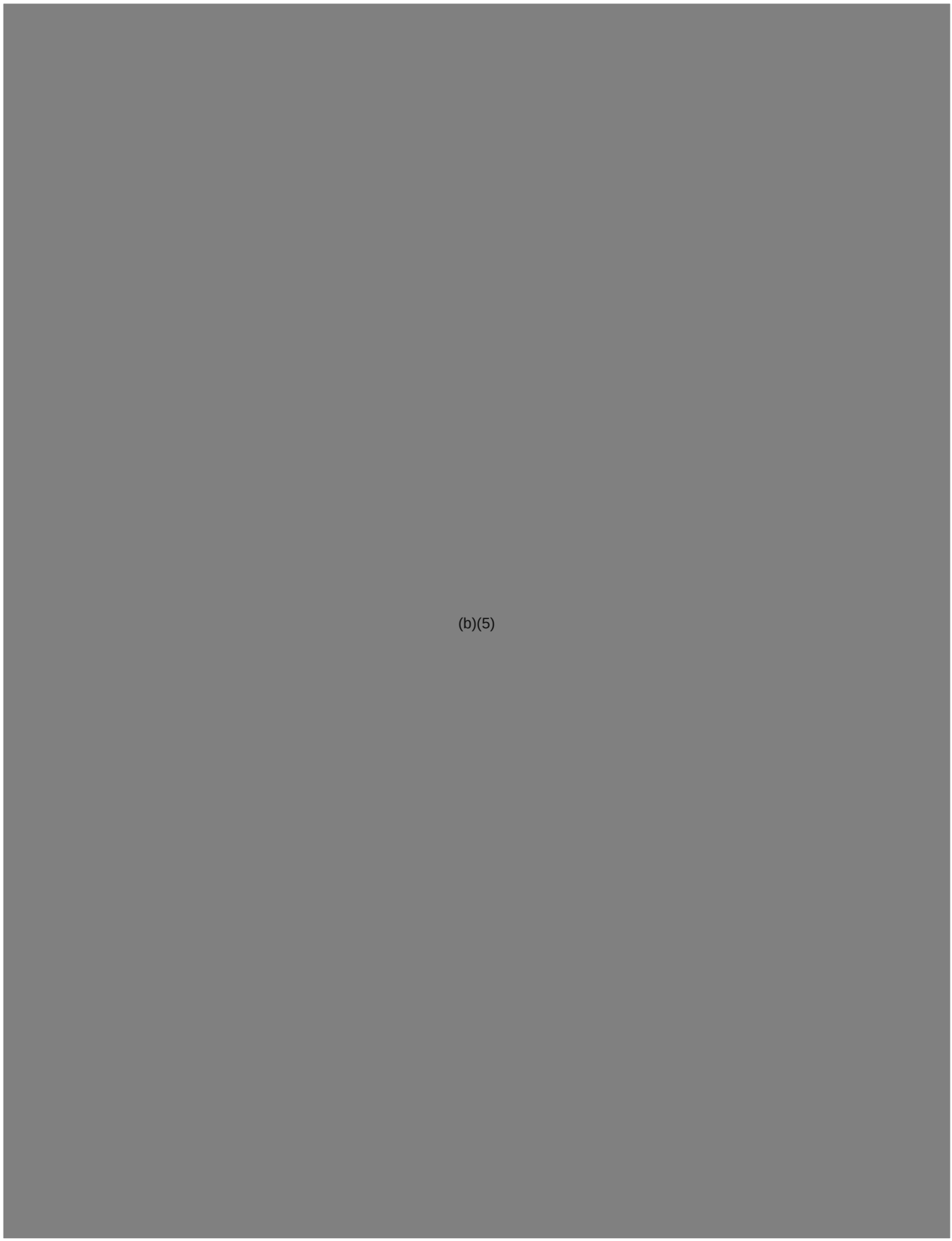
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

August 16, 2002

(b)(5)

SUBJECT: Freedom of Information (FOIA) Coverage

(b)(5)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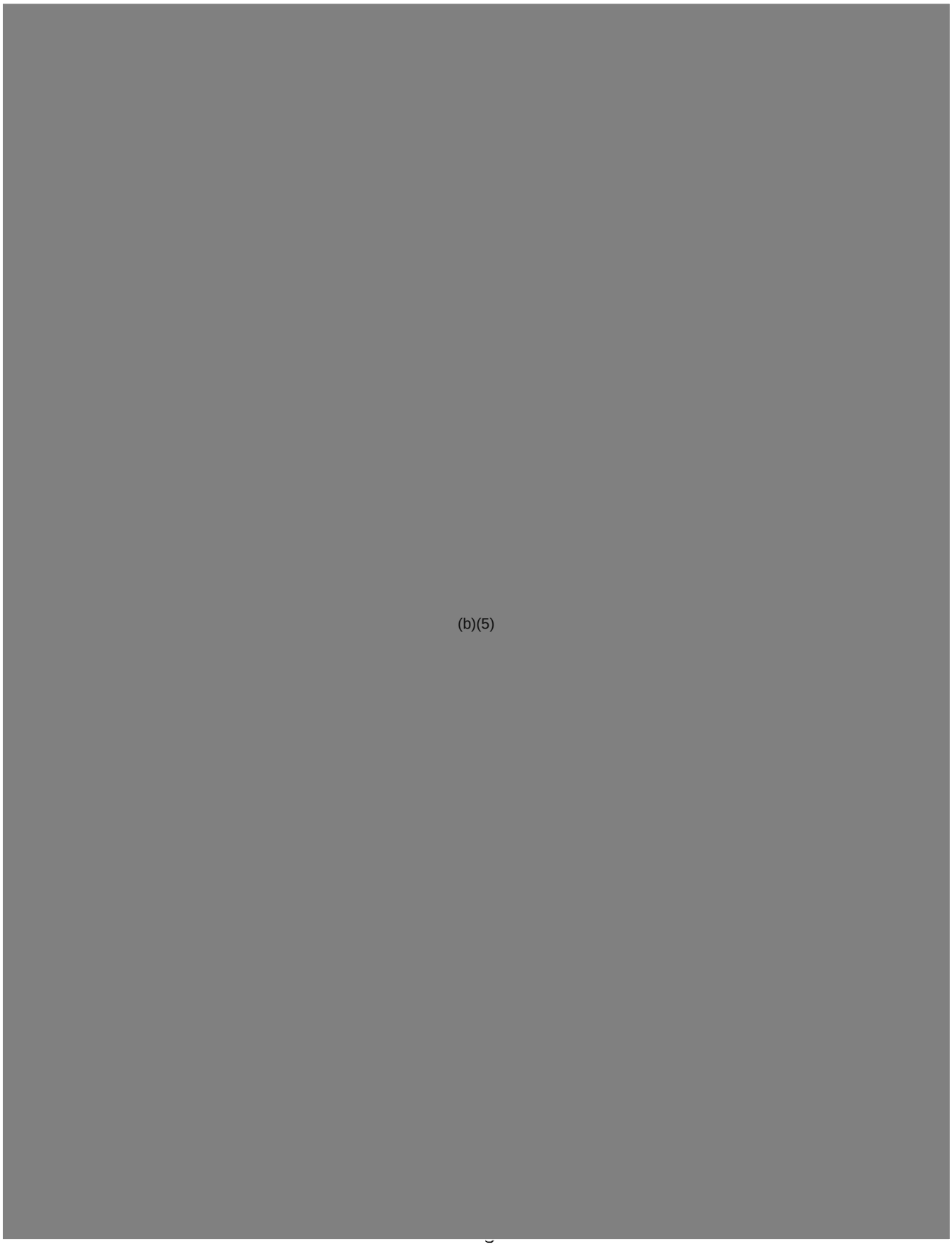
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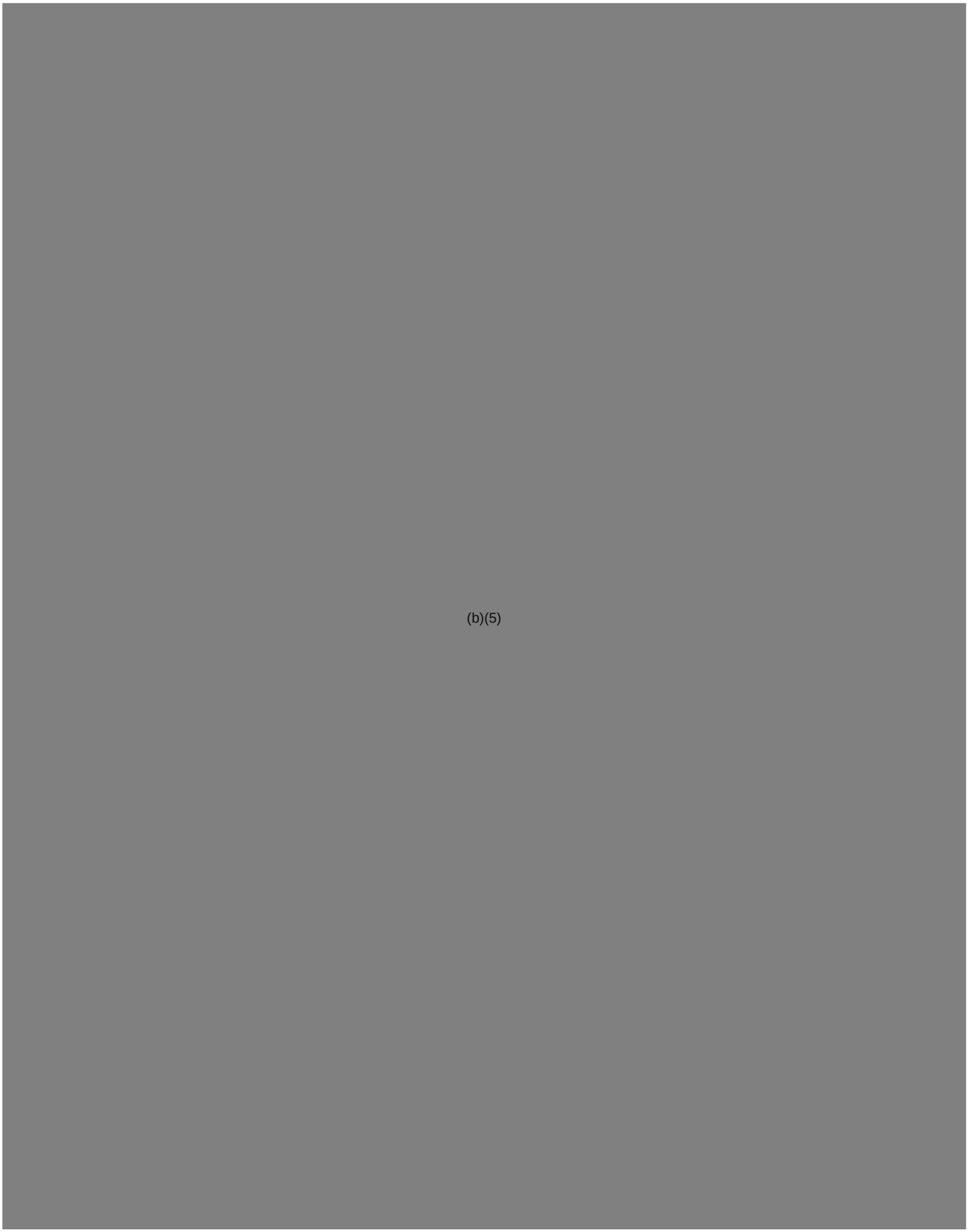
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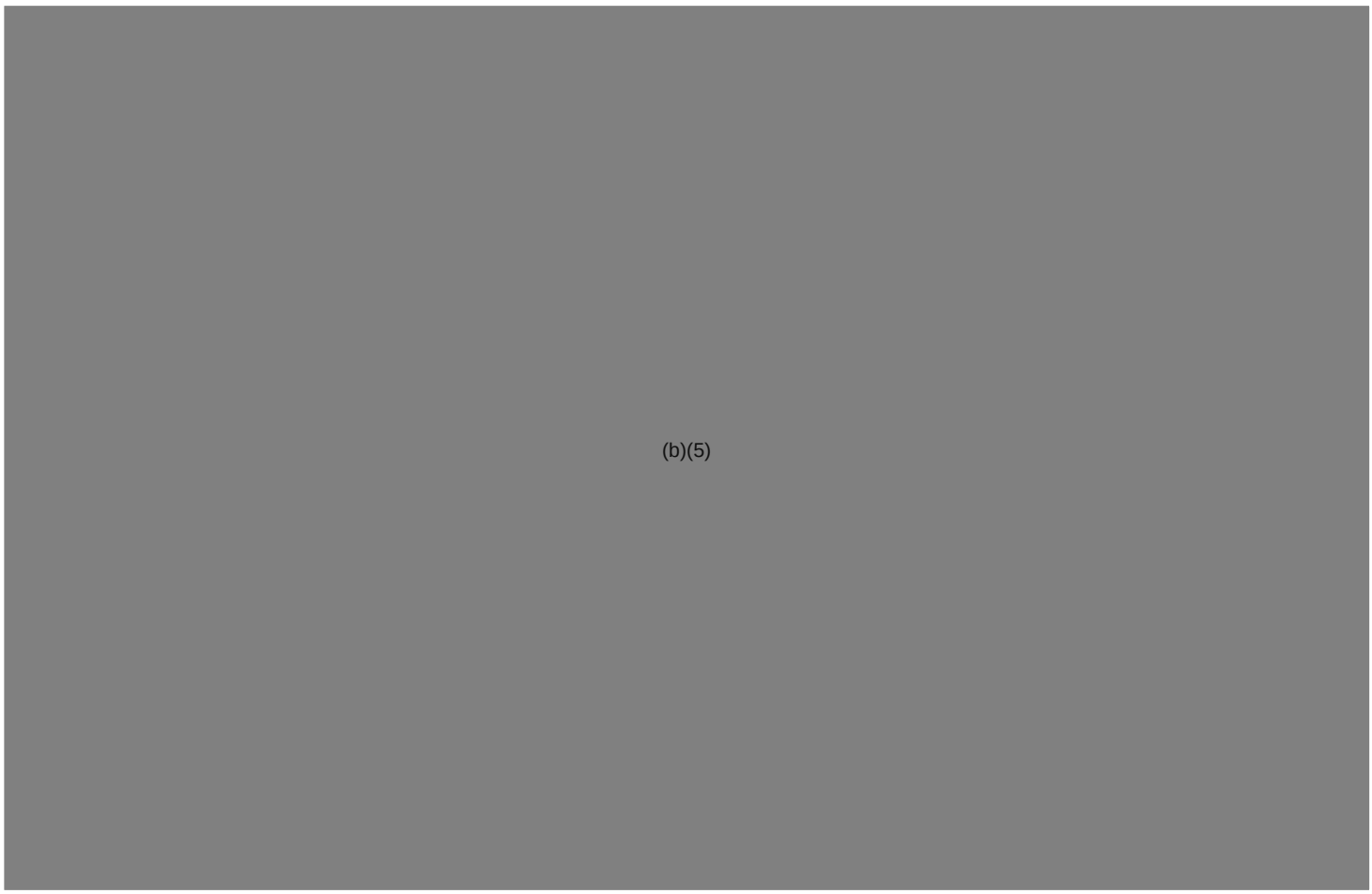

(b)(5)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

June 24, 1998

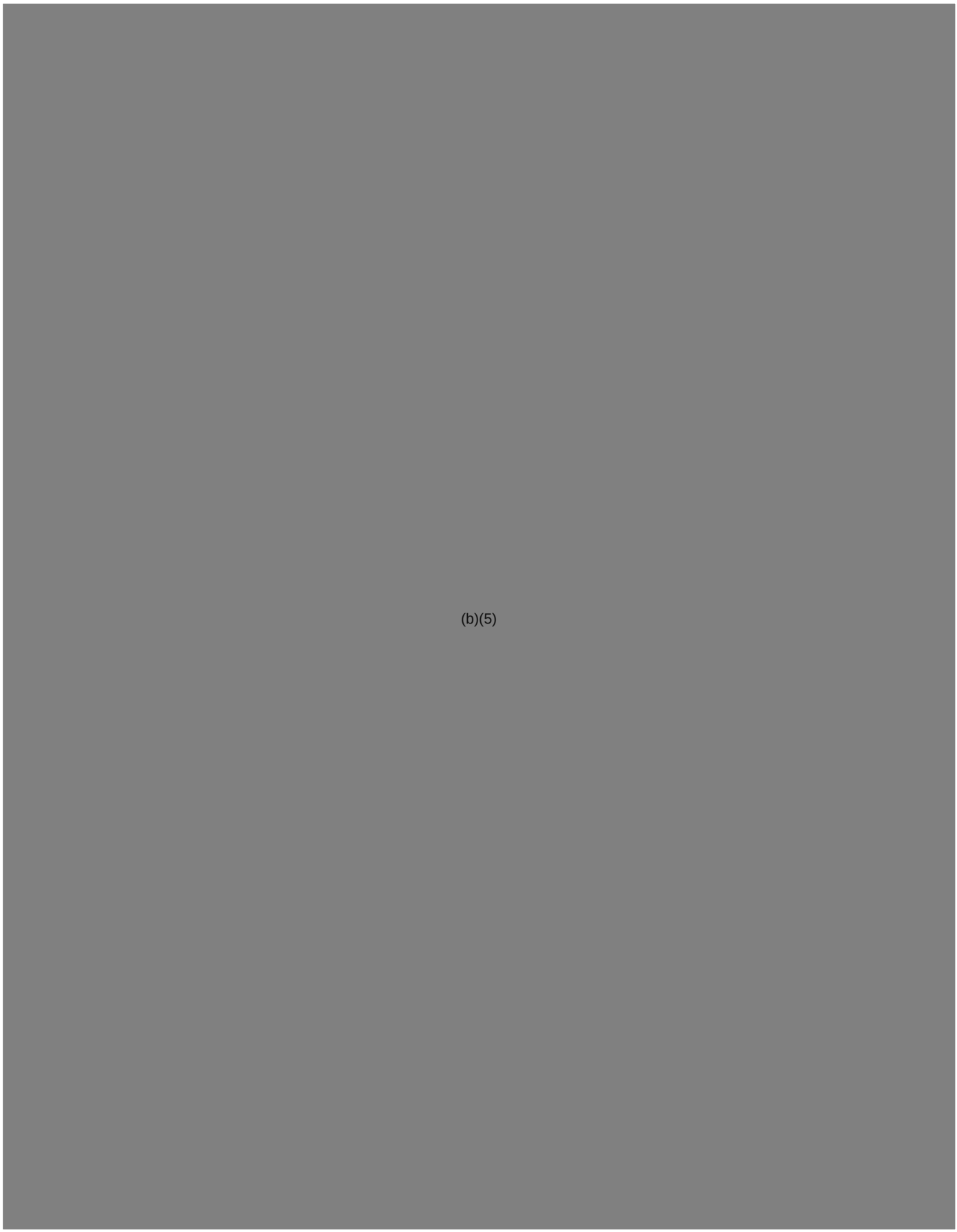
[redacted]

(b)(5)

SUBJECT: IRS Forms 1042 and 1042-S

[redacted]

(b)(5)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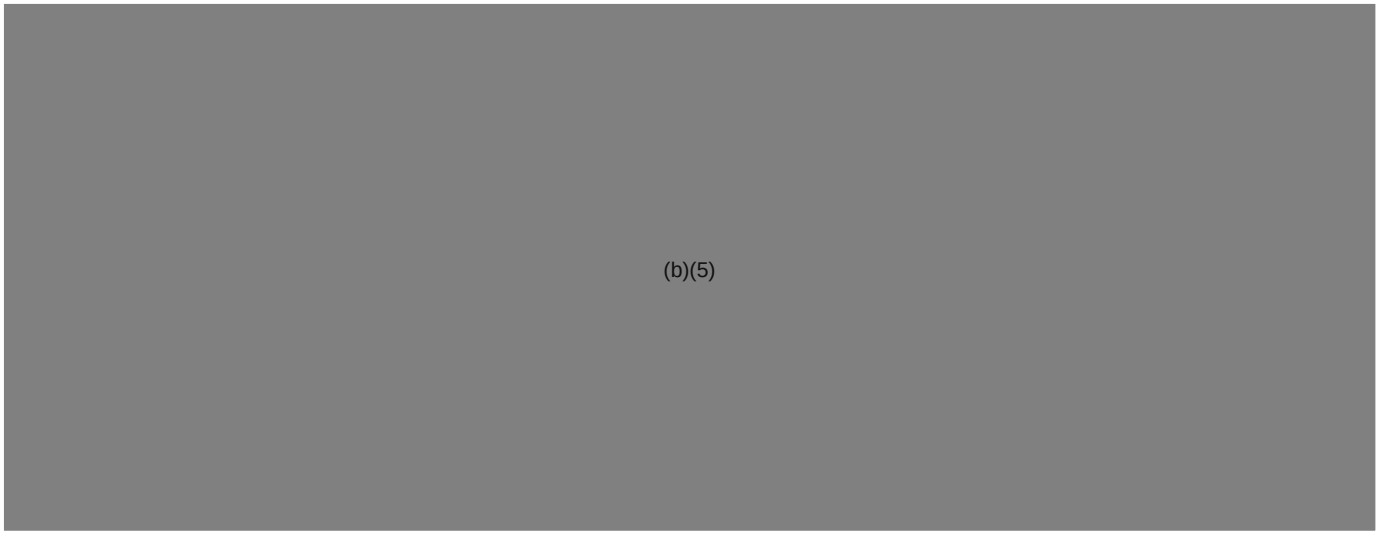
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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street, NW Washington, DC 20005

THRIFT SAVINGS PLAN

September 27, 1990

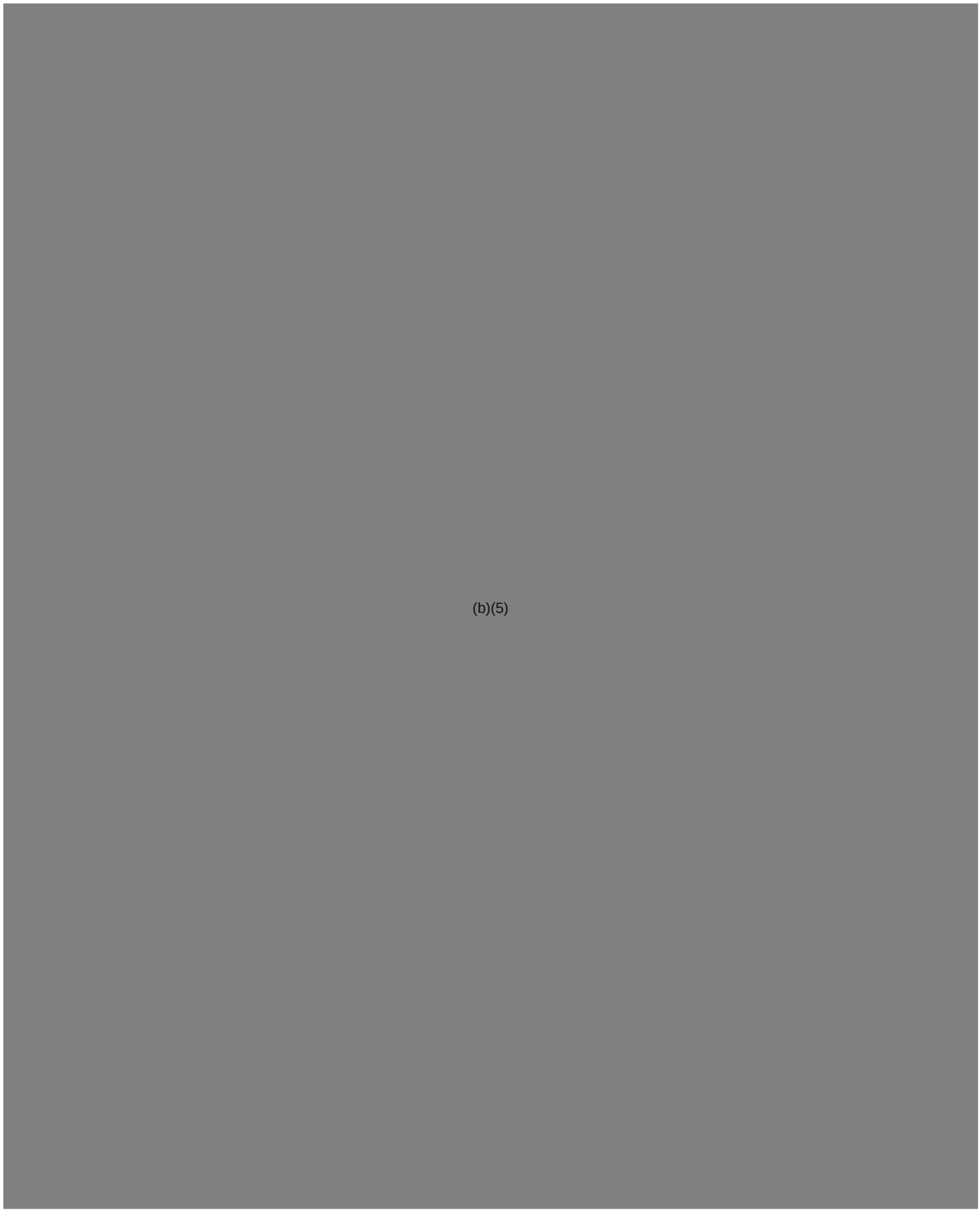
[redacted]

(b)(5)

SUBJECT: Individual Retirement Account
Located Outside of the United States

[redacted]

(b)(5)


(b)(5)

(3) The term "plan" means an employee benefit plan to which Title I of the Act applies.

§2550.404b-1 Maintenance of the indicia of ownership of plan assets outside the jurisdiction of the district courts of the United States [Published in the Federal Register on October 4, 1977; amended by the Federal Register of January 6, 1981].

(a) No fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States, unless:

(1) Such assets are (i) Securities issued by a person, as defined in section 3(9) of the Employee Retirement Income Security Act of 1974 (Act) (other than an individual), which is not organized under the laws of the United States or a State and does not have its principal place of business within the United States, (ii) securities issued by a government other than the government of the United States or of a State, or any political subdivision, agency or instrumentality of such a government, (iii) securities issued by a person, as defined in section 3(9) of the Act (other than an individual), the principal trading market for which securities is outside the jurisdiction of the district courts of the United States, or (iv) currency issued by a government other than the government of the United States if such currency is maintained outside the jurisdiction of the district courts of the United States solely as an incident to the purchase, sale or maintenance of securities described in paragraph (a)(1) of this section; and

(2)(i) Such assets are under the management and control of a fiduciary which is a corporation or partnership organized under the laws of the United States or a State, which fiduciary has its principal place of business within the United States and which is—

(A) A bank as defined in section 202(a)(2) of the Investment Advisors Act of 1940 that has, as of the last day of its most recent fiscal year, equity capital in excess of $1,000,000;

(B) An insurnace company which is qualified under the laws of more than one State to manage, acquire, or dispose of any asset of a plan, which company has, as of the last day of its most recent fiscal year, net worth in excess of $1,000,000 and which is subject to supervision and examination by the State authority having supervision over insurance companies; or

(C) An investment advisor registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets under its management and control in excess of $50,000,000 and either (1) Shareholders' or partners' equity in excess of $750,000 or (2) all of its obligations and liabilities assumed or guaranteed by a person described in paragraph (a)(2)(i)(A), (B), or (C)(*1*) or (a)(2)(ii)(A)(*2*) of this section; or

(ii) Such indicia of ownership are either

(A) In the physical possession of, or, as a result of normal business operations, are in transit to the physical possession of, a person which is organized under the laws of the United States or a State, which person has its principal place of business in the Untied States and which is—

(1) A bank as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, equity capital in excess of $1,000,000;

(2) A broker or dealer registered under the Securities Exchange Act of 1934 that has, as of the last day of its most recent fiscal year, net worth in excess of $750,000; or

(3) A broker or dealer registered under the Securities Exchange Act of 1934 that has all of its obligations and liabilities assumed or guaranteed by a person described in paragraph (a)(2)(i)(A), (B), or (C)(*1*) or (a)(2)(ii)(A)(*2*) of this section; or

(B) Maintained by a broker or dealer, described in paragraph (a)(2)(ii)(A)(*2*) or (*3*) of this section, in the custody of an entity designated by the Securities and Exchange Commission as a "satisfactory control location" with respect to such broker or dealer pursuant to Rule 15c3-3 under the Securities Exchange Act of 1934 provided that:

(1) Such entity holds the indicia of ownership as agent for the broker or dealer, and

(2) Such broker or dealer is liable to the plan to the same extent it would be if it retained the physical possession of the indicia of ownership pursuant to paragraph (a)(2)(ii)(A) of this section.

(C) Maintained by a bank described in paragraph (a)(2)(ii)(A)(*1*), in the custody of an entity that is a foreign securities depository, foreign clearing agency which acts as a securities depository, or foreign bank which entity is supervised or regulated by a government agency or regulatory authority in the foreign jurisdiction having authority over such depositories, clearing agencies or banks, provided that:

(1) the foreign entity holds the indicia of ownership as agent for the bank;

(2) the bank is liable to the plan to the same extent it would be if it retained the physical possession of the indicia of ownership within the United States;

(3) the indicia of ownership are not subject to any right, charge, security interest, lien or claim of any kind in favor of the foreign entity except for their safe custody or administration;

(4) beneficial ownership of the assets represented by the indicia of ownership is freely transferable without the payment of money or value other than for safe custody or administration; and

(5) upon request by the plan fiduciary who is responsible for the selection and retention of the bank, the bank identifies to such fiduciary the name, address and principal place of business of the foreign entity which acts as custodian for the plan pursuant to this paragraph (a)(2)(ii)(C), and the name and address of the government agency or other regulatory authority that supervises or regulates that foreign entity.

(b) Notwithstanding any requirement of paragraph (a) of this section, a fiduciary, with repsect to a plan may maintain in Canada the indicia of ownership of plan assets which are attributable to a contribution made on behalf of a plan participant who is a citizen or resident of Canada, if such indicia of ownership must remain in Canada in order for the plan to qualify for and maintain tax exempt status under the laws of Canada or to comply with other applicable laws of Canada or any Province of Canada.

(c) For purposes of this regulation:

(1) the term "management and control" means the power to direct the acquisition or disposition through purchase, sale, pledging, or other means; and

(2) the term "depository" means any company, or agency or instrumentality of government, that acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series or any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates.

§2550.407a-1 General rule for the acquisition and holding of employer securities and employer real property [Published in the Federal Register of September 20, 1977; amended by the Federal Register of November 22, 1977].

(a) *In general.* Section 407(a)(1) of the Employee Retirement Income Security Act of 1974 (the Act) states that except as otherwise provided in section 407 and section 414 of the Act, a plan may not acquire or hold any employer security which is not a qualifying employer security or any employer real property which is not qualifying employer real property. Section 406(a)(1)(E) prohibits a fiduciary from knowingly causing a plan to engage in a transaction which constitutes a direct or indirect acquisition, on behalf of a plan, of any employer security or employer real property in violation of section 407(a), and section 406(a)(2) prohibits a fiduciary who has authority or discretion to control or manage assets of a plan to permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a).

(b) *Requirements applicable to all plans.* A plan may hold or acquire only employer securities which are qualifying employer securities and employer real property which is qualifying employer real property. A plan may not hold employer securities and employer

M has established an employee stock ownership trust under an employee stock ownership plan described in section 4975(e) of the Code and the regulations thereunder, in which all of *M's* employees are eligible to participate. The trust holds on behalf of the participating employees 30 percent of the outstanding stock in *M*. The trust is administered by a bank that is not related to or controlled by *M* or the foundation.

All of the stock that is held by the trust has been allocated to individual participants. In accordance with the terms of the trust's governing instrument, each participant is entitled to direct the trust as to the manner in which the shares allocated to the participant are to be voted. The allocated shares are then voted by the trustee bank as directed by the participants.

LAW AND ANALYSIS

Section 4946(a)(1)(C) of the Code provides that the term "disqualified person" includes a person who is an owner of more than 20 percent of the total combined voting power of a corporation that is a substantial contributor to a private foundation.

Section 53.4946-1(a)(5) of the Foundation Excise Tax Regulations provides that the term "combined voting power" includes voting power represented by holdings of voting stock, actual or constructive, but does not include voting rights held only as a director or trustee.

The trust's control over the *M* stock is subject to the direction of the individuals on whose behalf the shares have been allocated and to whom the beneficial interest in the shares has passed. Therefore, to the extent that the trust has any voting power with respect to the *M* stock, it is merely the voting power of a trustee. Thus, although the trust holds legal title to 30 percent of the total combined voting power of *M*, it is not treated as the owner of the stock, for purposes of section 4946(a)(1)(C) of the Code.

HOLDING

Because the trust is not treated as the owner of the M stock allocated to the participating employees, it is not a disqualified person within the meaning of section 4946(a)(1)(C) of the Code with respect to the private foundation.

¶ 19,571B

Rev. Rul. 81-100, I. R. B. 1981-13, 32.

Group trusts—Qualified retirement funds and individual retirement accounts—Pooling of assets.—Trusts that are parts of qualified retirement plans and individual retirement accounts may pool their assets in a group trust without affecting the exempt status of the separate trusts. The group trust may also qualify for exemption. Rev. Ruls. 56-267 and 75-530 superseded.

Back references: ¶ 2474 and 9805.

This revenue ruling restates and consolidates the positions stated under Rev. Rul. 56-267, 1956-1 C. B. 206 and Rev. Rul. 75-530, 1975-2 C. B. 146, under current law.

The revenue rulings concern the effect on the tax exempt status of trusts forming parts of qualified retirement plans and individual retirement accounts of an arrangement under which the individual trusts pool their assets in a group trust (usually created for the purpose of providing diversification of investments), where the group trust is declared to be part of the qualified plan or individual retirement account and the trust instruments creating both the participating and group trusts provide that amounts shall be transferred from one trust to the other at the direction of the trustee of the participating trust.

Section 501(a) of the Internal Revenue Code provides, in part, that a trust described in section 401(a) shall be exempt from income tax.

Section 401(a)(1) of the Code provides, in effect, that a trust or trusts created or organized in the United States and forming a part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries shall be qualified under this section if contributions are made to the trust or trusts by such employer, or employees for the purpose of distributing to such employees or their beneficiaries the

corpus and income of the fund accumulated in accordance with such plan.

By making contributions to a participating trust, which provides that from time to time amounts so contributed may be transferred to and from a specified group trust, the employer and any partcipating employees, in effect, make contributions to the group trust for purposes of section 401(a)(1).

Section 401(a)(2) of the Code provides that under each trust instrument it must be impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the plan and the trust or trusts, for any part of the corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of the employees or their beneficiaries.

Section 408(e)(1) of the Code provides for the exemption from taxation of individual retirement accounts which meet the requirements of section 408. Section 408(a)(5) provides that the assets of the trust (individual retirement account) may not be commingled with other property except in a common trust fund or common investment fund. With regard to section 408(a)(5), the Conference Committee stated that the conferees intend that the assets of qualified individual retirement accounts may be pooled with the assets of qualified section 401(a) trusts. The conferees intended that the group trust itself will be entitled to exemption from tax under the Code. See Conference Report No. 93-1280, 93rd Cong., 2nd Sess. 337 (1974), 1974-3 C. B. 415, 498.

Held, if the requirements below are satisfied, a group trust is exempt from taxation under section 501(a) of the Code with respect to its funds which equitably belong to participating trusts described in section 401(a) and is exempt from taxation under section 408(e) with respect to its funds which equitably belong to individual retirement accounts, which satisfy the requirements of section 408. Also, the status of individual trusts as qualified under section 401(a) or meeting the requirements of section 408 of the Code and exempt from tax under section 501(a) or 408(e), respectively, will not be affected by the pooling of their funds in a group trust if the following requirements are satisfied.

(1) The group trust is itself adopted as a part of each individual retirement account or employer's pension or profit-sharing plan.

(2) The group trust instrument expressly limits participation to individual retirement accounts which are exempt under section 408(e) of the Code and employer's pension and profit-sharing trusts which are exempt under section 501(a) of the Code by qualifying under section 401(a).

(3) The group trust instrument prohibits that part of its corpus or income which equitably belongs to any individual retirement account or employer's trust from being used for or diverted to any purposes other than for the exclusive benefit of the individual or the employees, respectively, or their beneficiaries who are entitled to benefits under such participating individual retirement account or employer's trust.

(4) The group trust instrument prohibits assignment by a participating individual retirement account or employer's trust of any part of its equity or interest in the group trust.

(5) The group trust is created or organized in the United States and is maintained at all times as a domestic trust in the United States.

Rev. Rul. 56-267 and Rev. Rul. 75-530 are superseded because the positions stated therein are restated under current law in this revenue ruling.

¶ 19,572

Rev. Rul. 81-105, I. R. B. 1981-12, 27. [Obsoleting Rev. Ruls. 68-370 at ¶ 18,653 and 75-35 at ¶ 19,374.]

Employees' trusts—Definitions and special rules—Affiliated service groups—Nondiscrimination requirements.—Information is provided with respect to when various businesses will be considered an affiliated service group and how this aggregation affects the retirement plans maintained by members of the group.

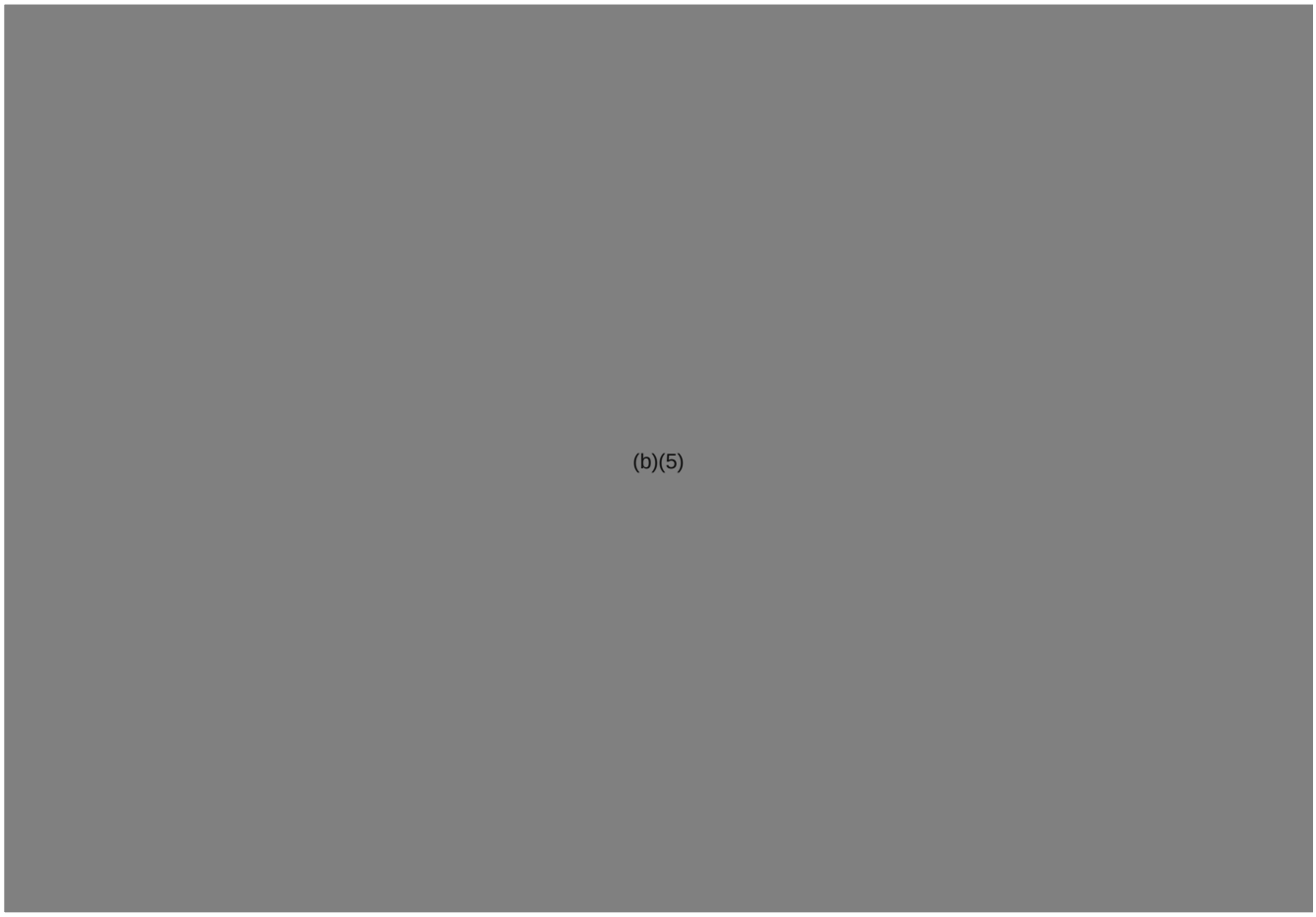
1) Foreign Payments
2) Participation-Special Group (General)

June 5, 1992

(b)(5)

SUBJECT: Participation by foreign national employees in the TSP

(b)(5)


(b)(5)


(b)(5)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street, NW Washington, DC 20005

November 04, 1988

(b)(5)

SUBJECT: Thrift Savings Plan (TSP) Distributions Delivered Outside the United States and Possessions

(b)(5)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street, NW Washington, DC 20005

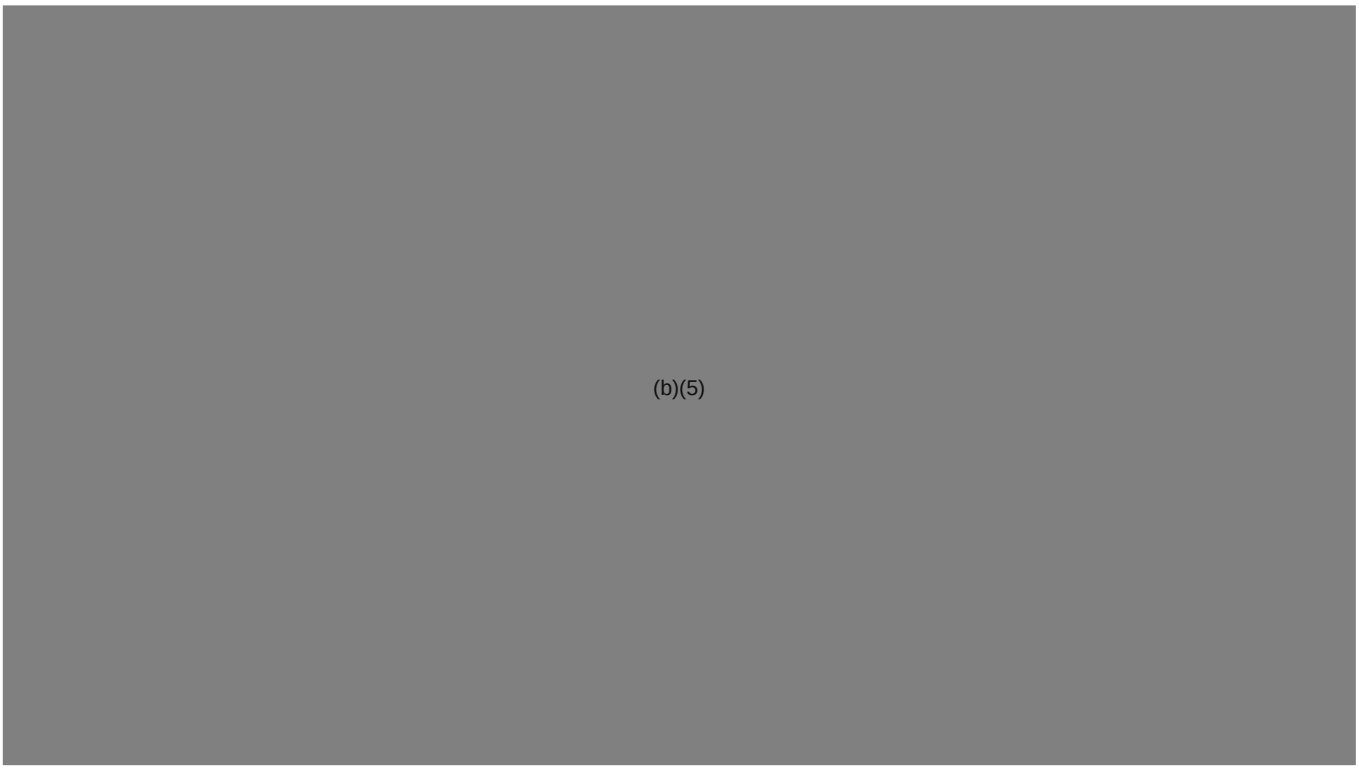
File -
1) Tax - Disbursements
2) Manual

January 2, 1991

(b)(5)

SUBJECT: Transfer of Thrift Savings Plan Assets to a Qualified Trust Located Outside of the United States

(b)(5)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(b)(5)

..Chron

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

April 15, 1998

(b)(5)

SUBJECT: Application of Privacy Act to Beneficiaries of Thrift Savings Plan Accounts

BACKGROUND

(b)(5)

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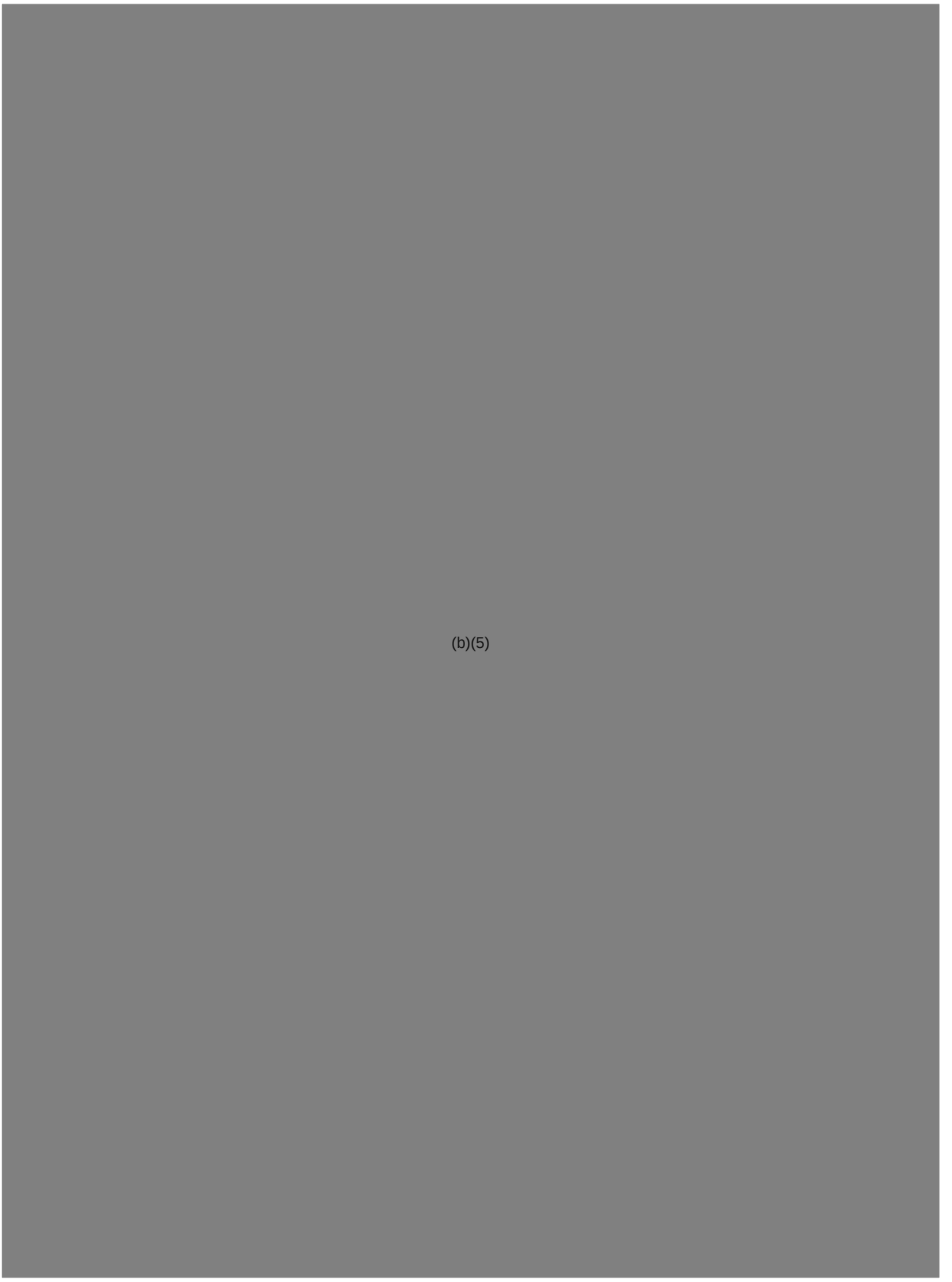
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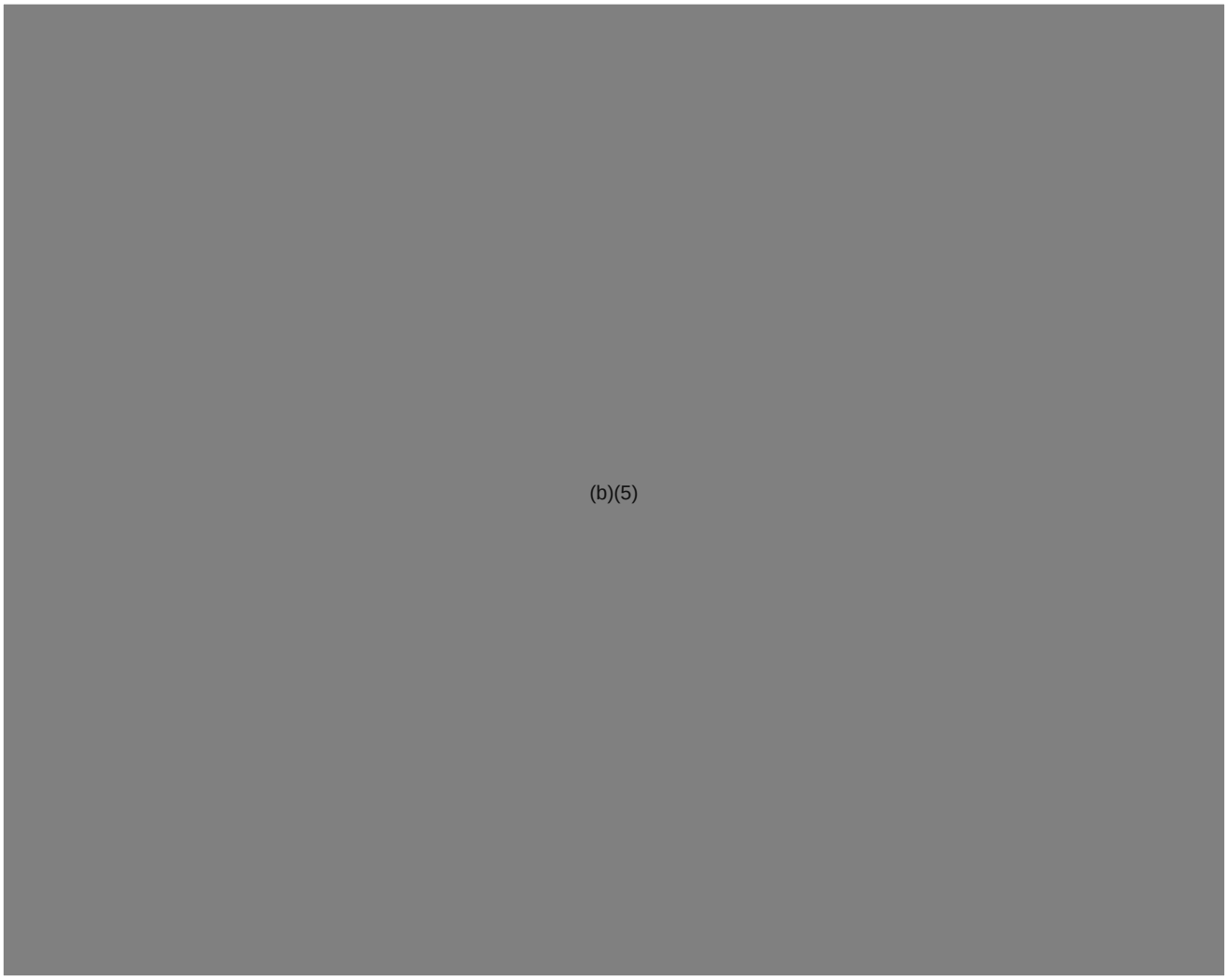

(b)(5)

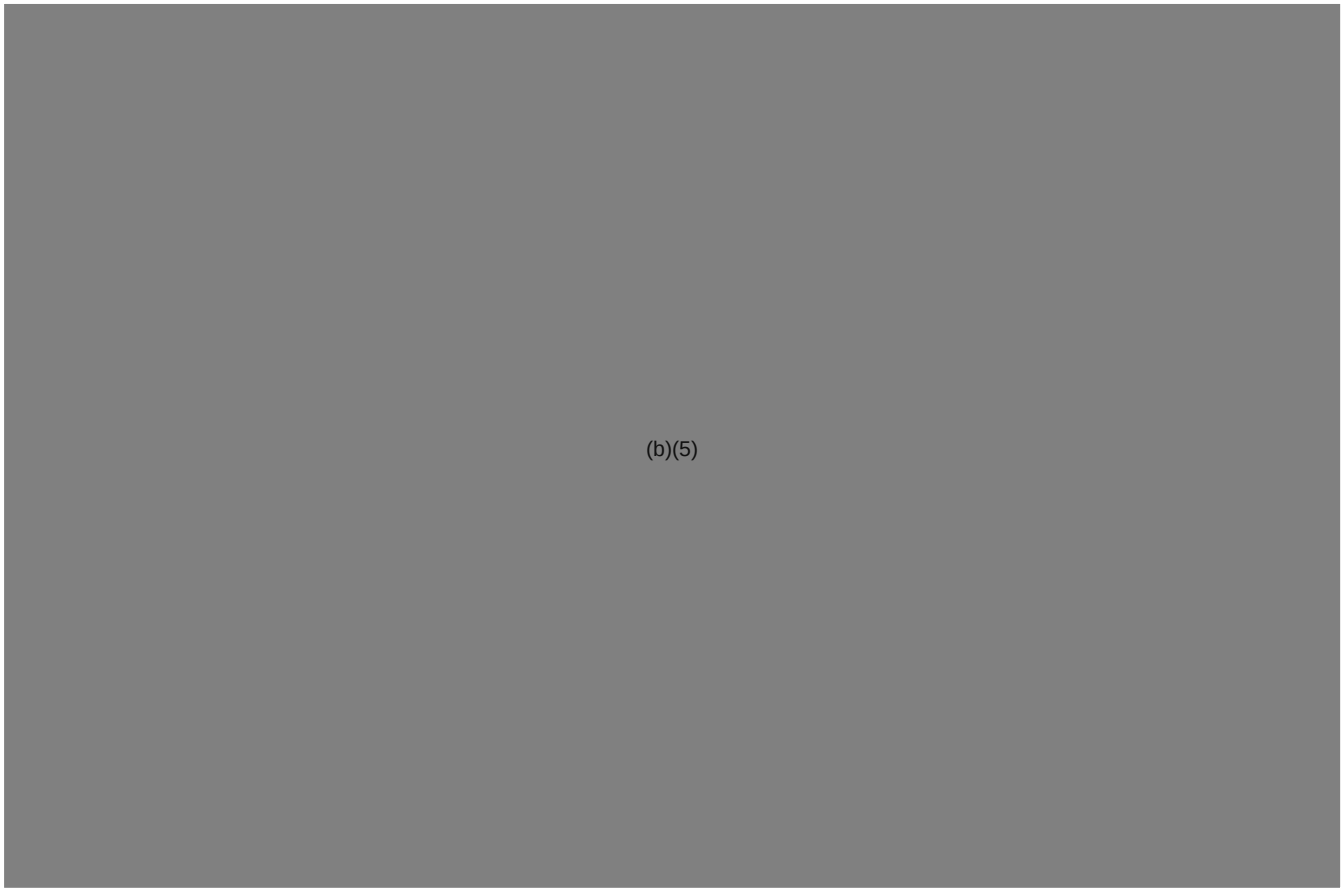
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

November 27, 1995

(b)(5)

SUBJECT: Inclusion of Addresses and Social Security Numbers in Court Order Pending Payment Letters and Notices

(b)(5)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Chron

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

November 10, 1997

(b)(5)

SUBJECT: Privacy Act Notice for Loans and Withdrawals Over Web Page and Voice Response System (VRS)

(b)(5)

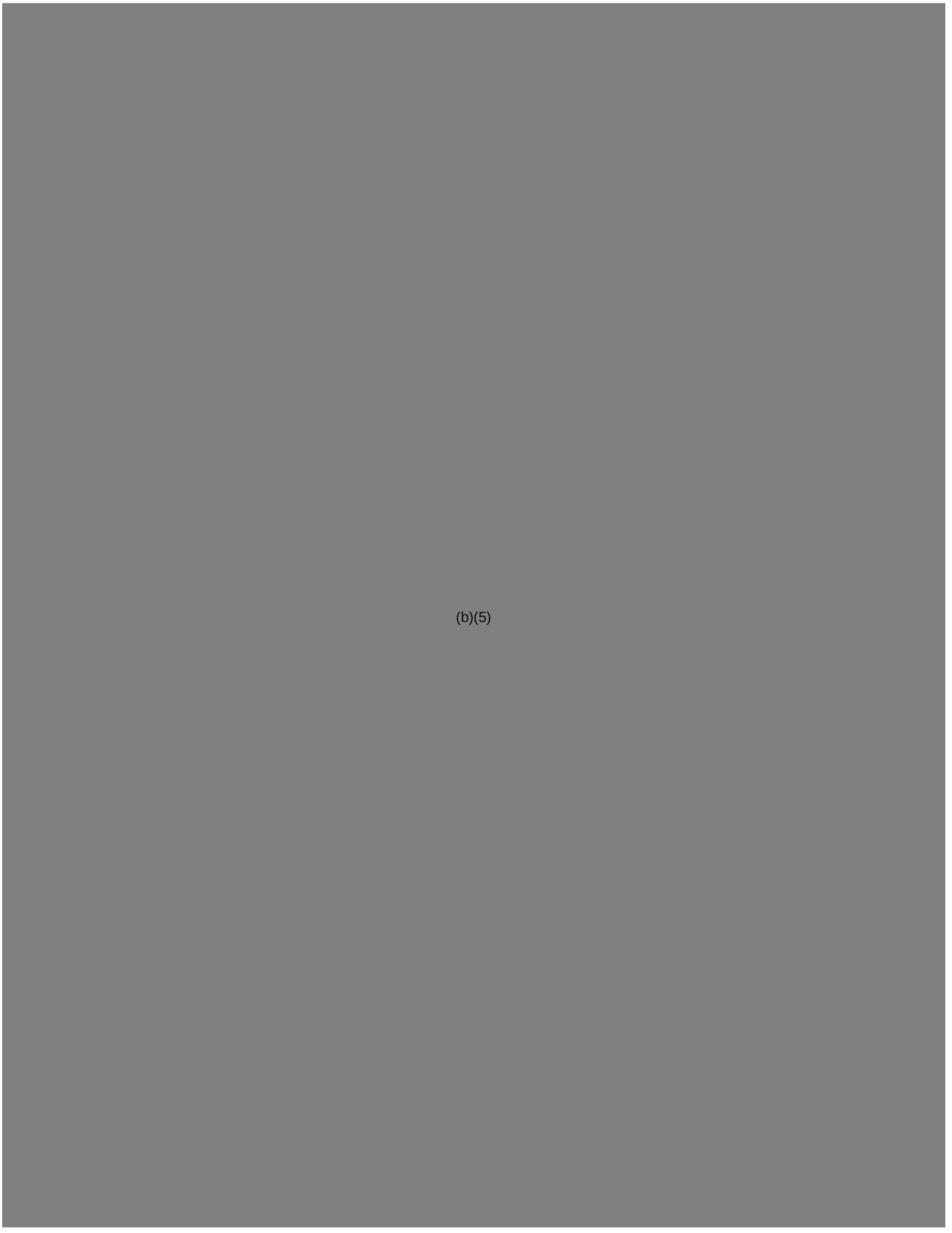
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

October 12, 2004

[redacted]
(b)(5)

SUBJECT: Privacy Interest of Agency Employee in His or Her Image or Picture

[redacted]
(b)(5)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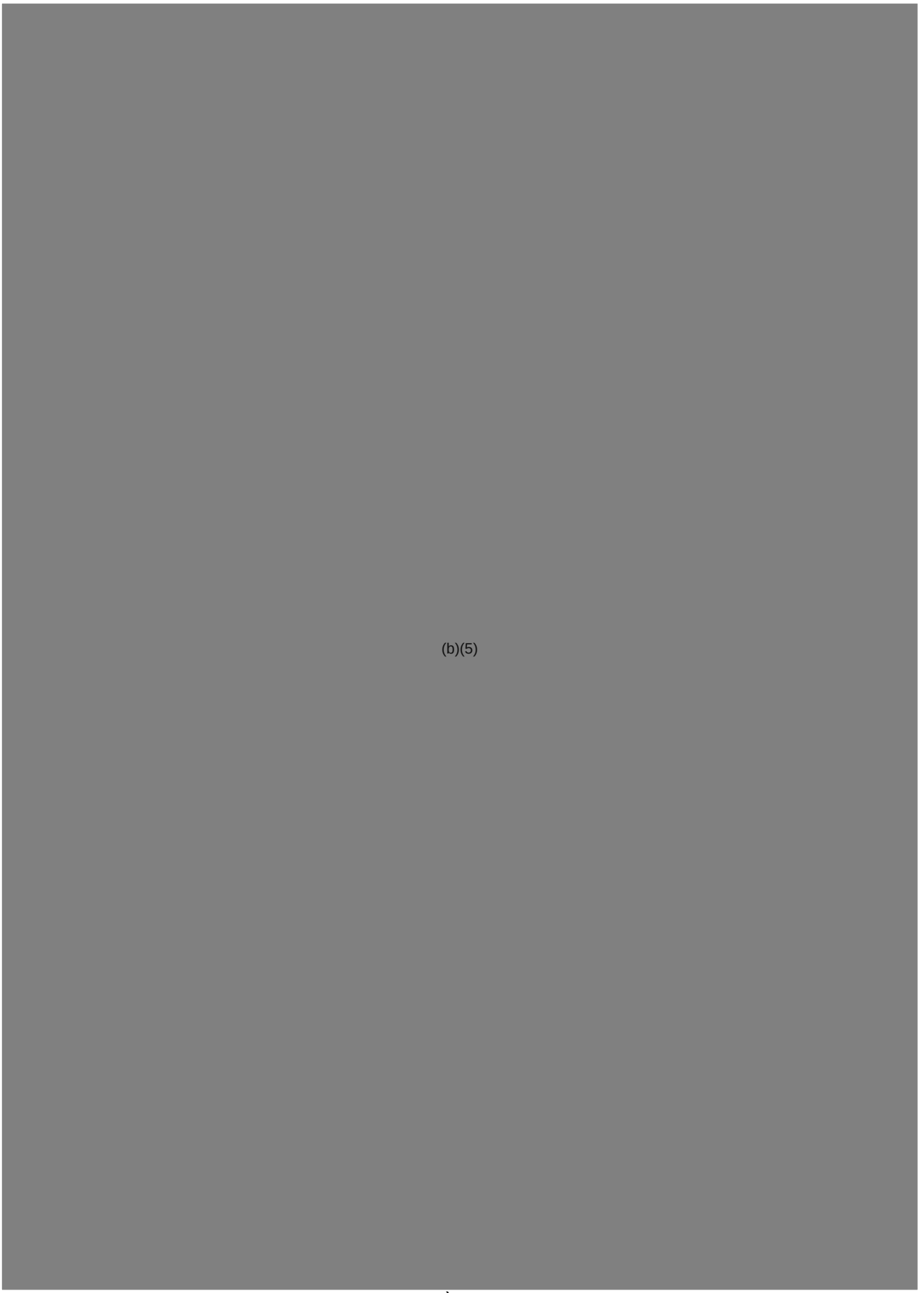
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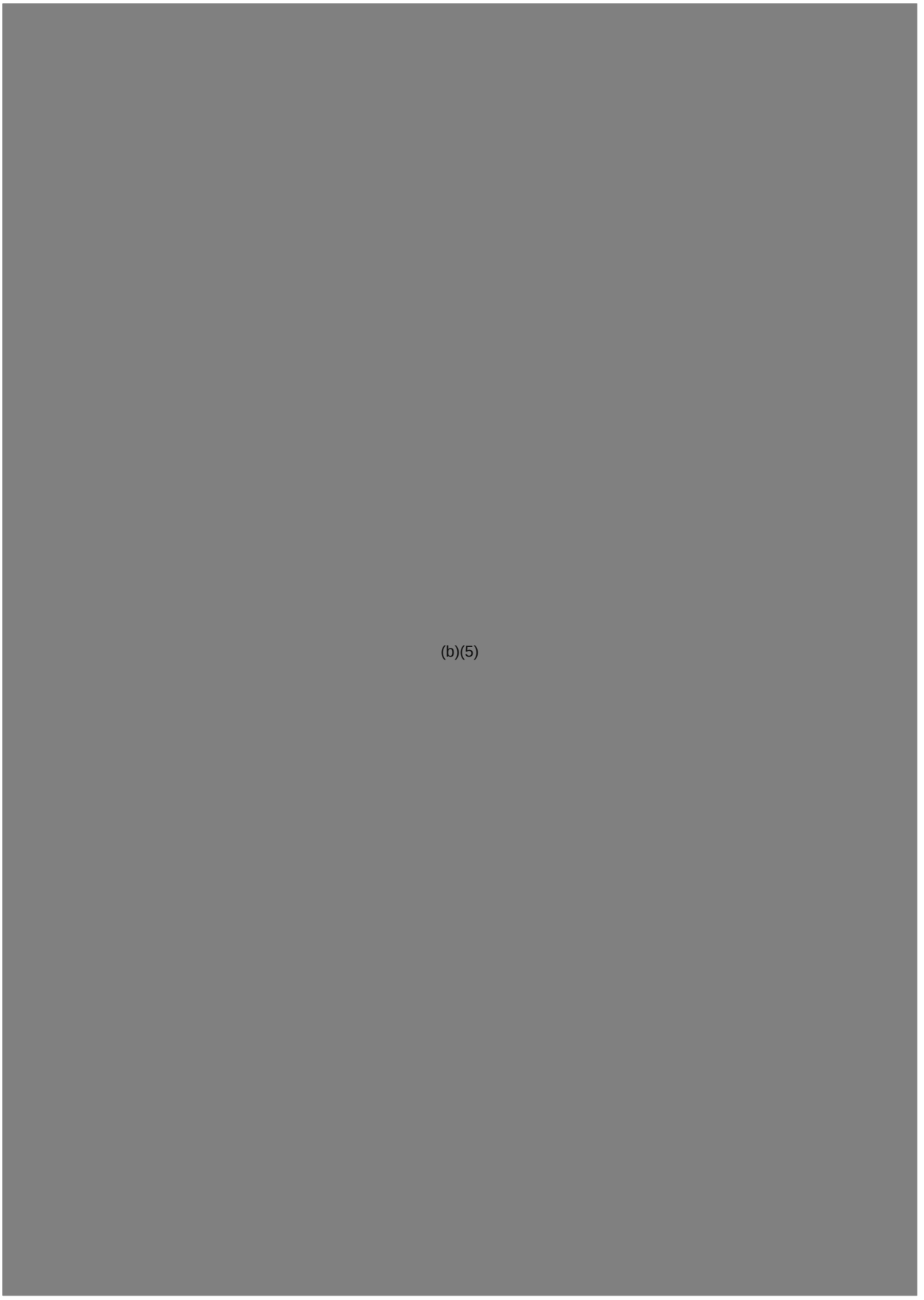
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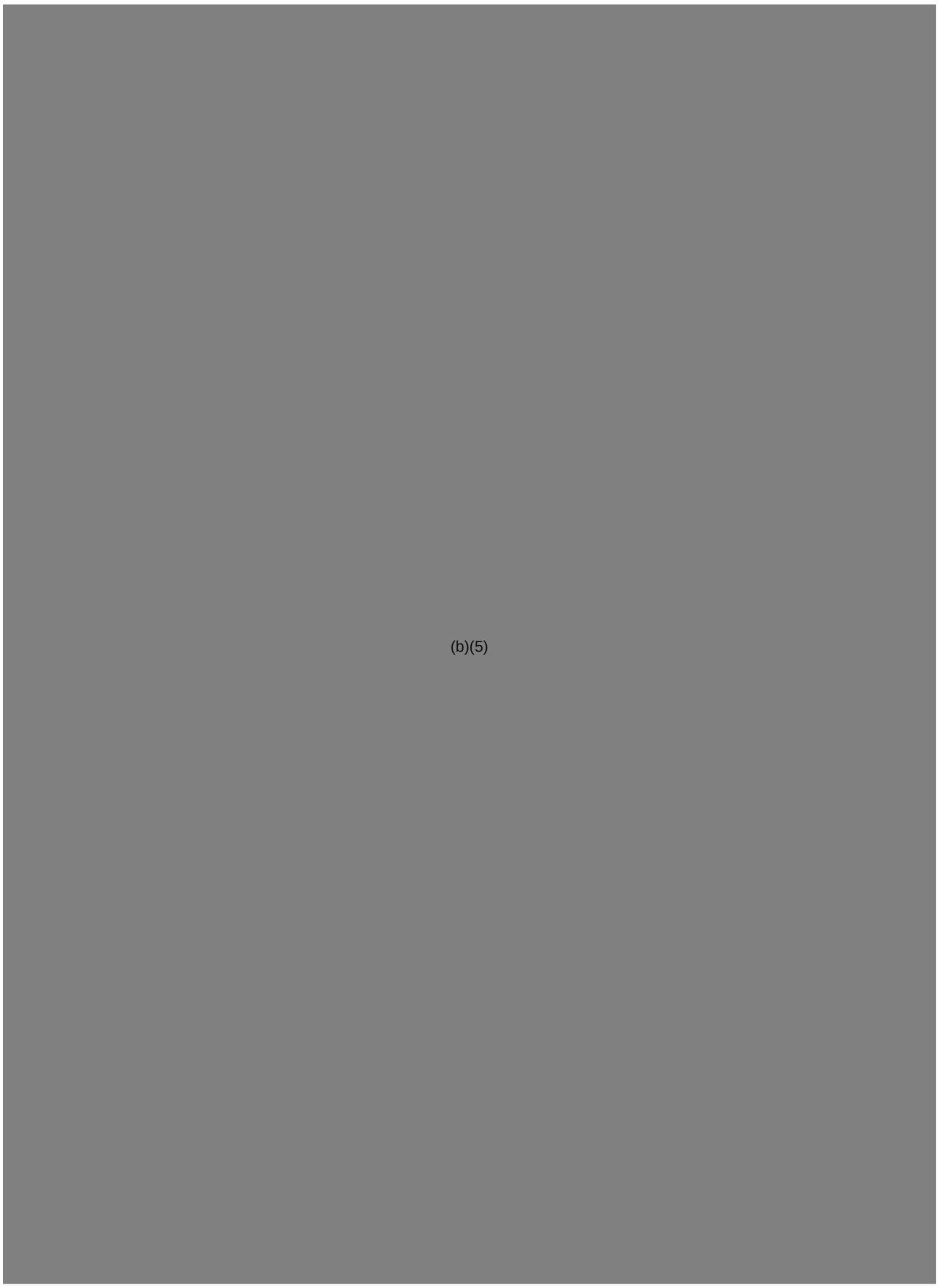
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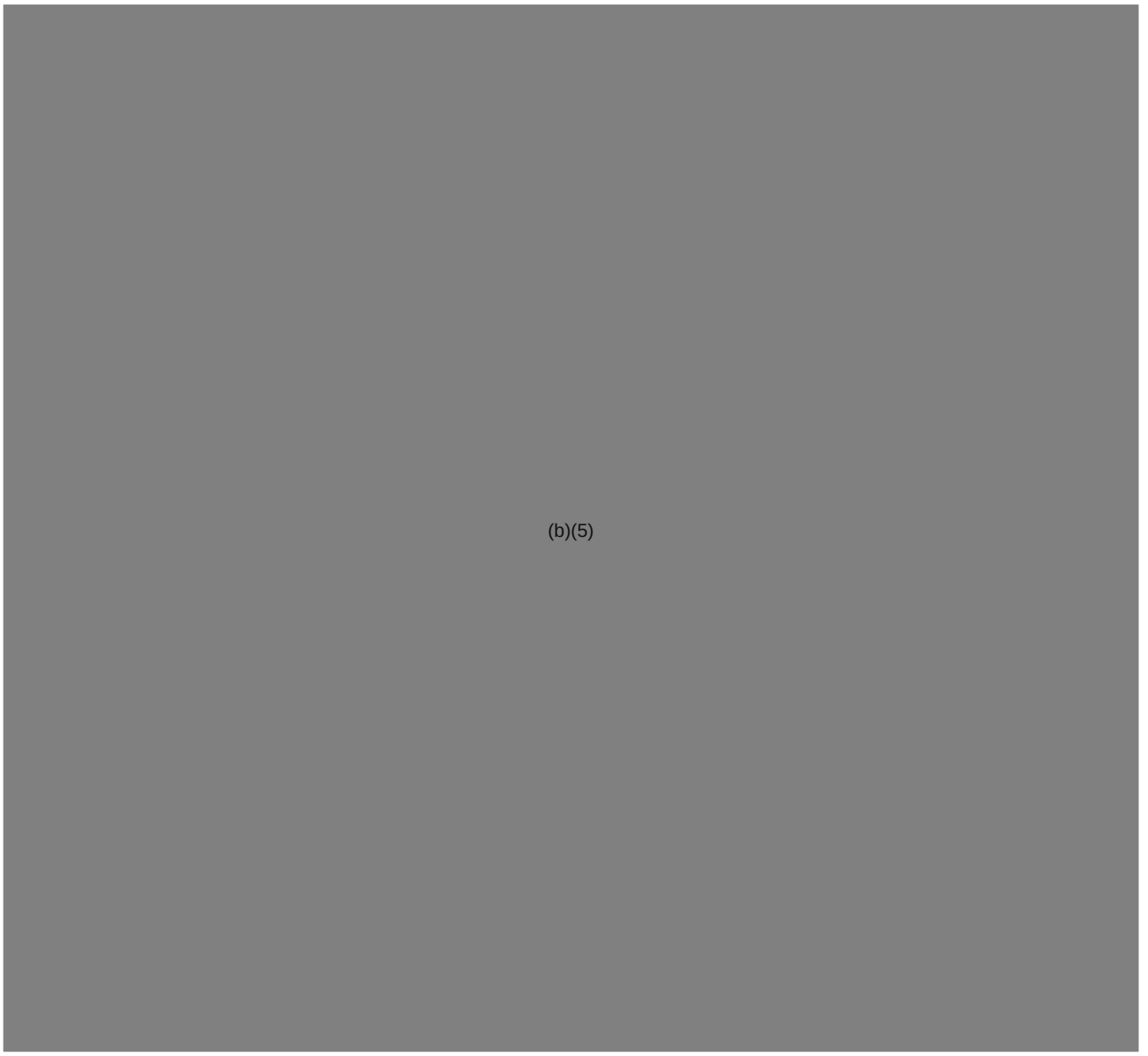
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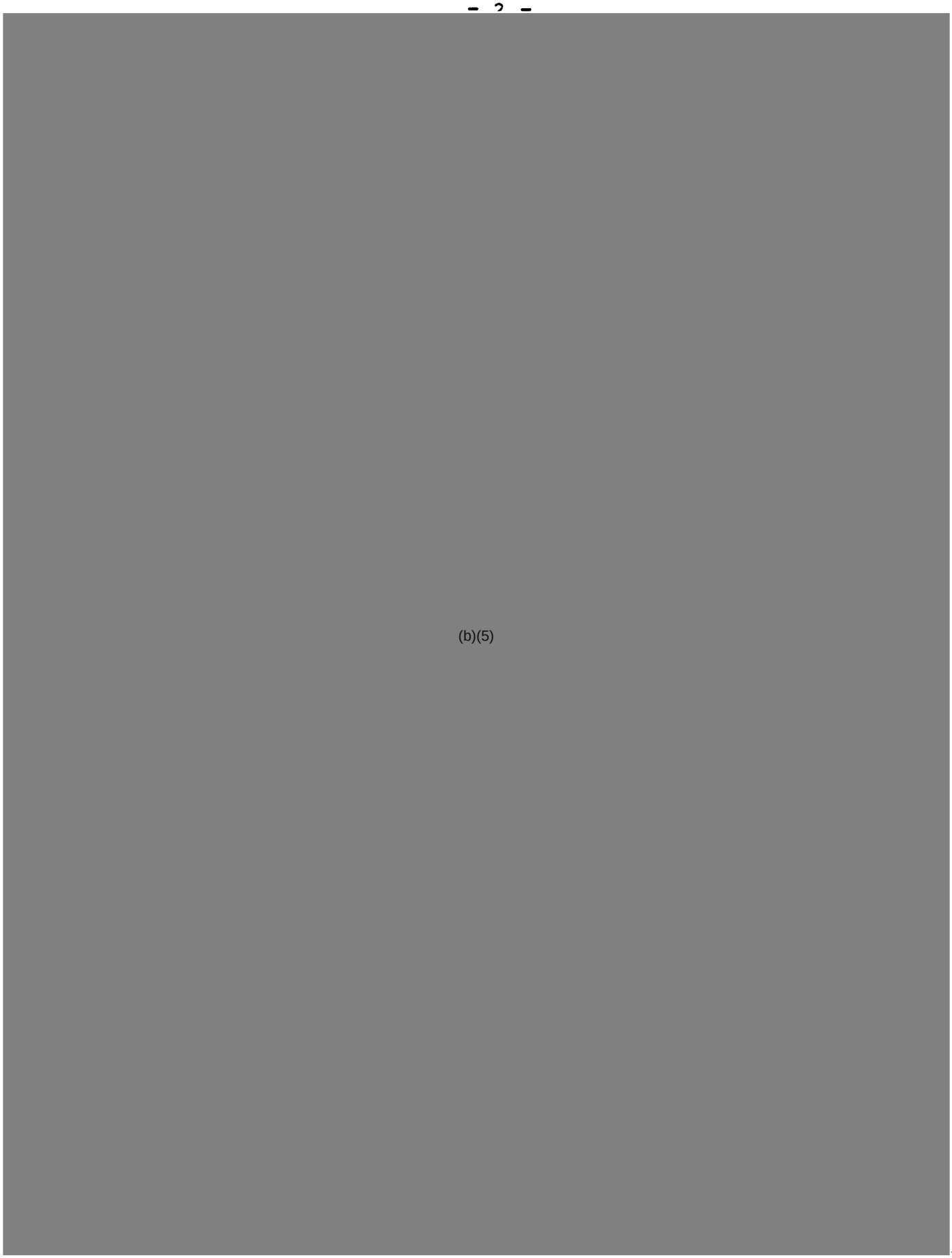
FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD

DATE: December 4, 1992

[redacted]
(b)(5)

SUBJECT: Processing Waiver Requests, Privacy Act Requests and Powers of Attorney

[redacted]
(b)(5)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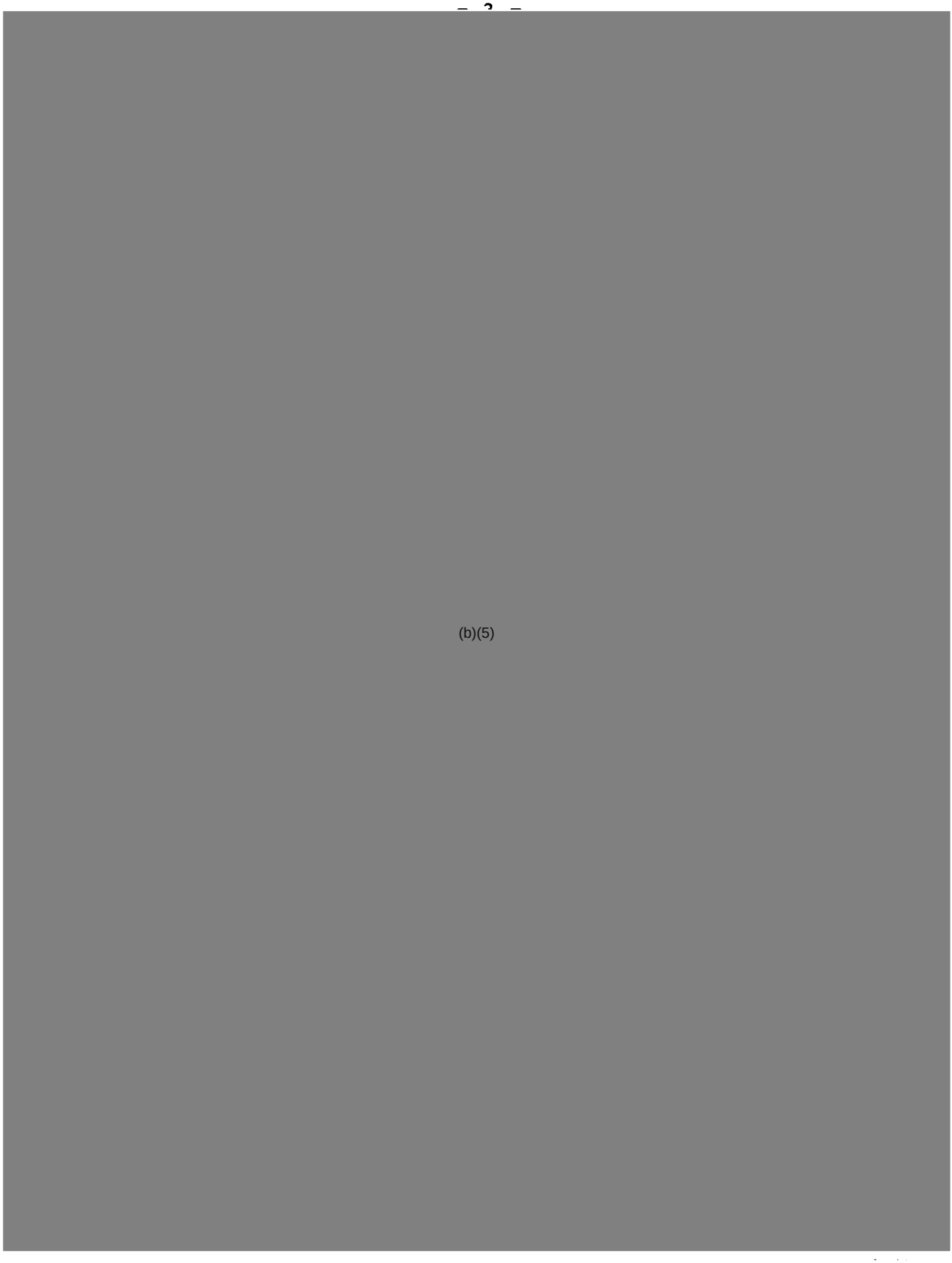
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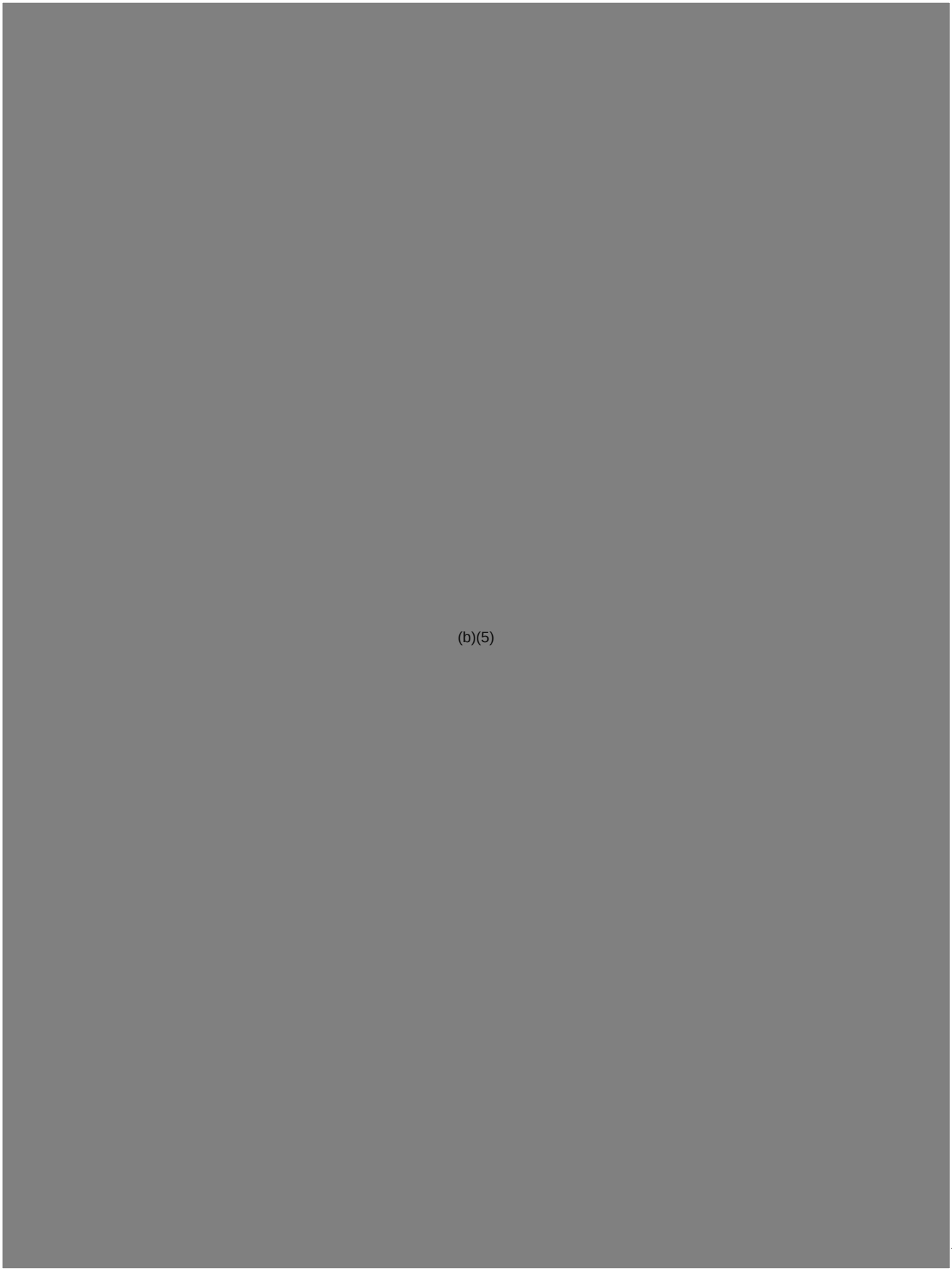
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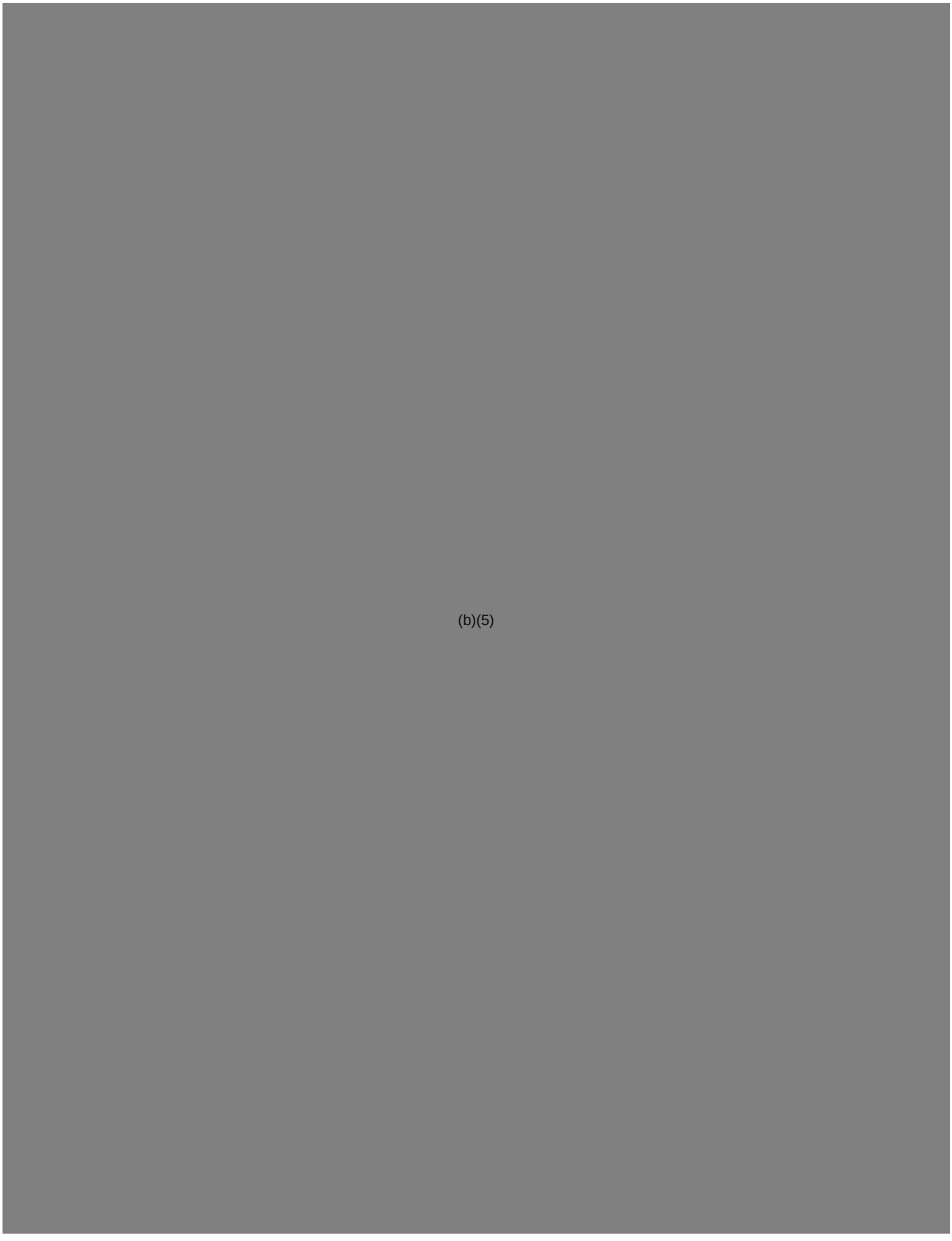
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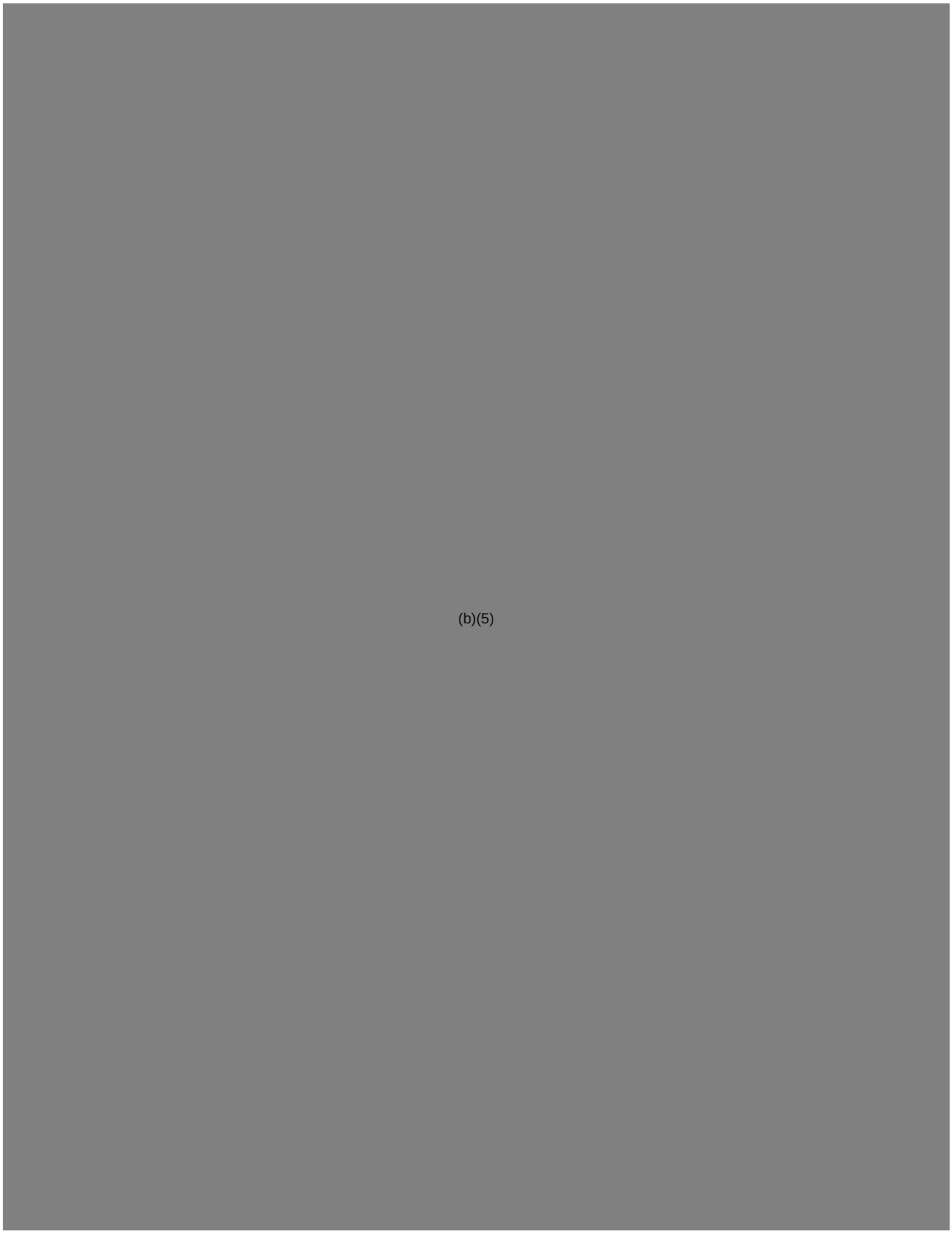
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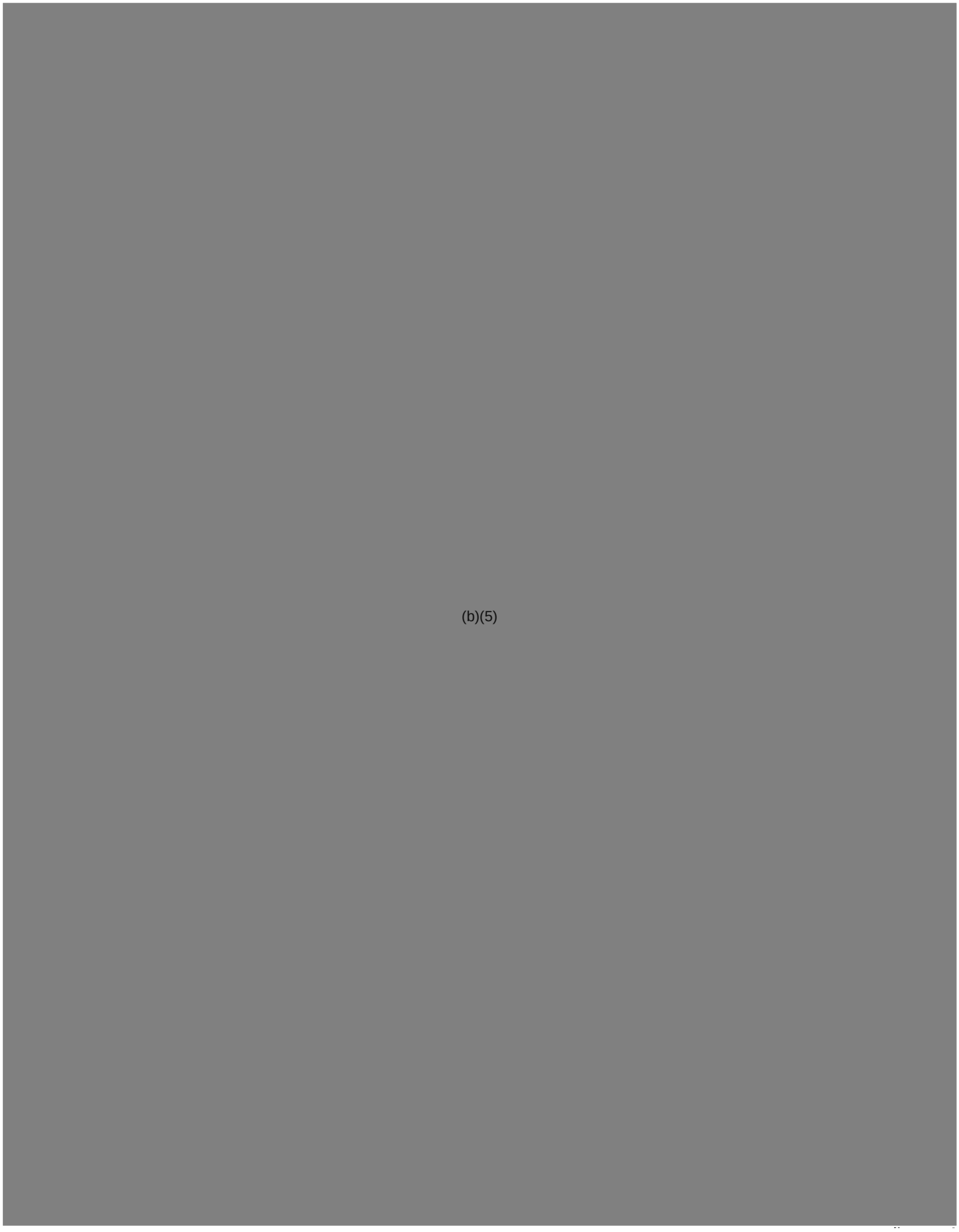
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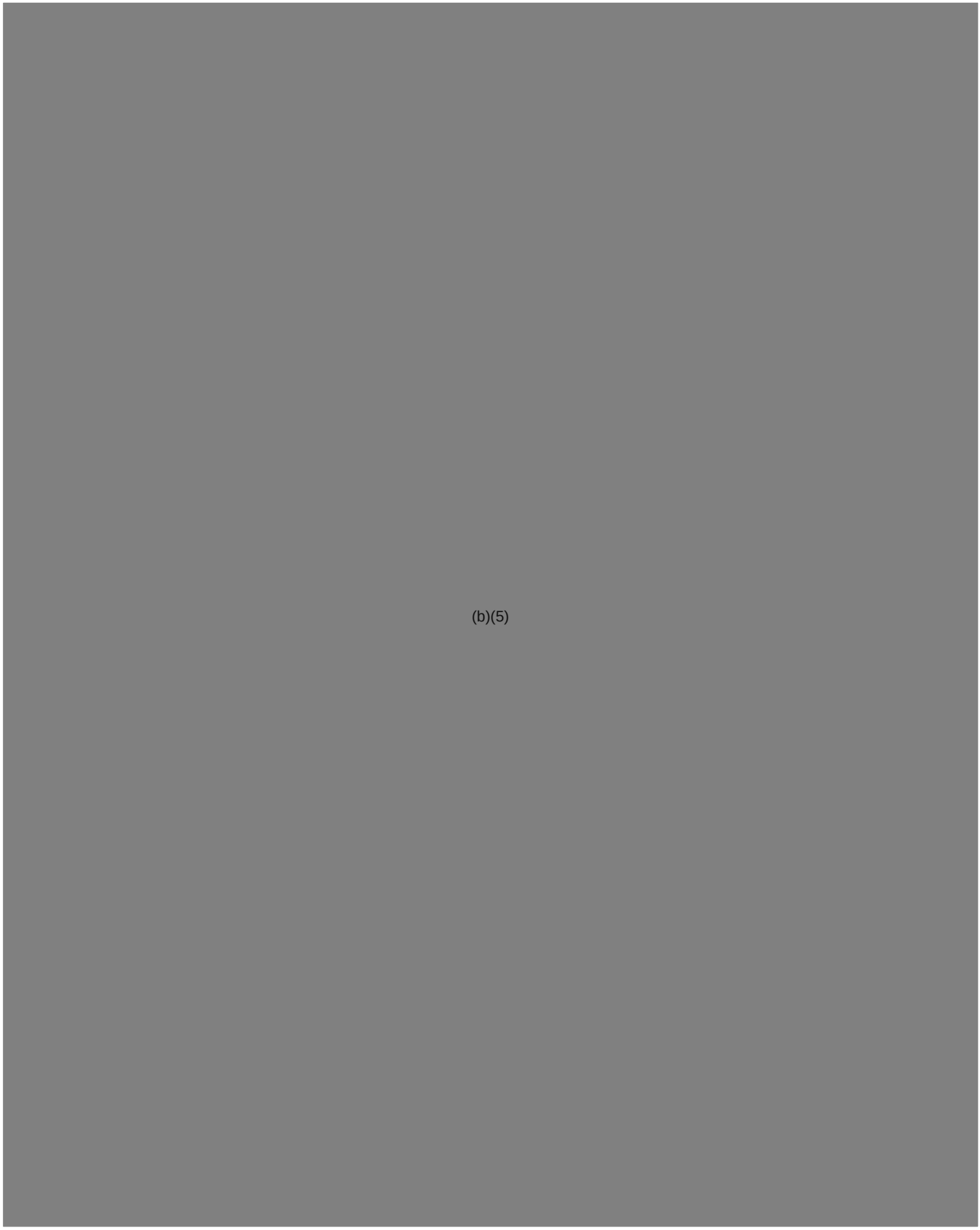
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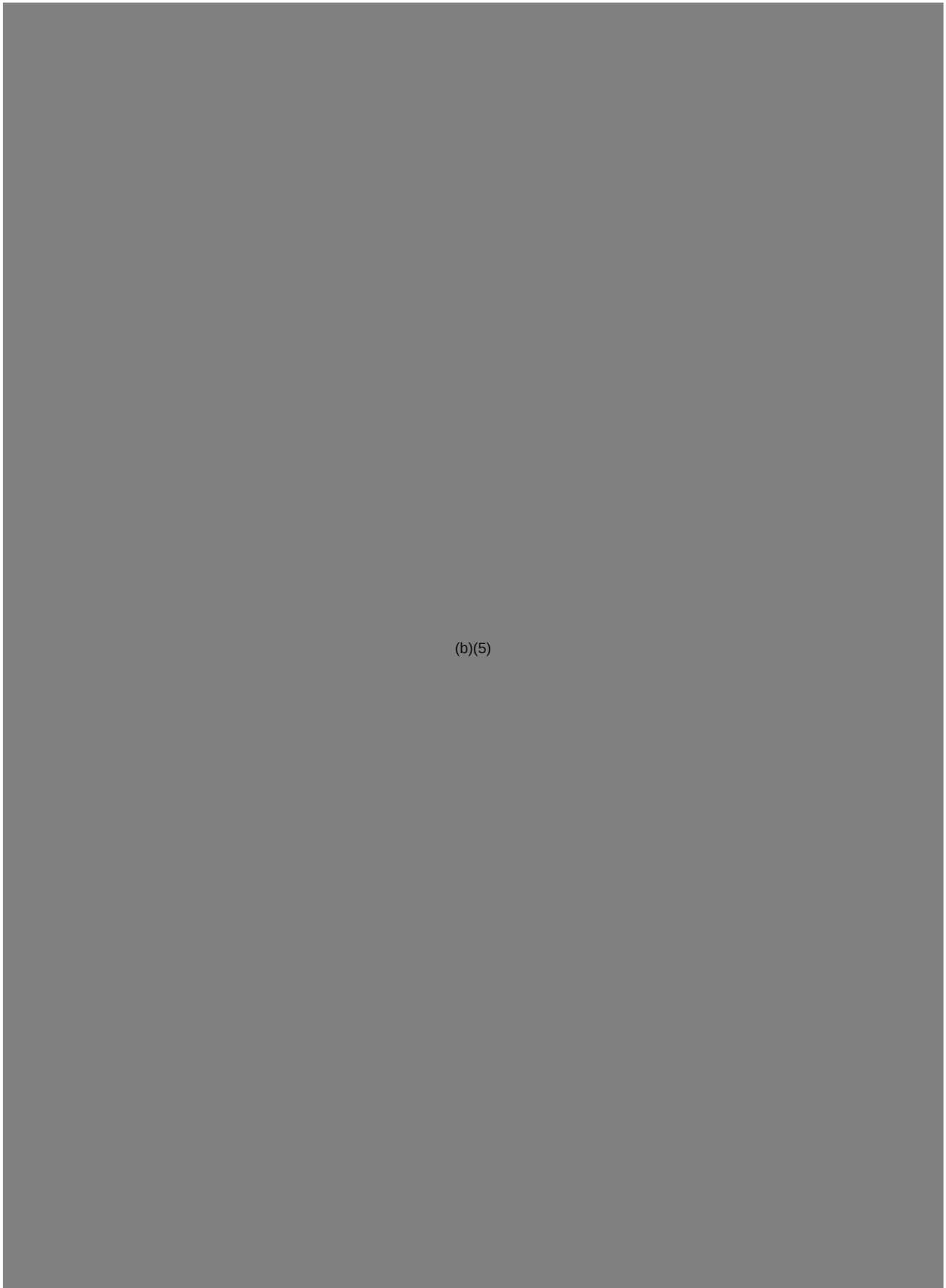
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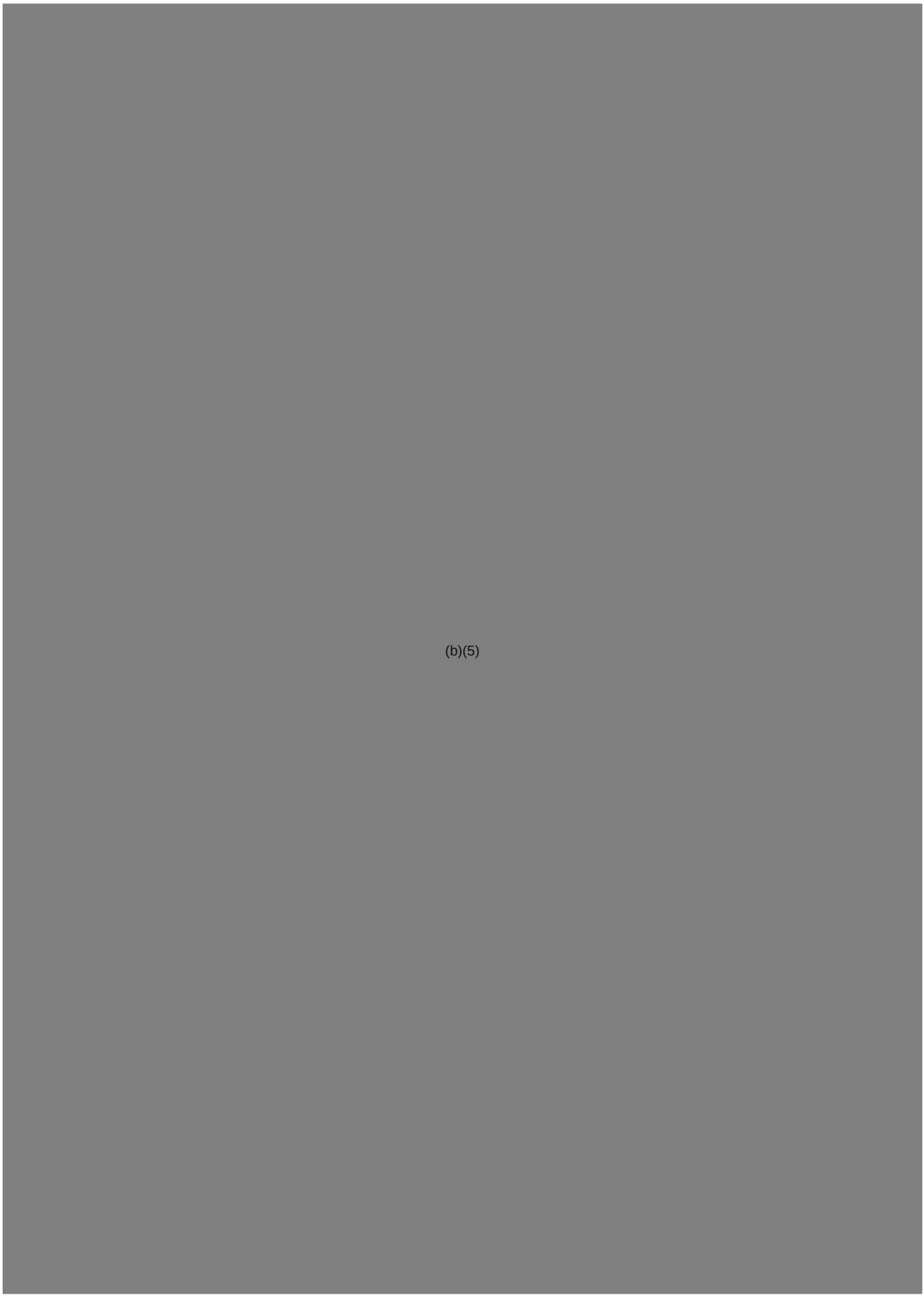
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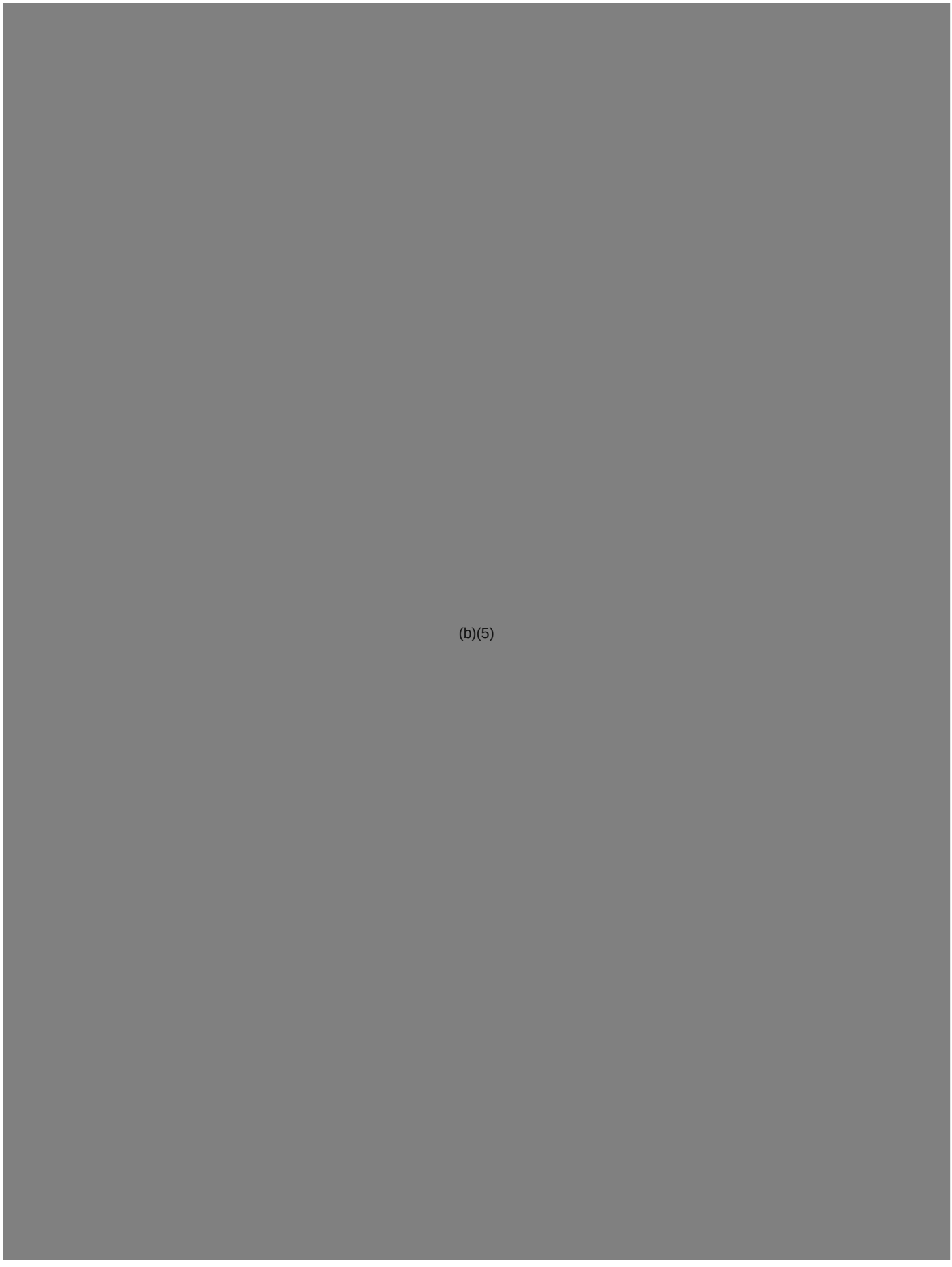
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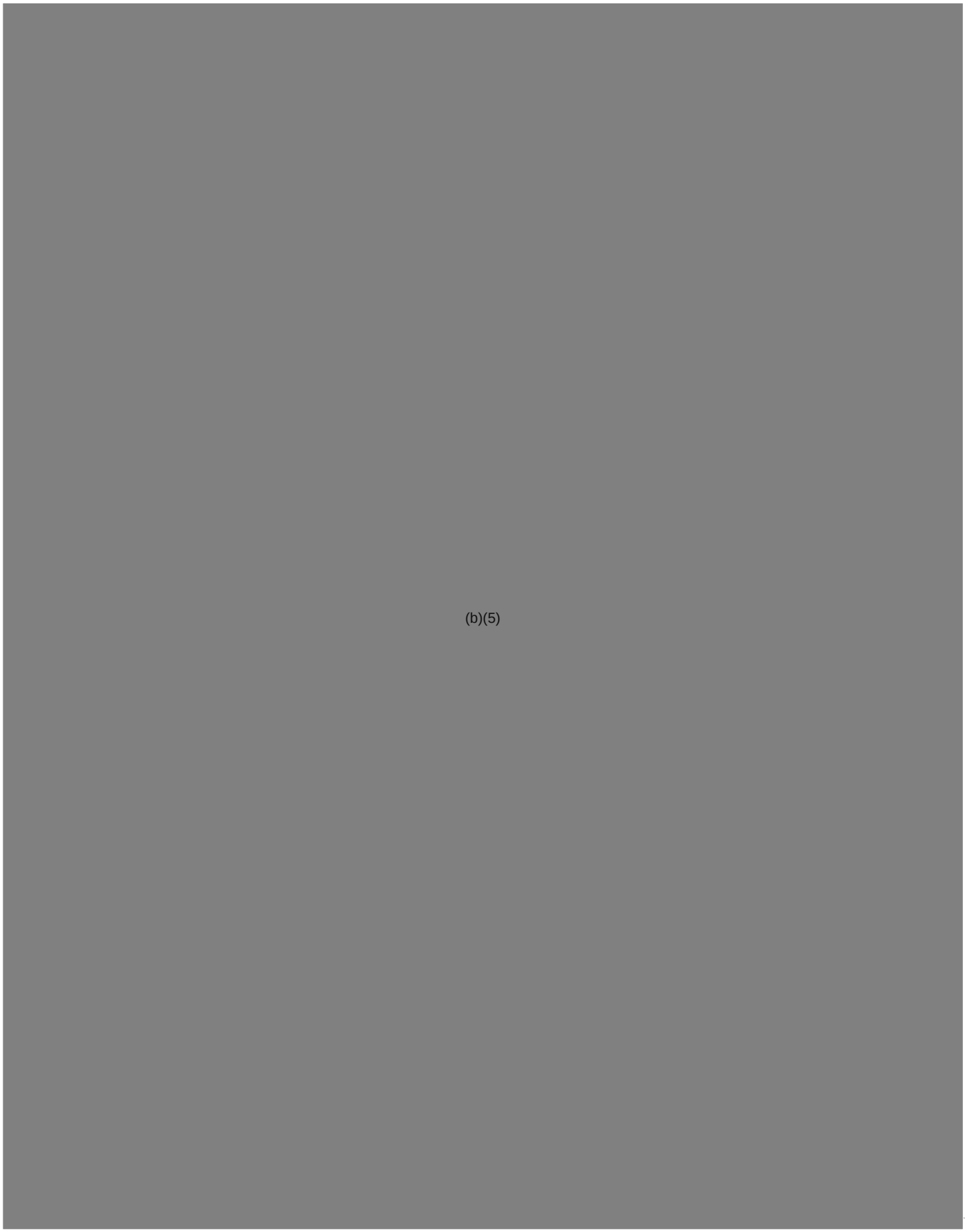
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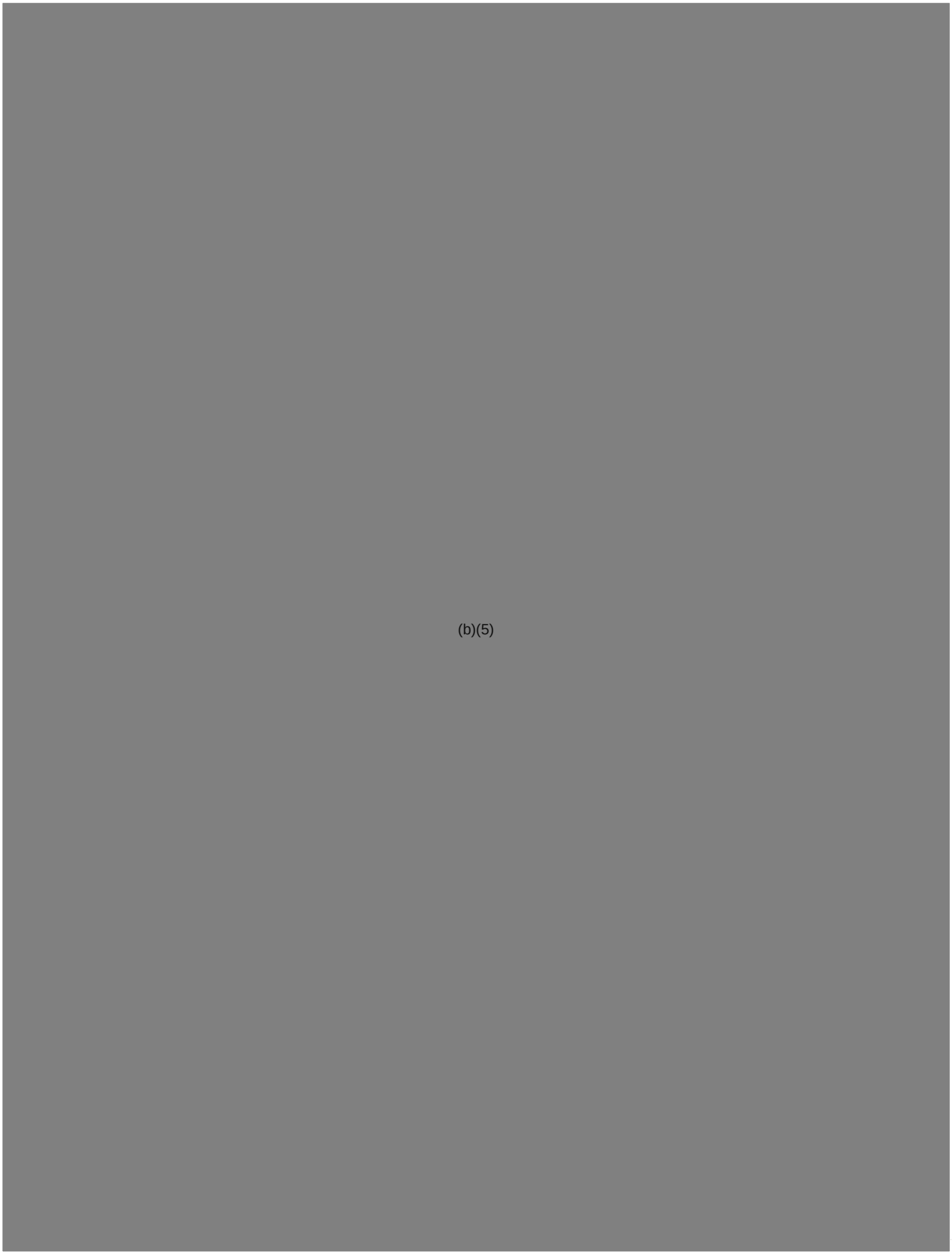
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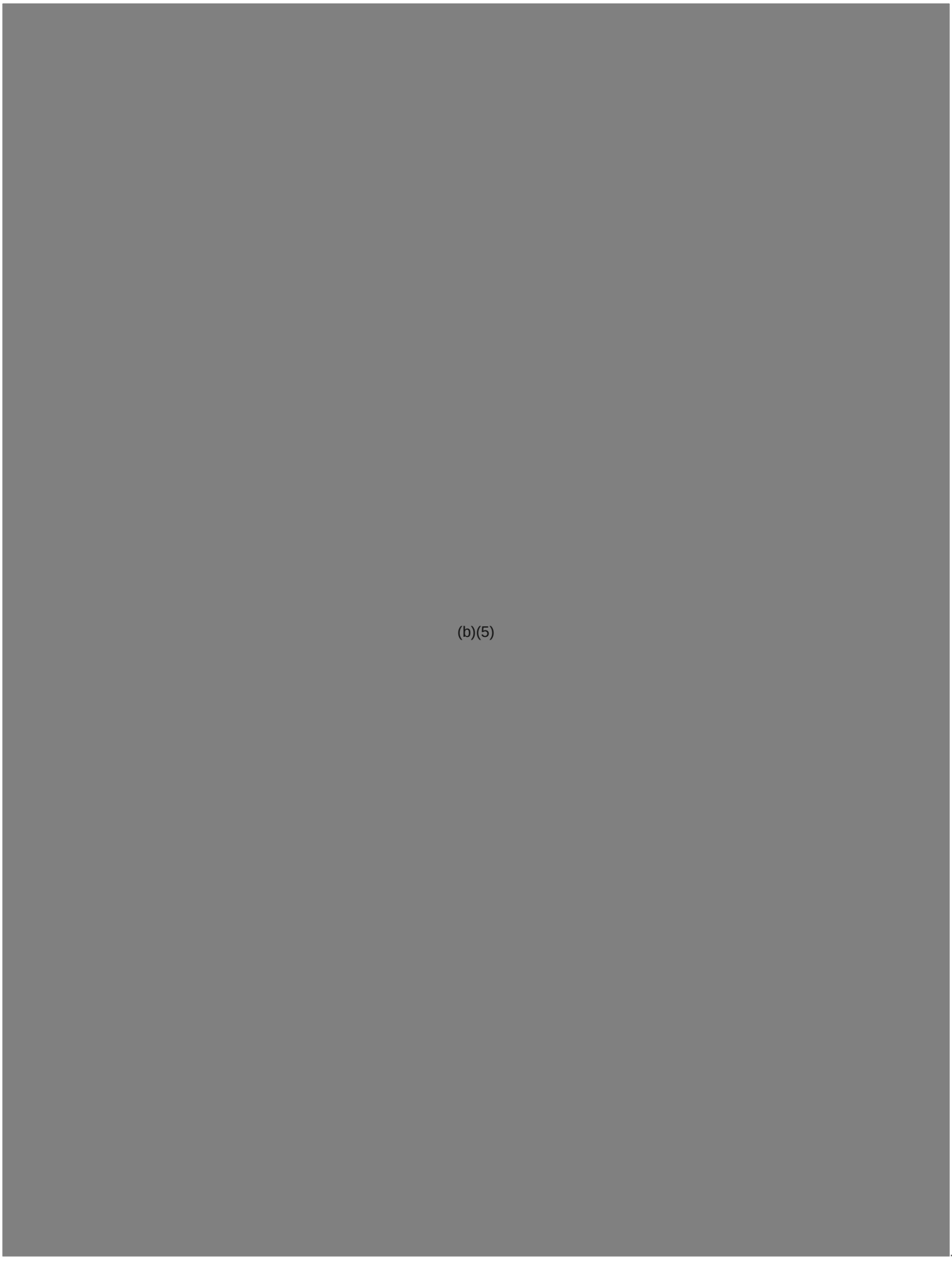
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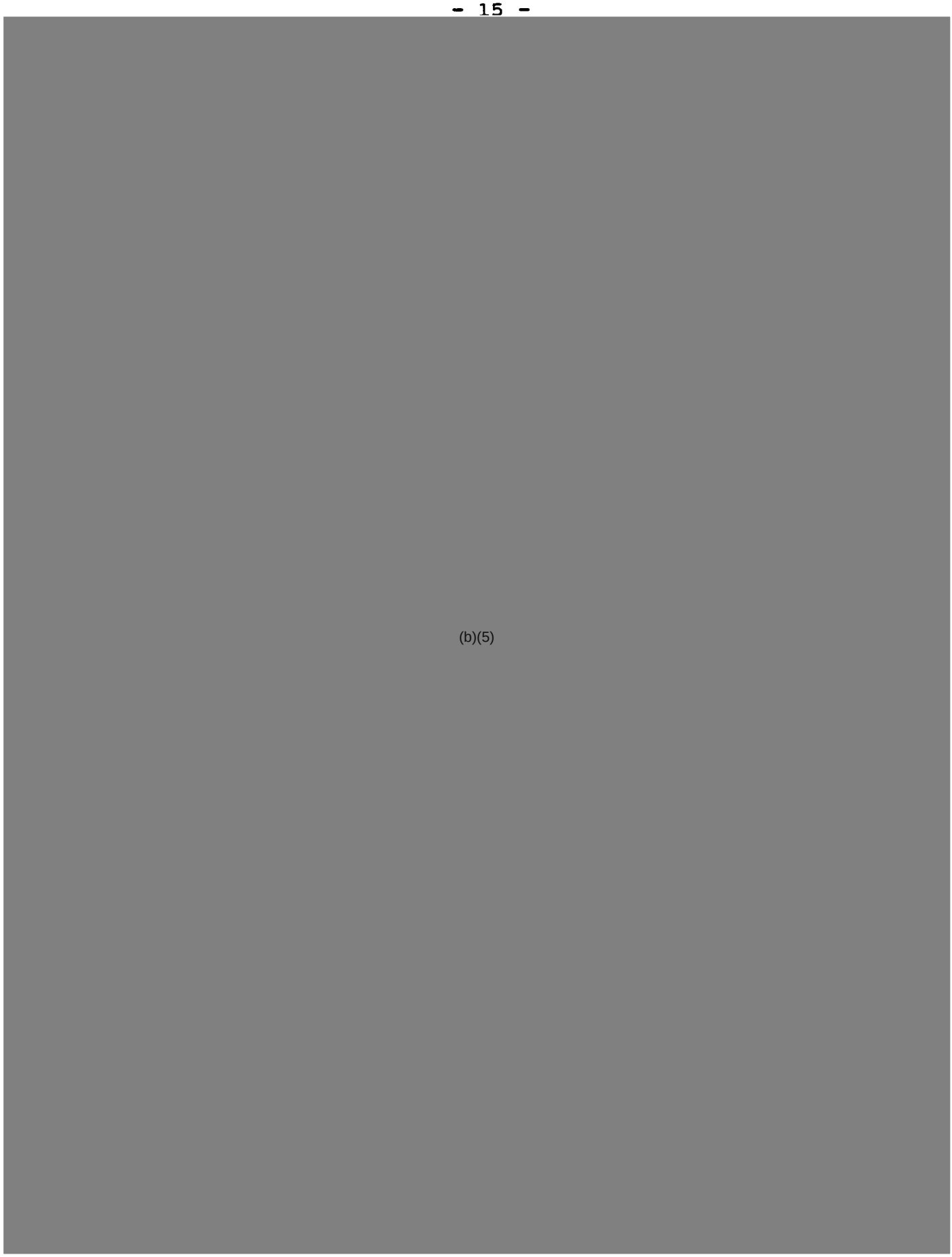
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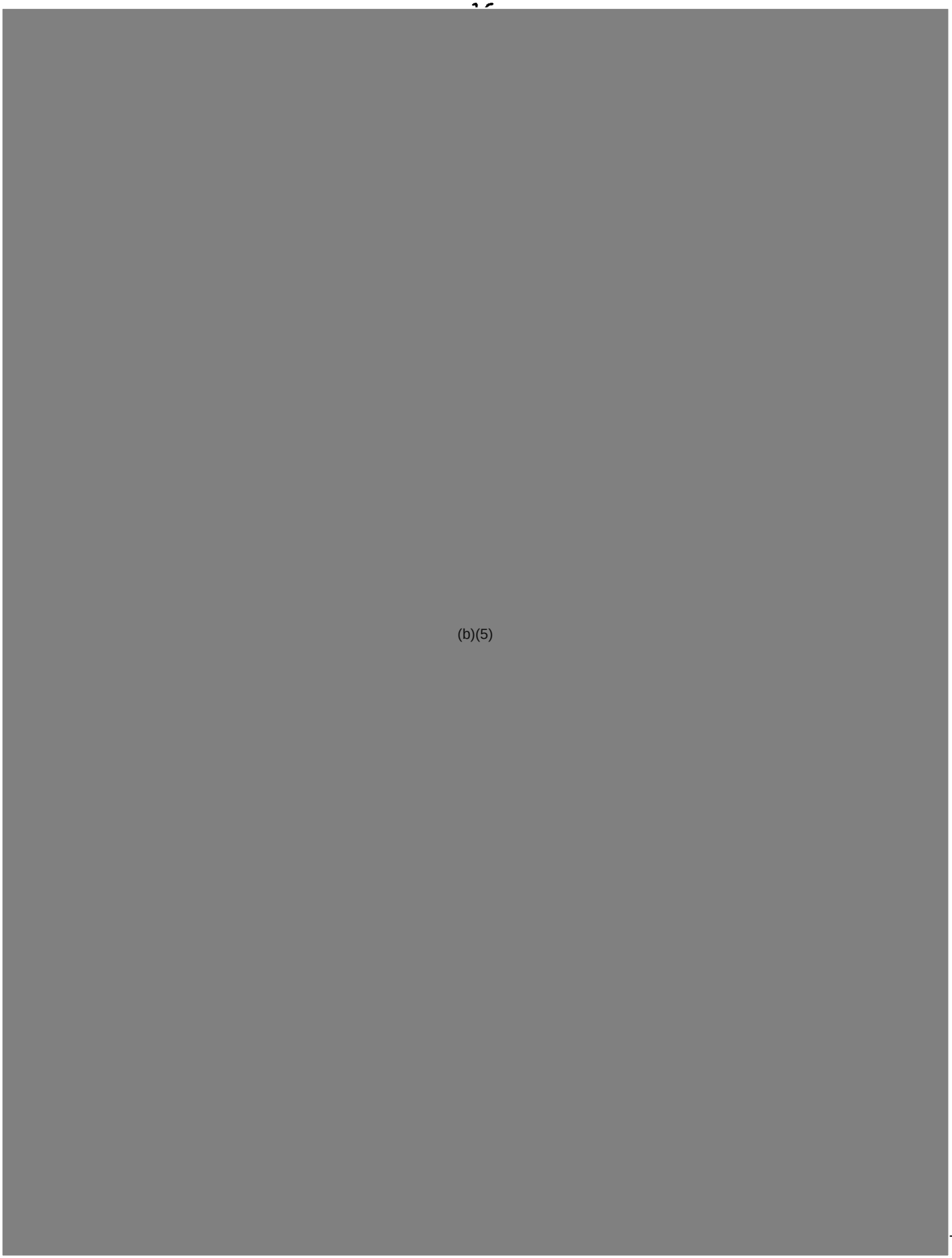
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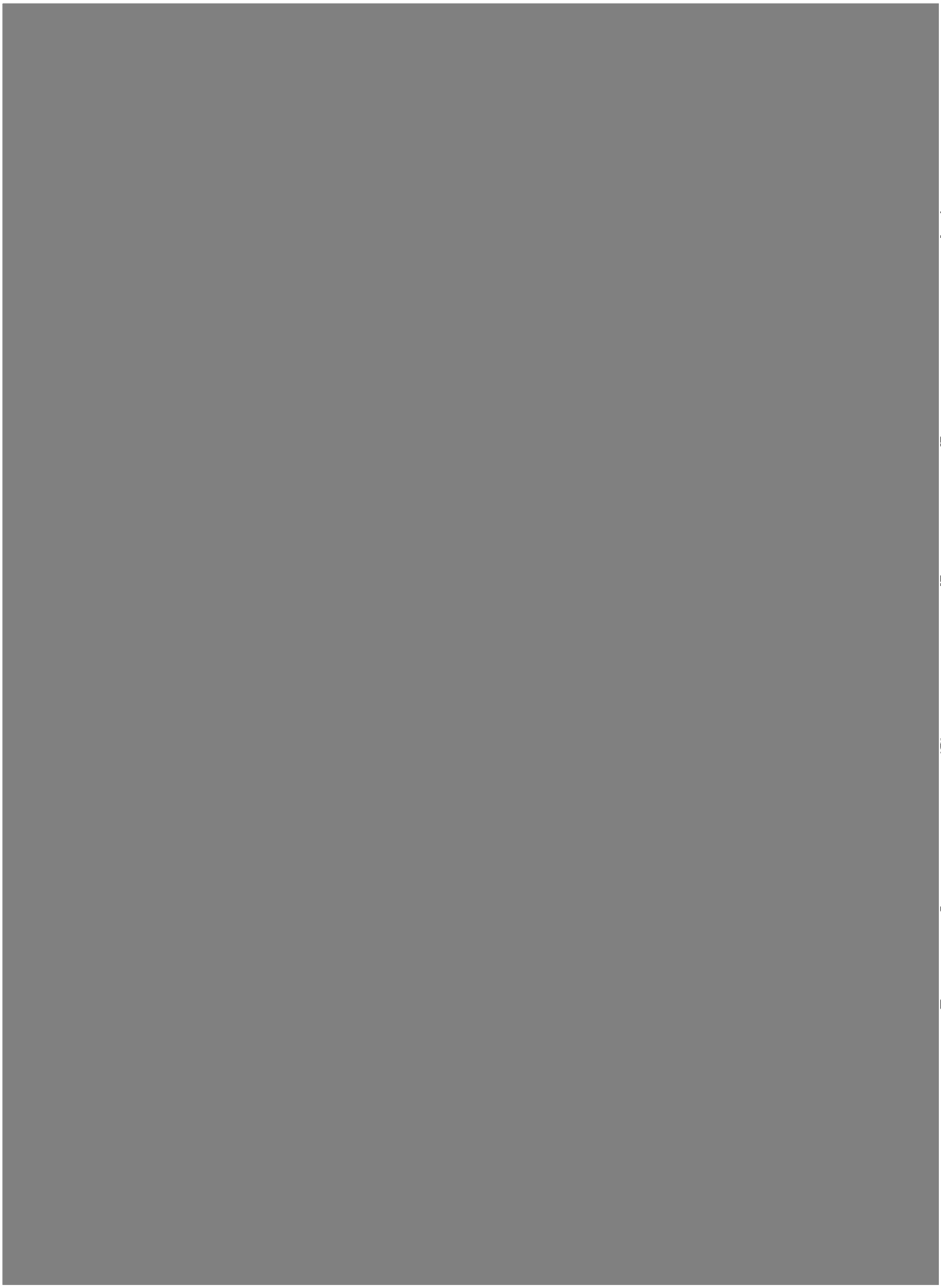

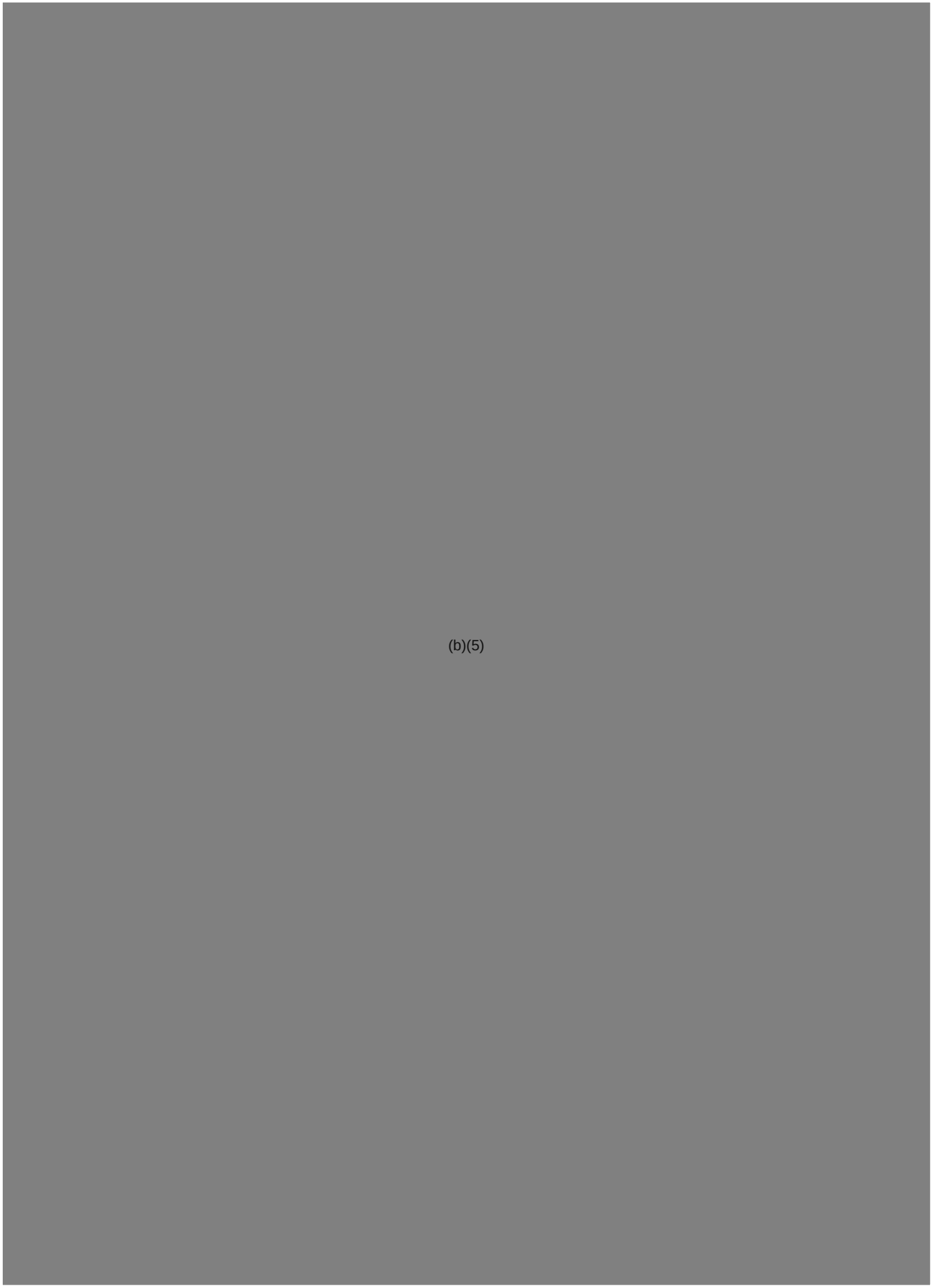
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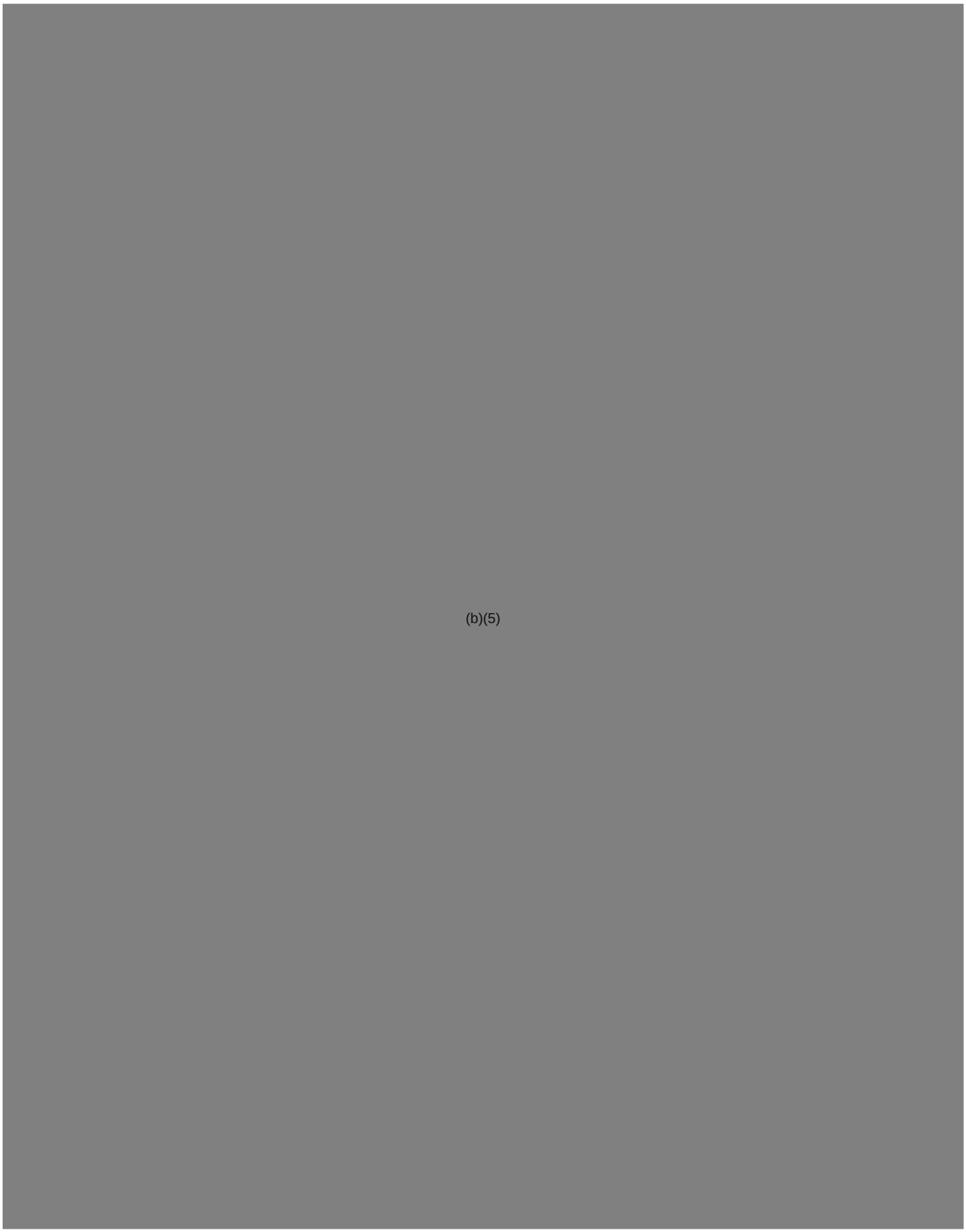
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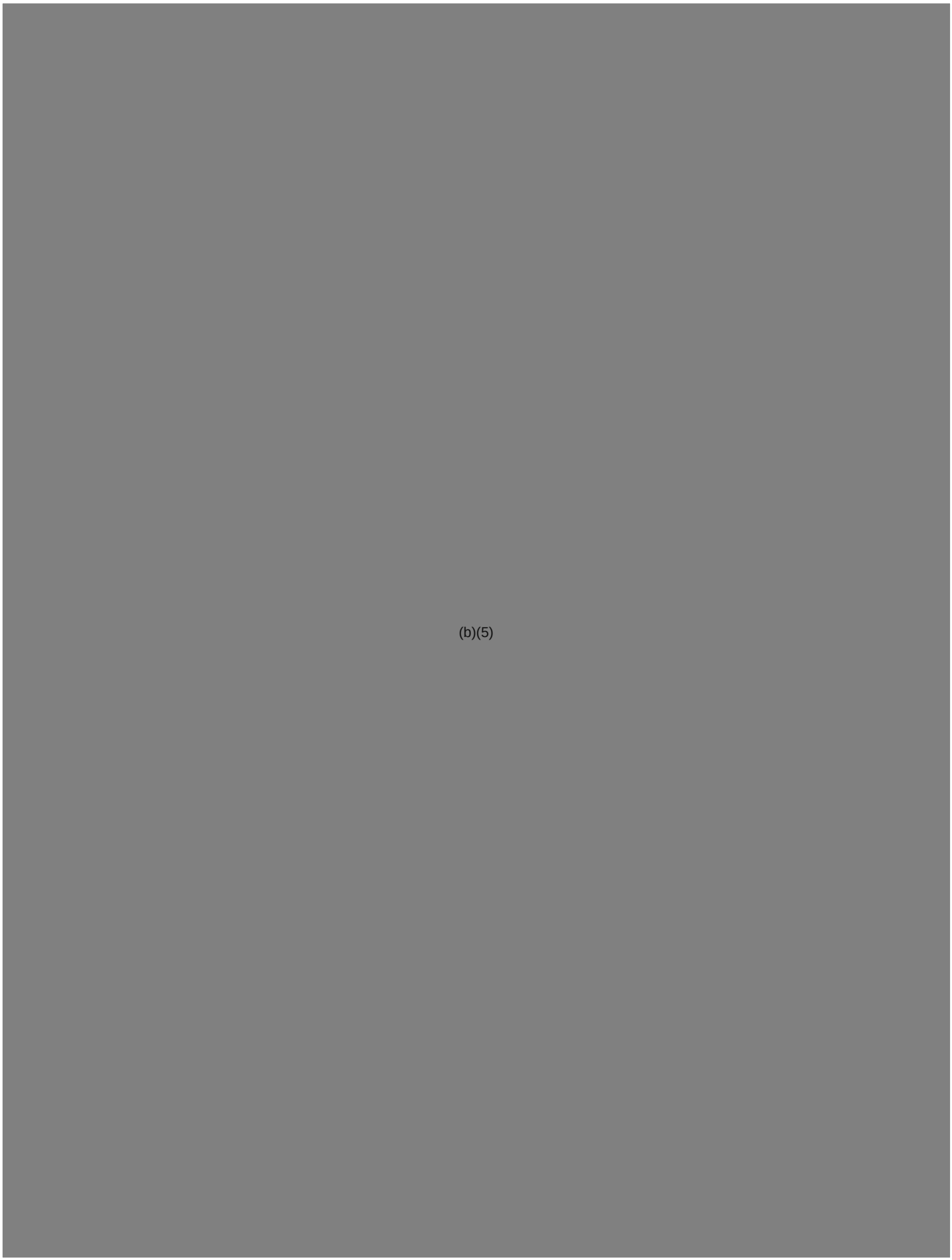

(b)(5)

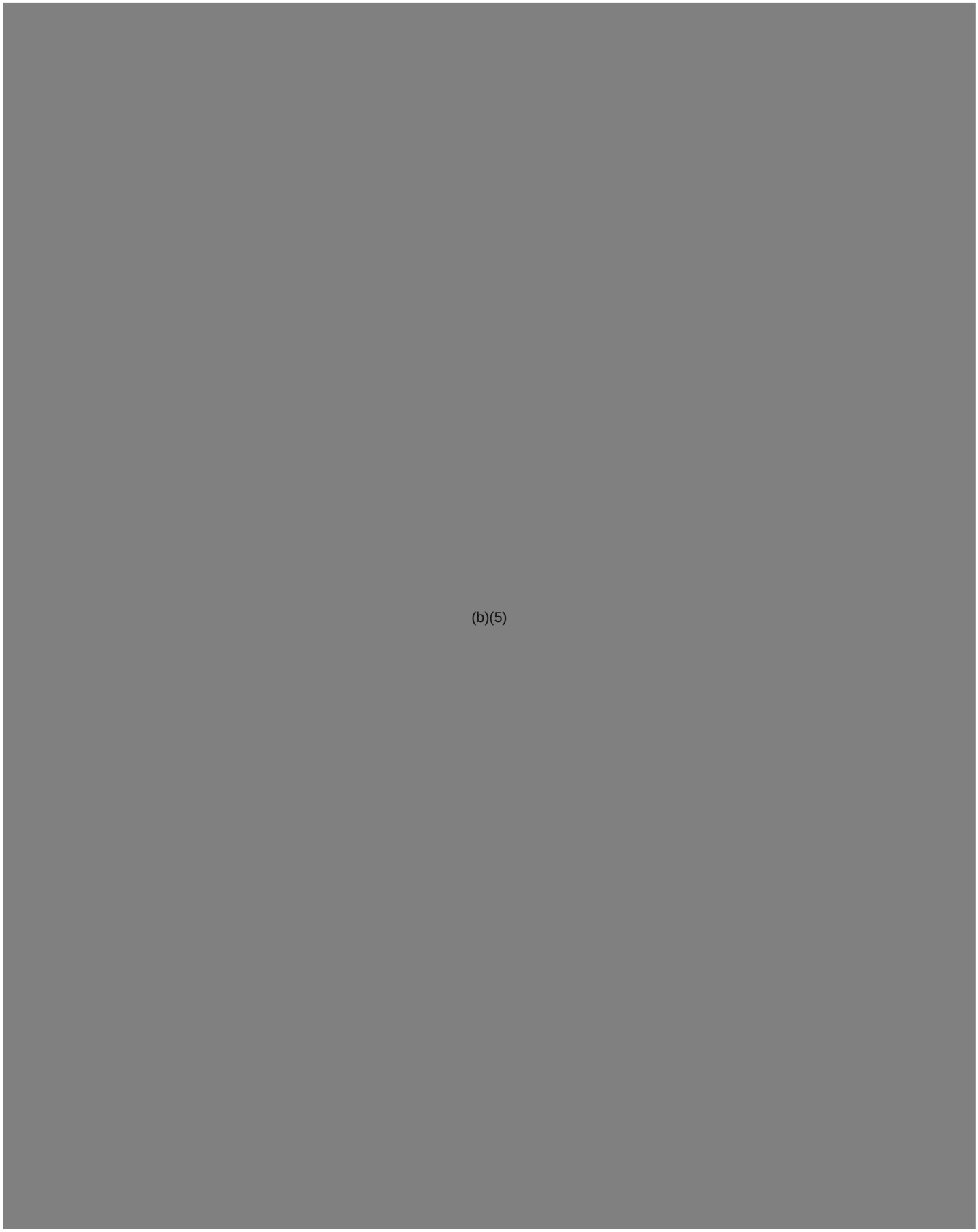
FEDERAL RETIREMENT
THRIFT INVESTMENT BOARD

DATE: July 5, 1996

(b)(5)

SUBJECT: Legality of using someone else's PIN and SSN to obtain account information over the ThriftLine

(b)(5)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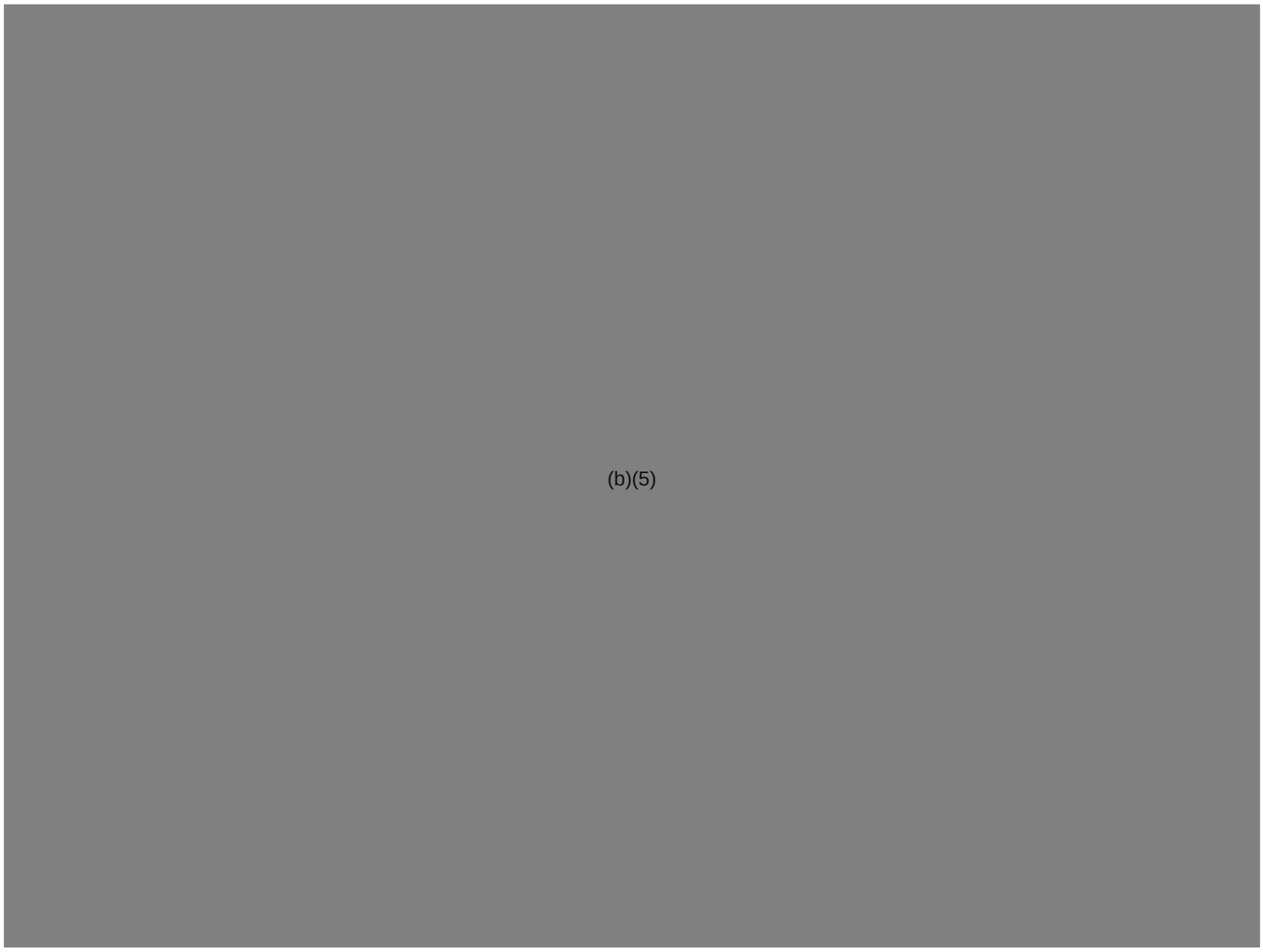

(b)(5)

File - Spouses

April 24, 1991

(b)(5)

UBJECT: Treatment of Legally Separated Spouses with Respect to Waiver and Consent Requirements

(b)(5)

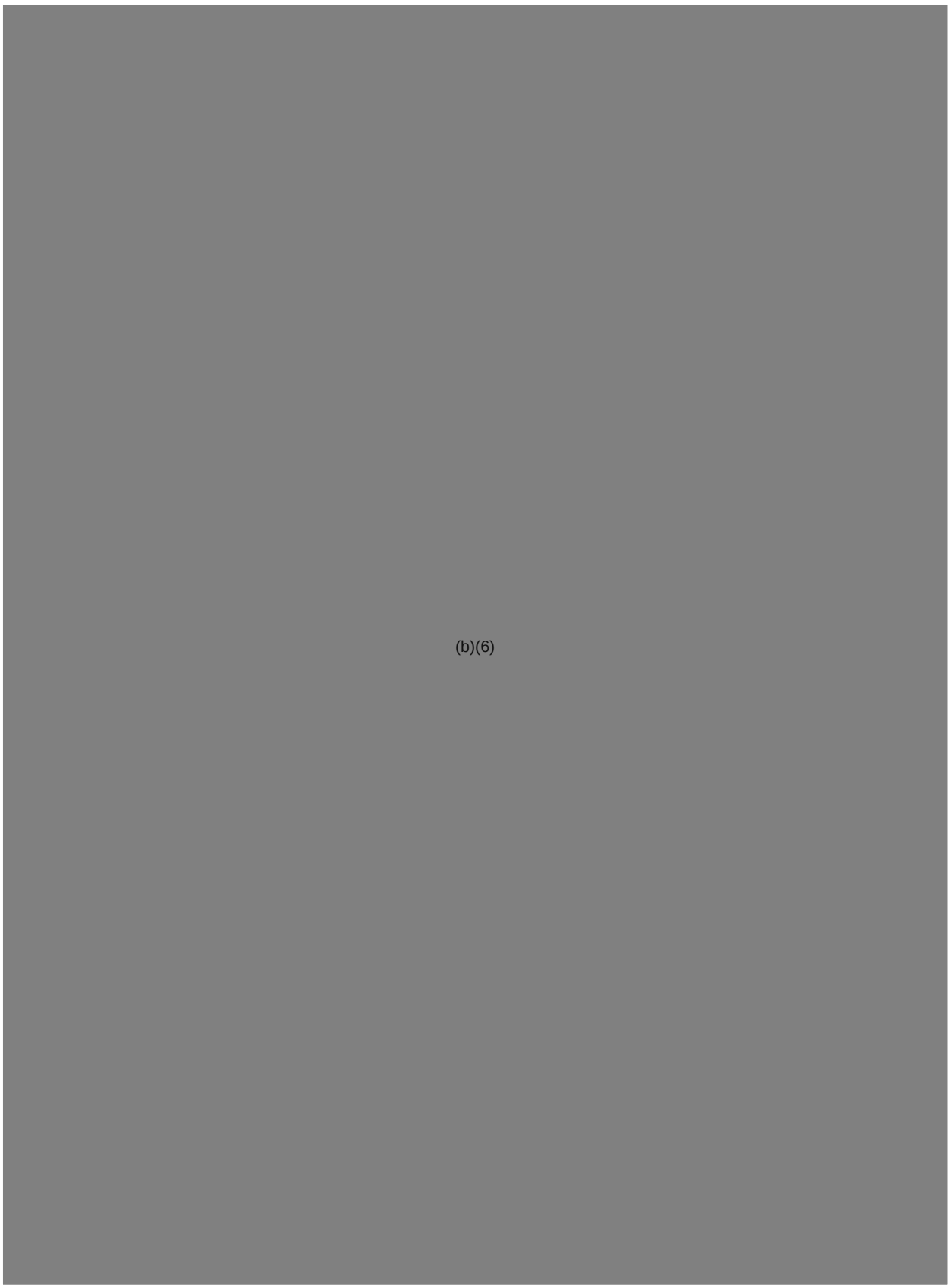
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street, NW Washington, DC 20005

January 15, 1991

[redacted]
(b)(5)

SUBJECT: Separated Spouses - Option to Waive Survivor Annuity

[redacted]
(b)(5)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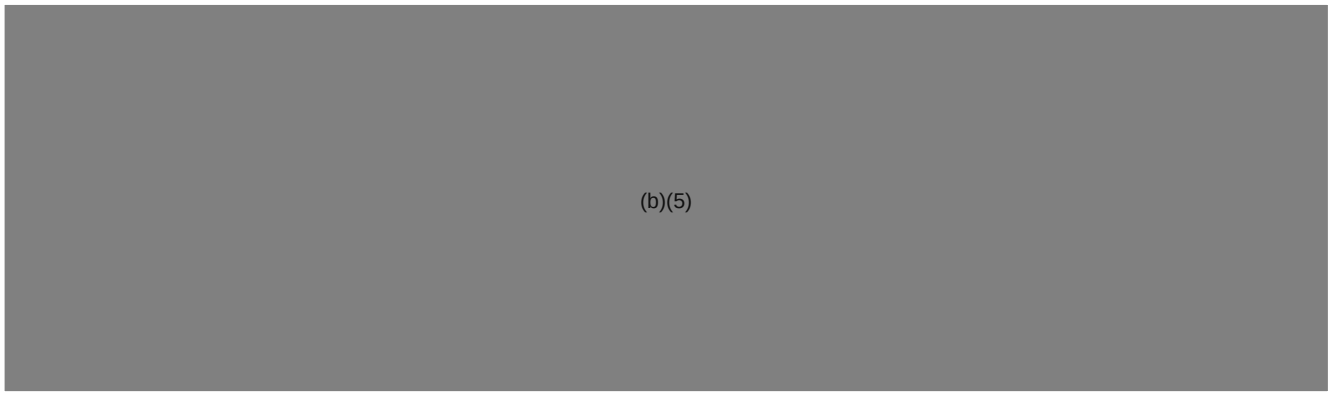
(b)(5)

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

March 21, 2003

MEMORANDUM TO: JAMES B. PETRICK
EXECUTIVE DIRECTOR (ACTING)

FROM: ELIZABETH S. WOODRUFF (b)(6)
GENERAL COUNSEL

SUBJECT: Response to Your E-Mail (attached) Dated March 11, 2003, Regarding Hardship Withdrawals

This is in response to your request for comment on a memorandum from Lawrence E. Stiffler, Director, Office of Automated Systems (OAS), to you in which he states that by using OmniPlus COTS, Thrift Savings Plan (TSP) financial hardship distributions will be self-certified by participants and, therefore, the need for reviewing detailed financial information from participants will be eliminated.

A. What rules are applicable to financial hardships from the TSP?

By law, the TSP is deemed to meet the requirements of I.R.C. § 401(a). I.R.C. § 7701(j)(1)(A) and (B). The tax treatment of TSP is governed by I.R.C. § 7701(j). See Letter from Carol Gold, IRS, to me dated April 22, 1998, concerning tax treatment of error corrections (attached). Thus, it is not required to adopt the rules provided by the IRS for private plans.

Congress added § 8433(h) (formerly 8433 (g)) to title 5, U.S.C., in the Thrift Savings Investment Funds Act of 1996, Public Law 104-208 (Act); It permits TSP participants access to the amount in their accounts attributable to their TSP employee contributions for distributions due to financial hardship. Id. § 8433(h)(3). Congress gave the Executive Director of the Board authority to promulgate regulations to carry out the new statutory provision. 5 U.S.C. § 8433(h)(4). The only available legislative history provides that a financial hardship in-service distribution should be allowed "where there is a clear and demonstrable need." S. Rep. No. 104-274, at 7 (1996).

The Executive Director has promulgated regulations that allow financial hardship distributions for the following reasons: net negative monthly income and extraordinary expenses, i.e., household improvements needed for medical care, medical expenses, personal casualty loss, or legal fees and court costs associated with separation or divorce. 5 C.F.R. § 1650.15(a)(1),(2).[1] Participants requesting a financial hardship distribution must complete Form TSP-76, Financial Hardship In-Service Withdrawal Request and a Financial Statement in order to establish that they have negative monthly income or have suffered one of the extraordinary expenses listed above. The amount of the withdrawal request must be at least $1000.00. Id. § 1650.31(a). The amount of the financial hardship distribution cannot exceed the smaller of the amount requested, the amount of the participant's employee contributions (and attributable earnings), or the amount (after tax withholding) that would make up for the negative cash flow for six months and the extraordinary expense. Id. § 1650.31(b).

The TSP In-Service Withdrawal Booklet outlines the income information and supporting documentation that must accompany a financial hardship withdrawal request. These include: a statement of monthly income, including salary, tax withholding, and other payroll deductions, alimony and child support, special or incentive pay for a uniformed services member; a current earnings and leave statement; an itemization of major (not all) monthly living expenses such as housing, utilities, dependent care, and installment loan payments. A request for a financial hardship distribution due to extraordinary expenses must be accompanied by documentation supporting the amount of the expense, such as medical support for a household improvement and unpaid bills for the cost of the improvement; police, insurance, or similar reports establishing that there has been a casualty loss, copies of insurance statements, and documentation of the cost of the repair; copies of bills for attorney fees; or explanation of benefits forms from an insurance provider and medical bills. These documents are reviewed by the TSP Service Office to determine whether the participant qualifies for a financial hardship withdrawal and to estimate the amount the participant may withdraw.

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[1] Financial hardship distributions are includible, for Federal tax purposes, in income and, if the participant who receives the distribution is less than 59½ years old at the time of distribution, he or she is subject to the 10% early withdrawal penalty. I.R.C. §§ 72(t) and 402(a). The Report states that the tax effect of the distribution should discourage the use of financial hardship distributions. S. Rep. No.104-274, at 2, 3.

B. What rules are applicable to financial hardships from private plans?

When it enacted FERSA, Congress was clearly aware of private sector financial hardship in-service distribution practices. S. Rep. No. 104-274, at 2. ("The changes [hardship withdrawals and simplified loan rules] are consistent with the practice of private sector 401(k) plans"). The Internal Revenue Code permits a 401(k) plan to provide for financial hardship distributions. I.R.C. § 401(k)(2)(B)(IV)(4). Such a hardship distribution can only be made for an "immediate and heavy financial need" and the amount distributed must be only the "amount necessary to satisfy that financial need." Treas. Reg. § 1.401(k)-1(d)(2). The plan must determine the existence of an immediate and heavy financial need in accordance with objective and nondiscriminatory standards. Id. § 1.401(k)-1(d)(2)(i).

In order to provide objective standards, the IRS regulations include two safe harbor provisions for financial hardship distributions. The first safe harbor provides standards for determining whether an immediate and heavy financial need exists. A financial hardship distribution will be deemed to meet the "immediate and heavy financial need" requirement if the distribution is made for one of the following reasons: medical care expenses as defined in I.R.C. § 213(d); purchase of a principal residence; payment of tuition, educational fees, or room and board for the next 12 months of post-secondary education; or payments necessary to prevent the eviction of the participant from his or her principal residence or foreclosure of the mortgage on that residence. Treas. Reg. § 1.401(k)-1(d)(2)(i).

A plan may provide for hardship distributions for other purposes but these other purposes are subject to a facts and circumstances test, i.e., the plan must review and determine whether (1) the need is immediate and heavy and (2) it is necessary for the participant to withdraw funds from his or her account. Id. § 1.401(k)-1(d)(2)(i). For example, a plan may provide that a participant may receive a hardship distribution for funeral expenses of a family member. Treas. Reg. § 1.401(k)-1(d)(2)(iii).. The plan administrator in this case would require documentation that the deceased was a family member and that the participant is responsible for the funeral expenses. In contrast, a distribution to a participant for a boat or television is not made on account of an immediate and heavy need. Id.

The second safe harbor provides standards for determining that the amount of the financial hardship distribution is no more than the amount that is necessary to relieve the immediate and heavy financial need. This safe harbor provides that a distribution will be deemed to equal the immediate and heavy financial need if (1) the distribution is not in excess of the need, (2) the employee has obtained all distributions and all plan loans currently available, and (3) the employee is prohibited from contributing to the plan for six months after receipt of the hardship distribution. Treas. Reg. § 1.401(k)-1(d)(2)(iv)(B).[2] If a plan uses this safe harbor test to determine the necessity of the distribution, the plan administrator does not have to review all of the relevant facts and circumstances, i.e., the participant's personal financial information, to determine that the need is not capable of being satisfied from other reasonably available sources of the participant and his spouse (which are treated as the participant's assets).

The IRS regulations also provide a method to meet the requirement (number 2 above) that the participant cannot relieve the immediate and heavy financial need through means other than through a financial hardship withdrawal and that method provides for a written statement from the participant. The plan administrator may rely on a self-certified statement from the participant that the need cannot be relieved through reimbursement, compensation or insurance, by liquidation of the participant's assets (the assets of the participant's spouse are treated as the assets of the participant), by cessation of employee contributions, or distributions or plan loans. Treas. Reg. § 1.401(k)-1(d)(2)(iii)(B)(1)-(4). The plan administrator cannot rely on the self-certification if the administrator has actual knowledge that the certification is not correct or true, such as where the participant's statement that he has exhausted other types of distributions from the plan (such as a loan) is contradicted by plan records. Id. Thus, adoption of either the safe harbor test or the self-certification relieves the plan administrator from conducting an extensive investigation of the participant's personal assets.[3]

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[2] The I.R.C. § 401(k) regulations actually provide for a 12 month period of suspending employee contributions but this restriction was amended by section 636(a)(1) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law No. 107-16, which reduced the 12 month period to six months.

[3] I have attached two sample 401(k) forms that do not require the participant to submit documentation. This suggests that it may be reasonable to require documentation from some but not all appli-

C. Does the TSP have to make receiving a financial hardship distribution difficult in order to prevent participants from squandering their retirement savings?

There is support for this statement in the TSP's legislative history in which Congress states, that financial hardship distributions would have to be documented and are discouraged by tax law. See S. Rep. No. 104-274, at 2.[4] This is one of the reasons that the IRS requires that a private plan provide objective standards to determine both what is a financial hardship and to determine the amount necessary to alleviate that hardship. Treas. Reg. § 1.401(k)-1(d)(2)(i). This is one of the reasons why the Executive Director adopted the requirement that a TSP participant receiving a financial hardship distribution could not make employee contributions (and would lose associated matching contributions) for six months after receiving the distribution.

Because the TSP is not statutorily required to follow the IRS rules for private plans, it can adopt its own standards, as long as those standards are not arbitrary and capricious.[5] Thus, the TSP has the discretion to adopt a self-certification process, such as that suggested in Larry's memorandum. (A participant's statement, under penalty of prosecution, can constitute "documentation"

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cants to ensure that participants who are requesting financial hardships are doing so to meet their immediate and heavy financial needs (attached).

[4] This is not a requirement the TSP has followed in the past. For example, the net income test may be used by participants to squander their TSP accounts. Item 42 of Form TSP-76 asks the participant to certify his or her monthly loan amount. This monthly loan amount may include payments for luxury items such as a boat, a fur coat, a BMW, etc. In other words, by granting a TSP financial hardship distribution based on this type of debt, the TSP is arguably permitting the participant to squander his retirement savings.

[5] The TSP's withdrawal regulations are promulgated by the Executive Director of the Board pursuant to the authority granted to him at 5 U.S.C. § 8433(h)(4); therefore, the regulations are entitled to judicial deference. Chevron v. National Resource Defense Council, 467 U.S. 837, 843-44 (1994) (legislative regulations are entitled to deference and given controlling weight unless arbitrary, capricious, or manifestly contrary to statute).

for purposes of FERSA.) It also has the discretion to adopt the objective standards for financial hardship distributions offered by SunGard. 5 U.S.C. § 8433(h)(4).

According to SunGard, OmniPlus COTS follows the IRS's safe harbor rules. See SunGard EBS Processing Hardship Withdrawals In The Private Sector (attached). The model requires that the participant submit documentation of the existence of a financial hardship (as opposed to self-certification). The SunGard model uses the safe harbor test for the amount necessary to relieve the financial hardship. For computation of the amount of the financial hardship distribution that is available to the participant, the SunGard model also restricts a participant to his or her employee contributions (without attributable earnings), after deducting previous hardship distributions. Treas. Reg. § 1.401(k)-1(d)(2)(ii).[6]

Conclusion

It is my opinion that the Board has the discretion to allow self-certification of TSP financial hardship distributions or to adopt SunGard's model which is based upon the I.R.C. § 401(k) regulations.

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[6] The language of 5 U.S.C. § 8433(h)(3) is consistent with SunGard's formula in that it provides that a participant may withdraw from his or her account only amounts that are "attributable to employee contributions." However, there is an indication in the legislative history that Congress anticipated that the earnings attributable to employee contributions would also be available to participants. S. Rep. 104-274, p 6, that a TSP participant who wants to obtain a TSP financial hardship withdrawal would be able to withdraw his or her own "contributions and associated earnings".) Thus, the language of our statute may be read to include earnings in the amount that a participant may receive. IRS section 401(k) regulations permit a plan to include earnings as eligible for withdrawal. Treas. Reg. § 1.401(k)-1(d)(2)(ii).

From: James Petrick
To: ewoodru
Date: 3/11/03 5:31PM
Subject: Hardship withdrawals