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May 23, 2017

VIA ECF AND ELECTRONIC MAIL

Honorable Stuart M. Bernstein
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Room 723
New York, New York 10004-1408
Bernstein.chambers@nysb.uscourts.gov

Re: In re: Bernard L. Madoff—302 Statements, dated December 16, 2008

Dear Judge Bernstein:

Counsel for the Trustee and Chaitman LLP are scheduled to appear for a hearing on various procedural and discovery disputes on May 31, 2017. As the Court is aware, a small group of Defendants for whom Ms. Chaitman is lead counsel have spent considerable time and resources pursuing testimony from Mr. Bernard Madoff concerning the start date of the fraud. Since that evidentiary issue directly relates to much of the procedural and other relief requested by Ms. Chaitman, we believe it would assist the Court to review the FD-302 forms from the Federal Bureau of Investigation (the “FBI”), which the Trustee just obtained from the United States Attorney’s Office (together with the FBI, the “Government”).¹

The FD-302 forms (the “302 Statements”) are a contemporaneous memorialization of Mr. Madoff’s direct statements to the Government, which he made five days after his arrest. They directly refute Ms. Chaitman’s continued assertion that the fraud did not start until 1992, for which Mr. Madoff’s own confused later testimony is her sole evidentiary basis. Even then, the Trustee respectfully asserts that the credibility of the world’s most notorious financial criminal—eight years after his conviction—must be afforded the utmost scrutiny.

¹ The Government first produced a redacted FD-302 form to the Trustee on May 17, 2017, then subsequently produced the same document with fewer redactions on May 23, 2017, both of which are attached hereto as Exhibits A and B, respectively. The transmittal letters accompanying the 302 Statements, dated May 17, 2017 and May 23, 2017, respectively, are attached hereto as Exhibits C and D.

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The 302 Statements confirm the validity of the Trustee's long-held position that BLMIS's Investment Advisory business operated as a fraud nearly from its inception and reinforces the Trustee's position that Mr. Madoff, the world's most notorious financial criminal, is not a credible witness. In particular, the 302 Statements confirm,

The fraud entailed MADOFF taking in funds from investors, holding those funds, and paying them out to investors seeking redemptions. It was essentially a Ponzi scheme. Customers received both monthly account statements and trade confirmation reflecting trades the [that] never took place.

Ex. B at BHUSA0000022 (emphasis added).

When MADOFF first began the retail business he did initially engage in some actual trades. Soon, however, he began to engage in fraud as to the entire retail business. He stopped engaging in any actual trading. For virtually the entire life of the retail business MADOFF simply did not trade and sent investors false account statements and false trade confirmations.

Id. at BHUSA0000021 (emphasis added). The 302 Statement further notes "MADOFF began engaging in fraud in earnest in the 1970s." *Id.* at BHUSA0000022 (emphasis added). With respect to purported trading that occurred in the Investment Advisory business, the 302 Statement reads,

As there was no actual trading, nothing cleared through DTCC or any clearing firm, and the only records of the purported trades are the paper confirmations.

Id. at BHUSA0000022 (emphasis added).

Respectfully, the Trustee submits that the 302 Statements should put an end to Ms. Chaitman's attempts to expend further time and the Trustee's resources on what amounts to a protracted fishing expedition. At a minimum, the 302 Statements should preclude further discovery regarding Ms. Chaitman's unsubstantiated claim that the Trustee has either withheld or failed to timely produce records that would show that trading occurred for customers of BLMIS's Investment Advisory business. The Court should not permit Mr. Madoff to commit a fraud on his former customers for a second time.

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Respectfully submitted,

/s/ Edward J. Jacobs

Edward J. Jacobs

cc: Helen Davis Chaitman, Chaitman LLP (via email)
Gregory Dexter, Chaitman LLP (via email)
Andrew Kratenstein, McDermott Will & Emery LLP (via email)
Robert Rich, Hunton & Williams LLP (via email)
Carole Neville, Dentons LLP (via email)
Jonathan K. Cooperman, Kelley Drye & Warren LLP (via email)
Matthew Kupillas, Milberg LLP (via email)

EXHIBIT A

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/18/2008

BERNARD MADOFF was interviewed pursuant to a proffer agreement in the presence of his attorneys Daniel Horowitz, Ira Sorkin, and Nicole DeBello. at the offices of the United States Attorney's Office, SDNY. [REDACTED]

[REDACTED] In addition to the standard SDNY proffer agreement, an analogous SEC civil agreement was executed. MADOFF provided the following information:

[REDACTED]

Investigation on 12/16/2008 at New York, NY

File #

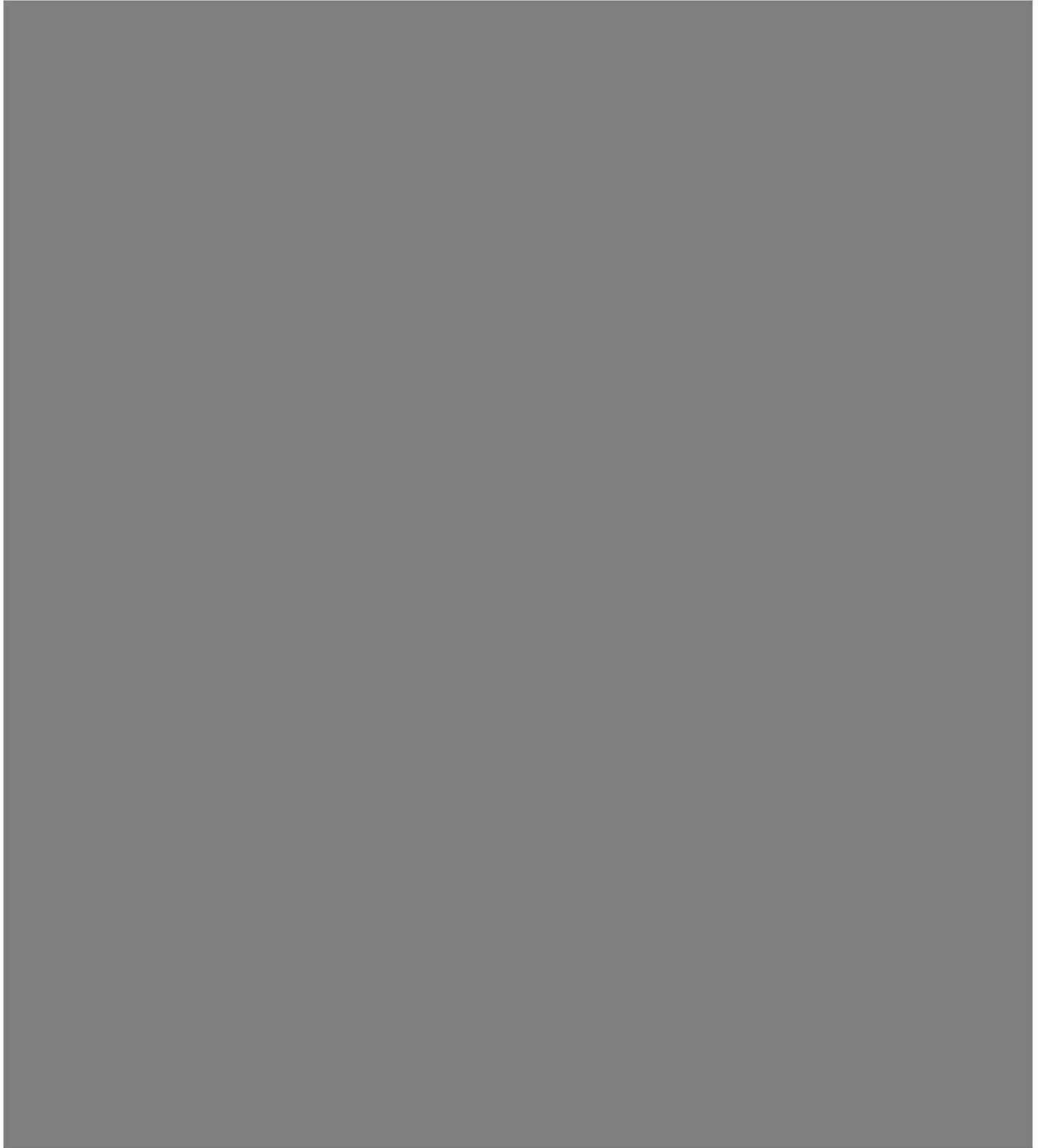
Date dictated

by [REDACTED]

FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 2



FD-302a (Rev. 10-6-95)

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 3

Since the inception of BLMIS MADOFF has managed a retail business associated with the firm. The business was initially quite small. When MADOFF first started the retail business most of the accounts were discretionary. MADOFF would, however, still generally consult clients with trade decisions prior to execution. The retail business grew and by the 1970s MADOFF was paying ridiculously high returns, in the range of 30% 50 40% per year, in order to attract business. At the time these rates of return were not unheard of at legitimate firms.

When MADOFF first began the retail business he did initially engage in some actual trades. Soon, however, he began to engage in fraud as to the entire retail business. He stopped engaging in any actual trading. For virtually the entire life of the retail business MADOFF simply did not trade and sent investors false account statements and false trade confirmations.

FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 4



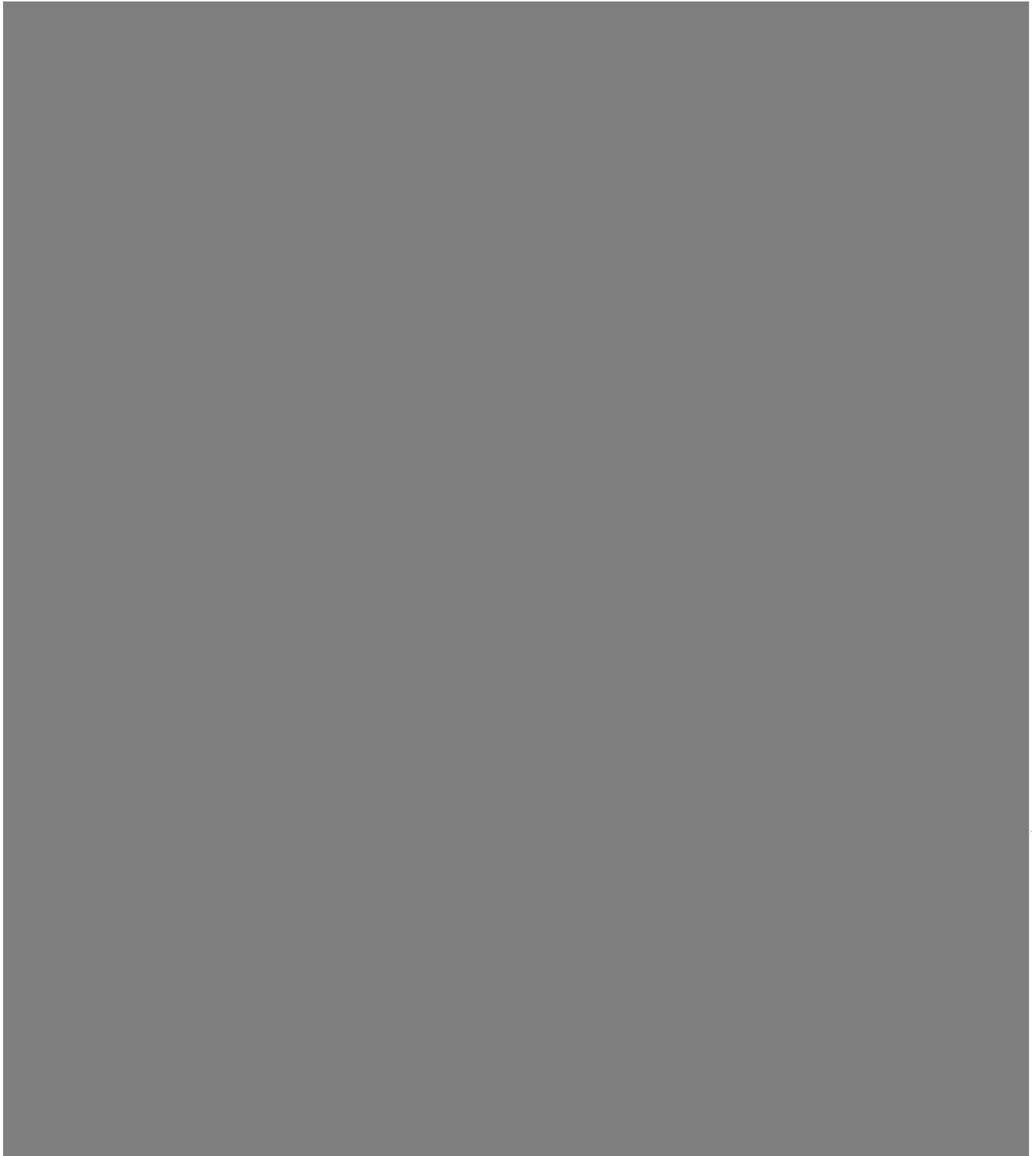
MADOFF began engaging in fraud in earnest in the 1970s. The 1980s saw a large expansion in the retail (i.e. fraudulent) portion of the business. As there was no actual trading, nothing cleared through DTCC or any clearing firm, and the only records of the purported trades are the paper confirmations.



FD-302a (Rev. 10-6-95)



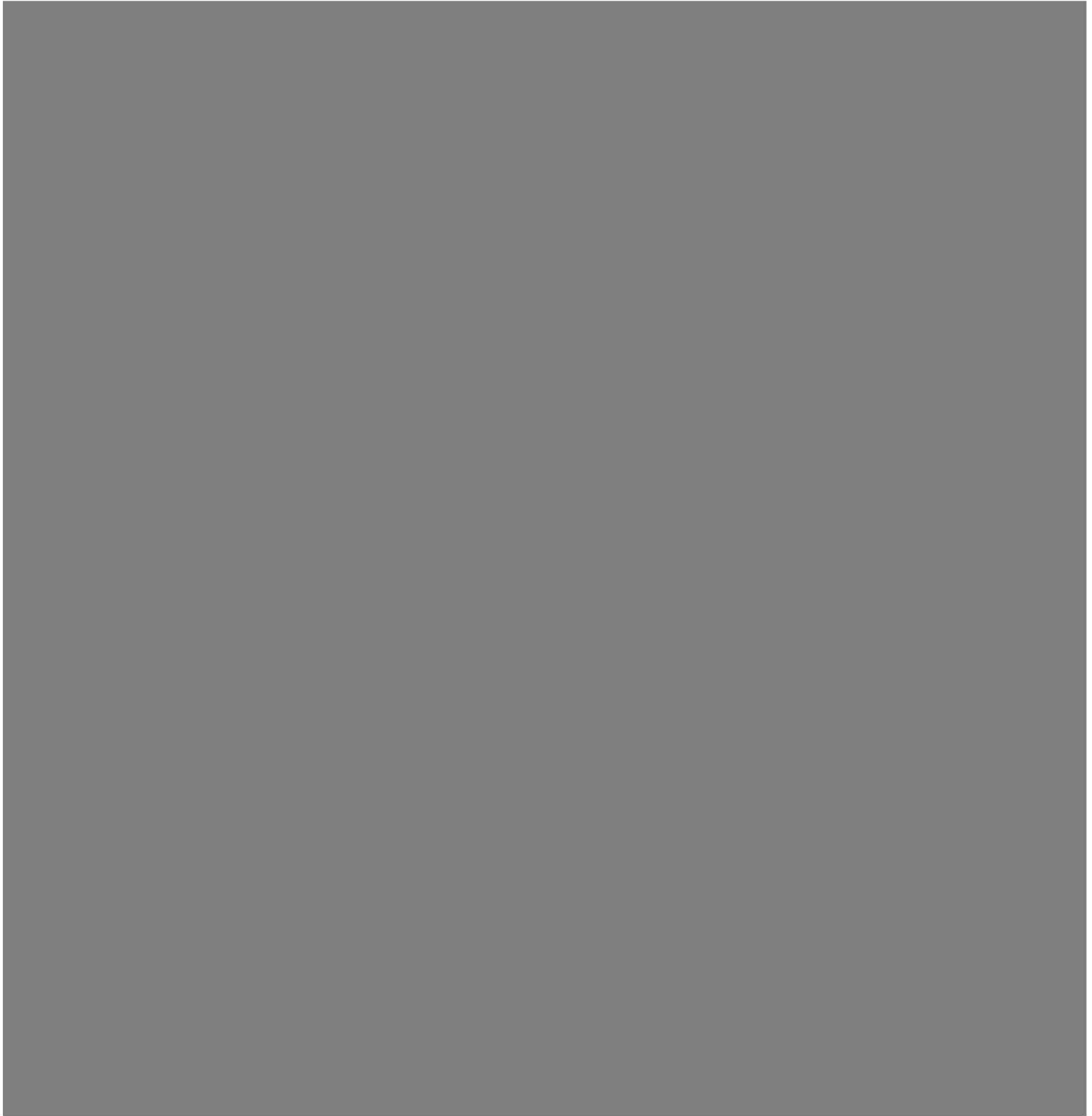
Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 5



FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 6

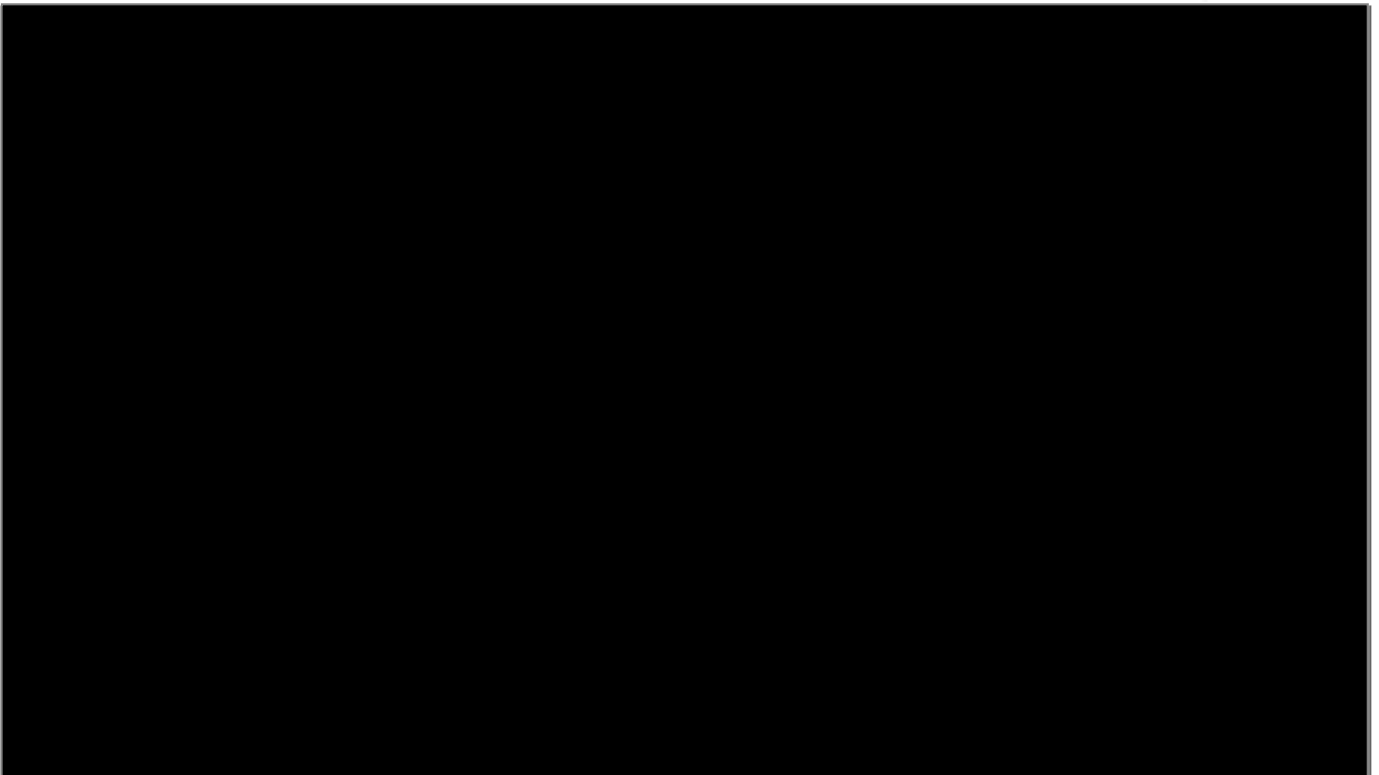




Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 7



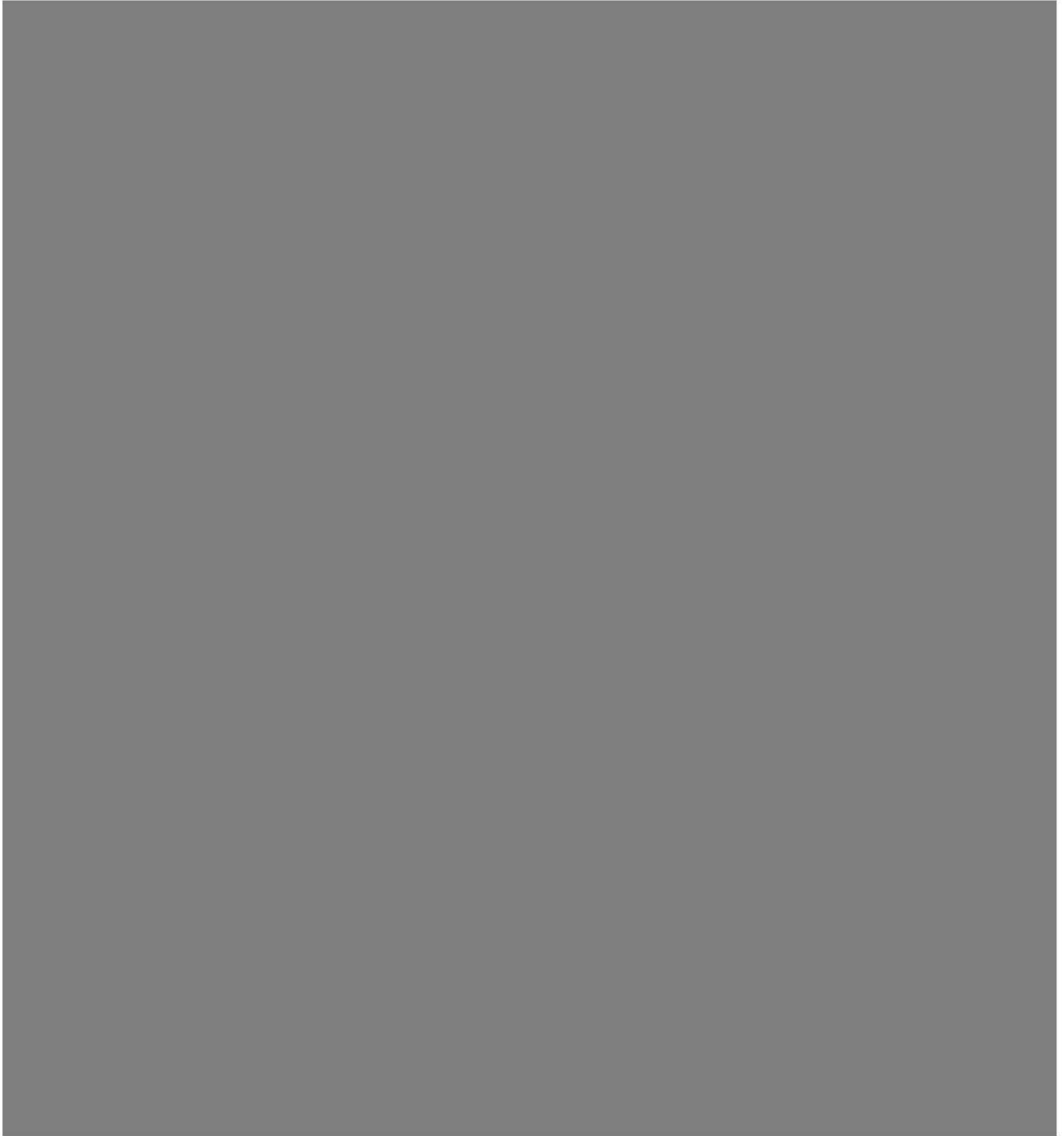
When MADOFF began a retail business in about 1960 he had about a dozen clients all of whom were family and friends. The retail business morphed into a fraud as time went by. In 1962 MADOFF's retail business was wiped out in the new issue collapse. All his clients lost virtually their entire investment, which amounted to a total of about \$30,000. MADOFF felt he had to pay them back, so he borrowed \$30,000 from his father in law to do so. His father in law was not pleased by this development. MADOFF was able to pay all these clients back and start the market making business. At about this time he took in new retail clients. These clients were also family and friends. He began to falsely report returns of 30% to 40% annual to these customers. All or virtually all of these accounts were discretionary and MADOFF had power of attorney over them.



FD-302a (Rev. 10-6-95)



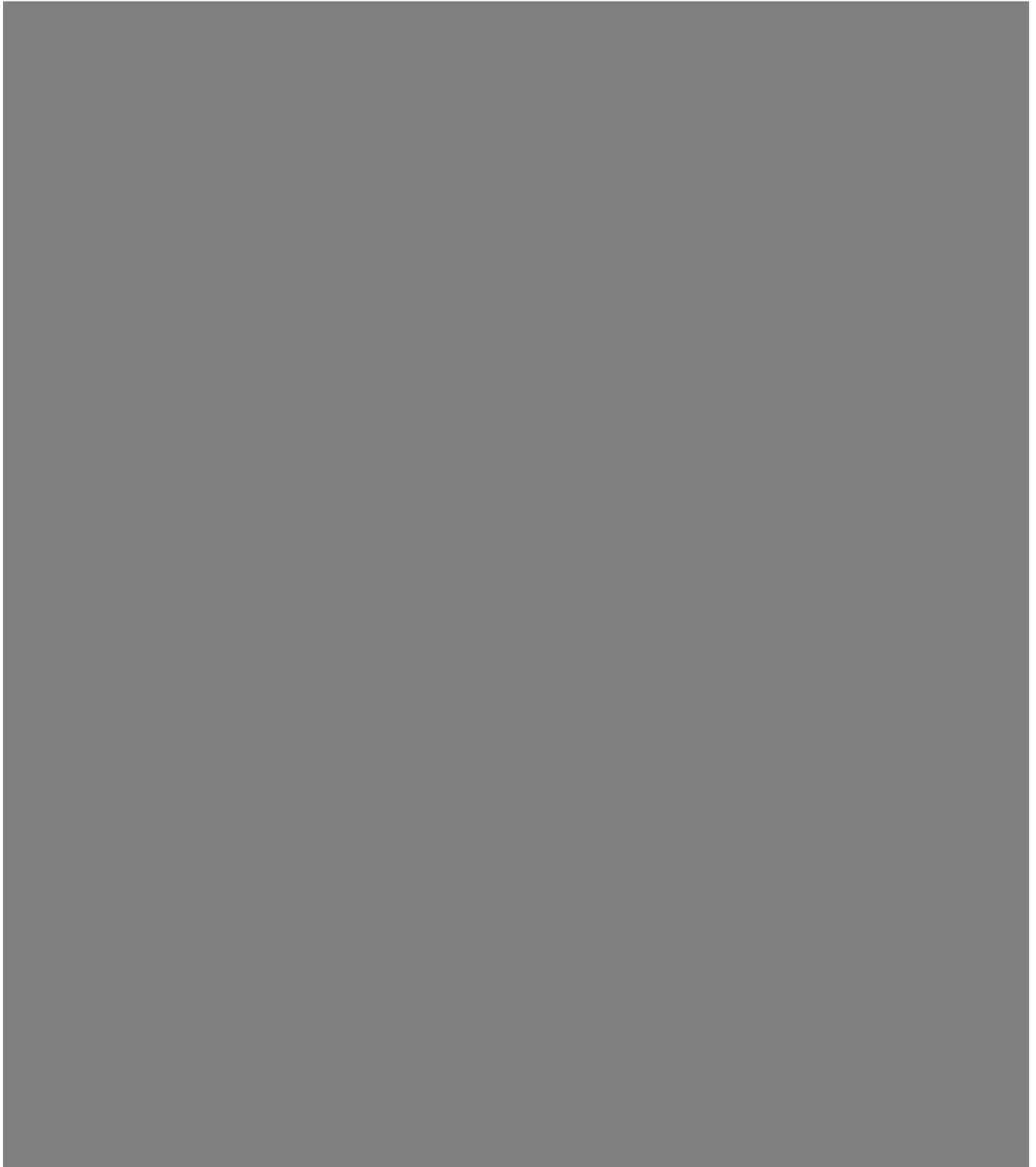
Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 8



FD-302a (Rev. 10-6-95)



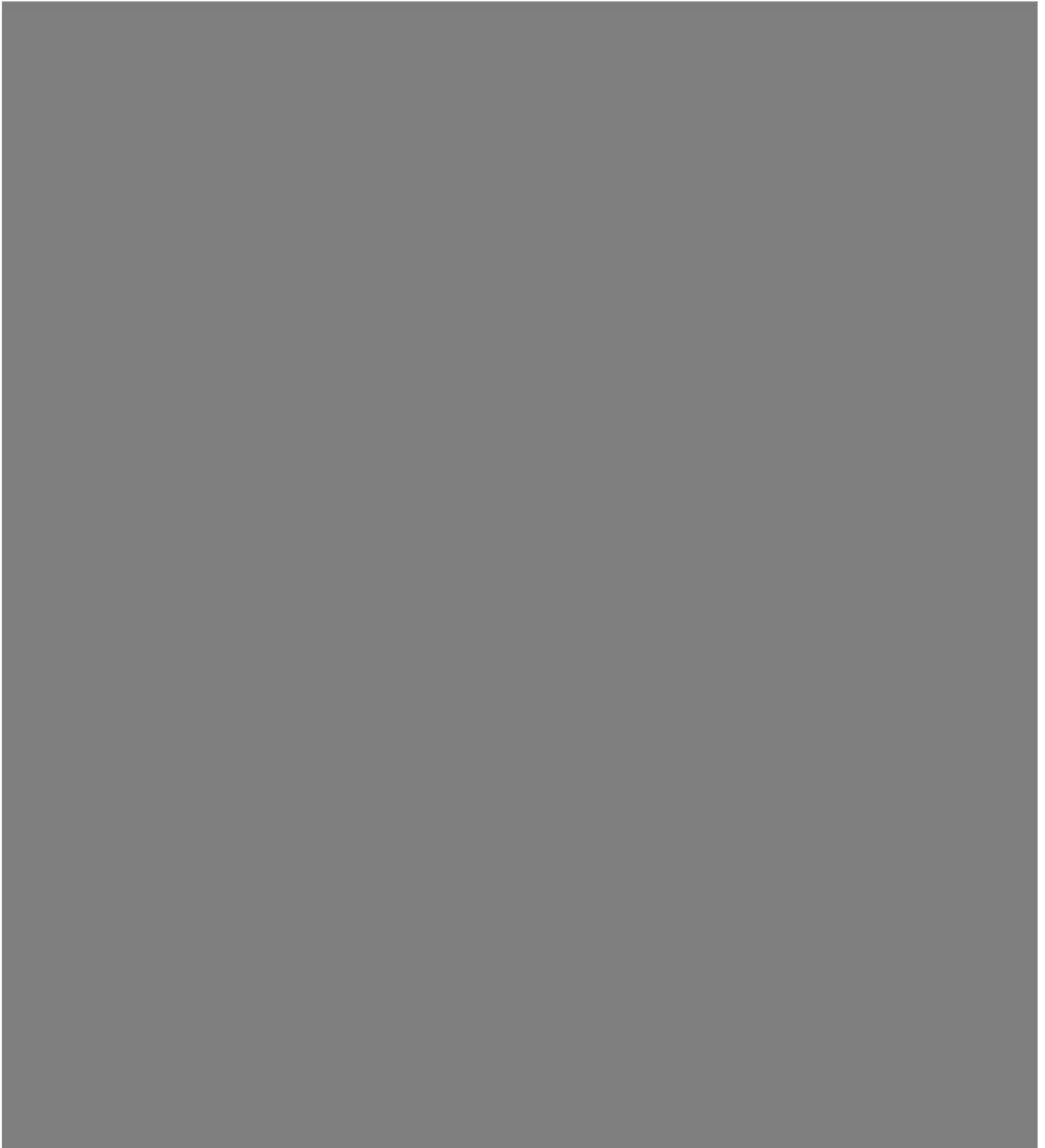
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FD-302a (Rev. 10-6-95)



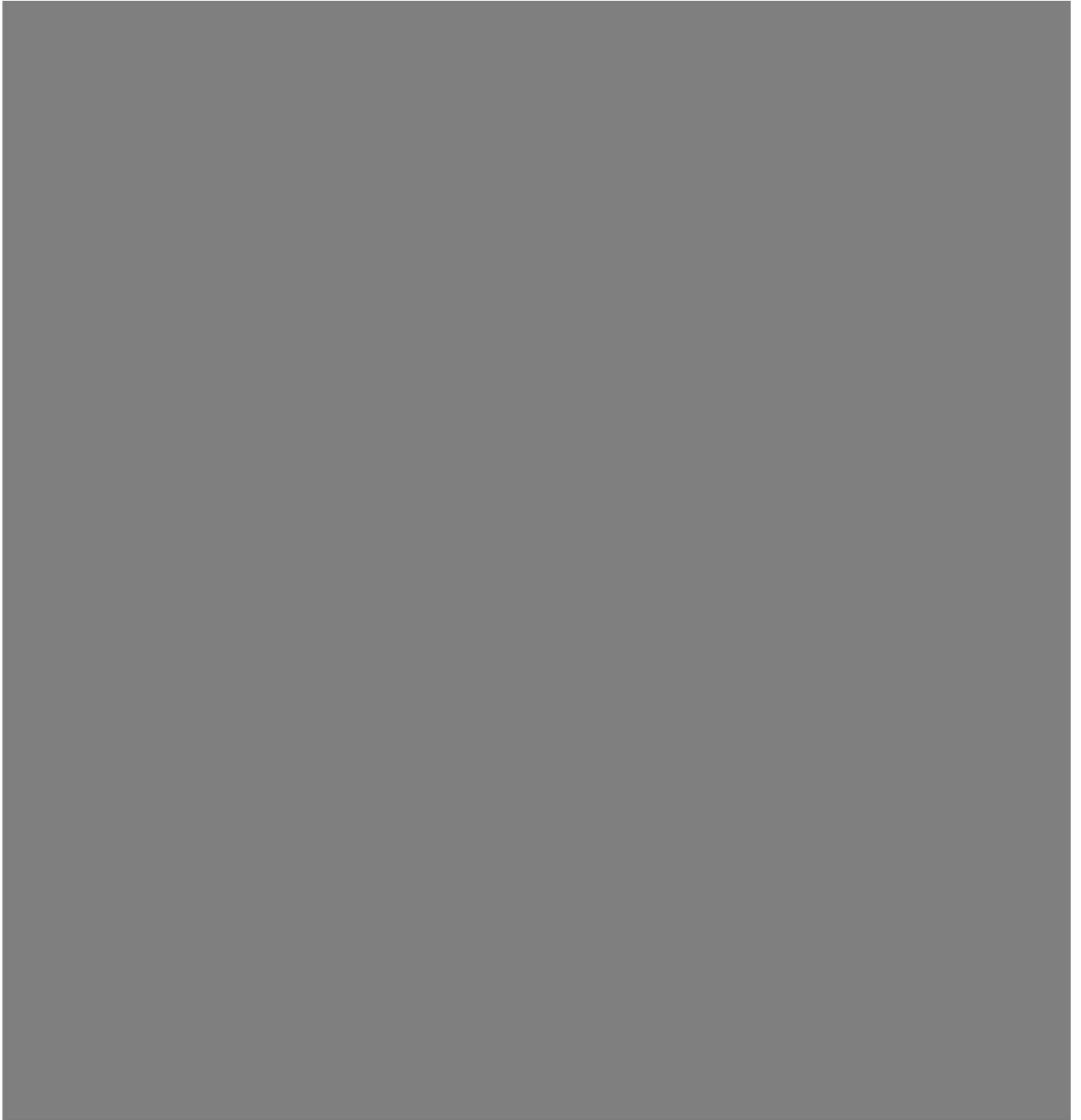
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FD-302a (Rev. 10-6-95)



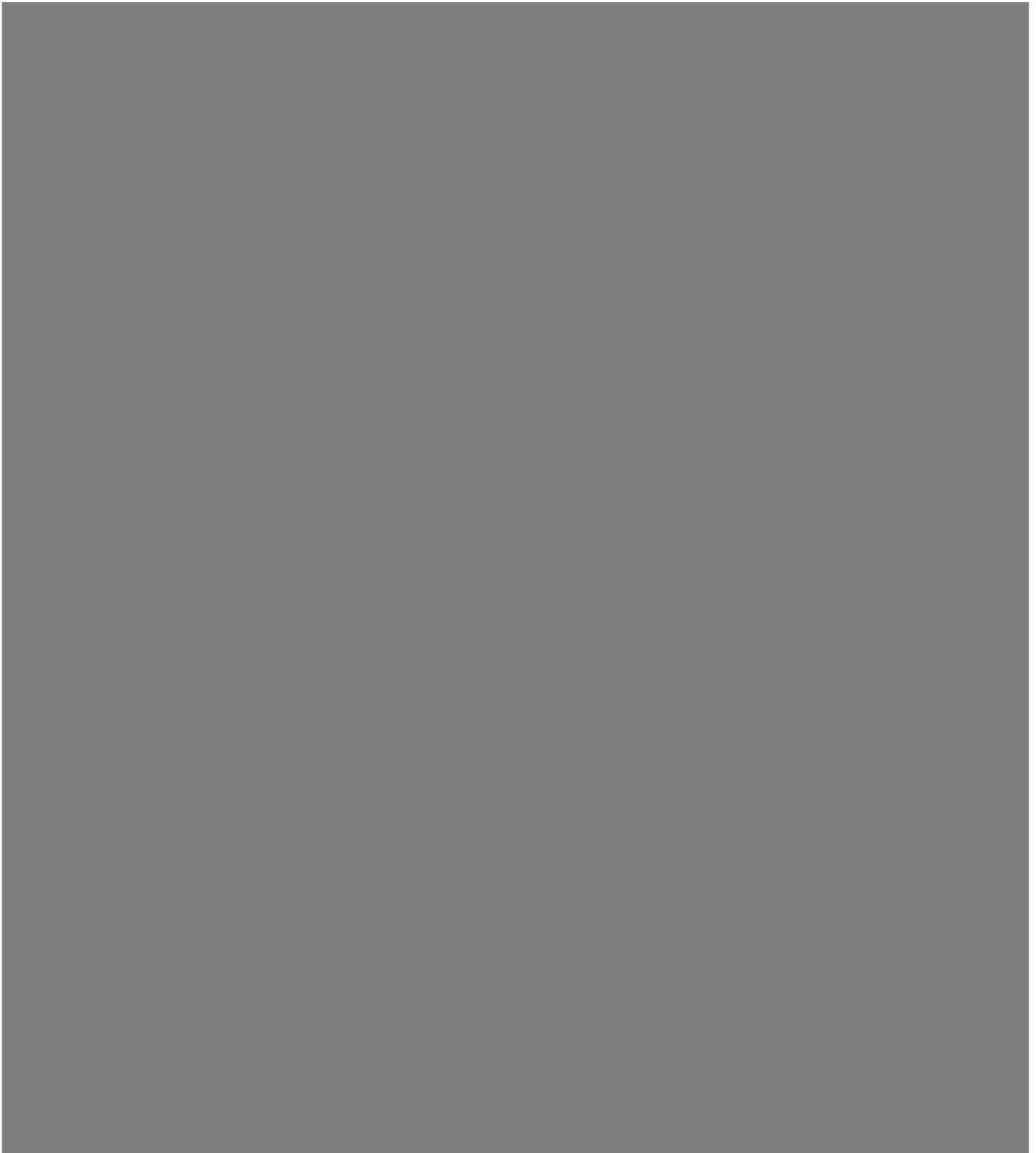
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FD-302a (Rev. 10-6-95)



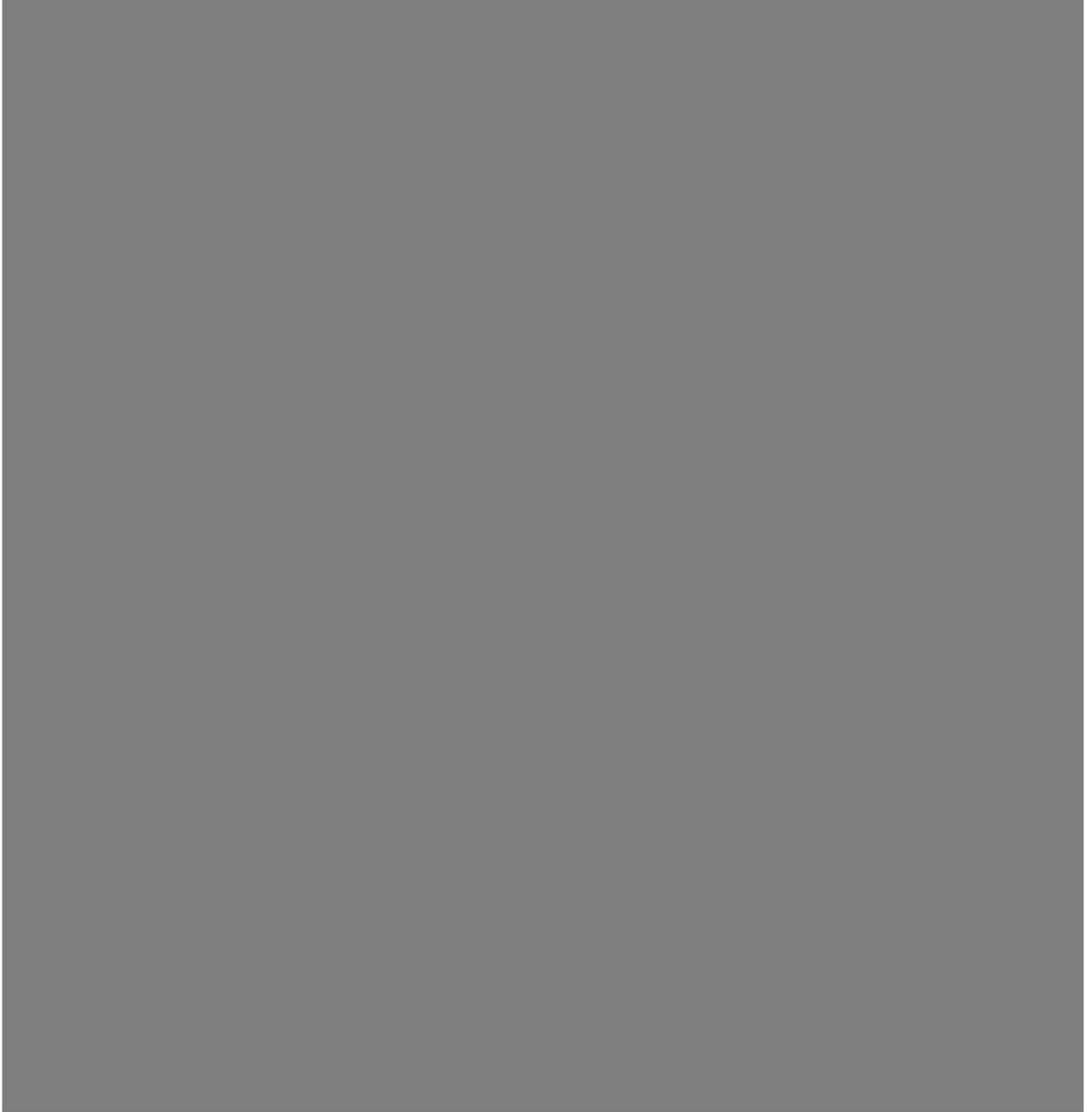
Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 12



FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 13



FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 14



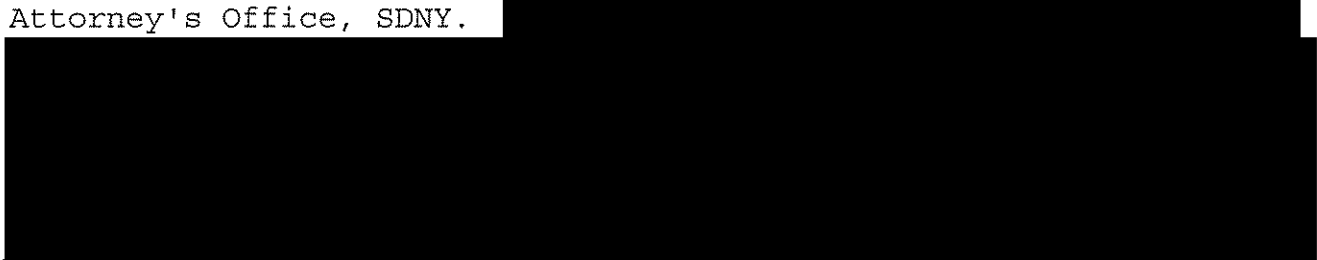
EXHIBIT B

- 1 -

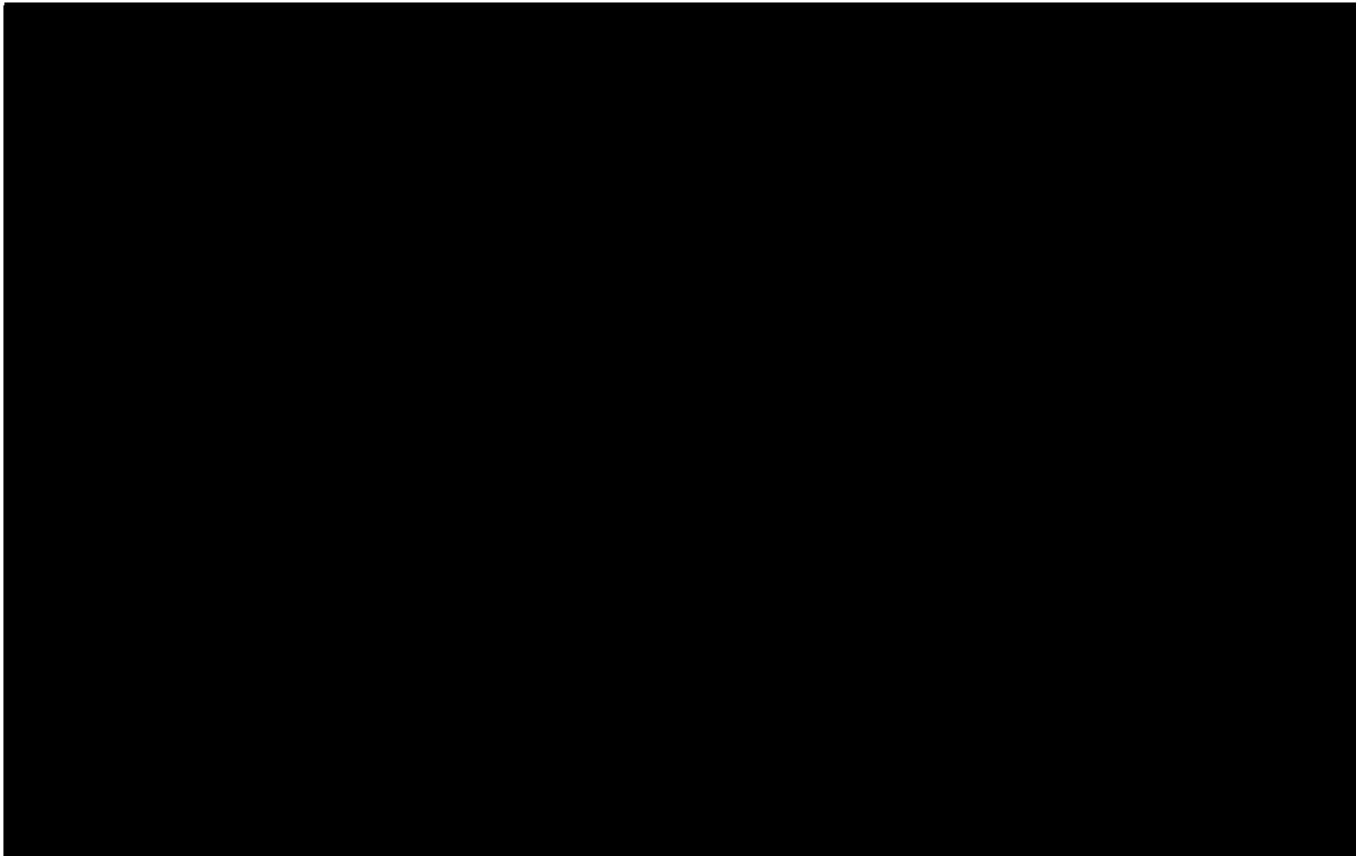
FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/18/2008

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In addition to the standard SDNY proffer agreement, an analogous SEC civil agreement was executed. MADOFF provided the following information:



Investigation on 12/16/2008 at New York, NY

File #  Date dictated _____

by _____

FD-302a (Rev. 10-6-95)

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 2

[REDACTED]

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 3

[REDACTED]

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[REDACTED]

FD-302a (Rev. 10-6-95)

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 4

[REDACTED]

[REDACTED]

[REDACTED] The fraud entailed MADOFF taking in funds from investors, holding those funds, and paying them out to investors seeking redemptions. It was essentially a Ponzi scheme. Customers received both monthly account statements and trade confirmation reflecting trades the never took place. MADOFF began engaging in fraud in earnest in the 1970s. The 1980s saw a large expansion in the retail (i.e. fraudulent) portion of the business. As there was no actual trading, nothing cleared through DTCC or any clearing firm, and the only records of the purported trades are the paper confirmations.

[REDACTED]

FD-302a (Rev. 10-6-95)

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 5

[REDACTED]

FD-302a (Rev. 10-6-95)

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 6

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 7

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FD-302a (Rev. 10-6-95)

[REDACTED]

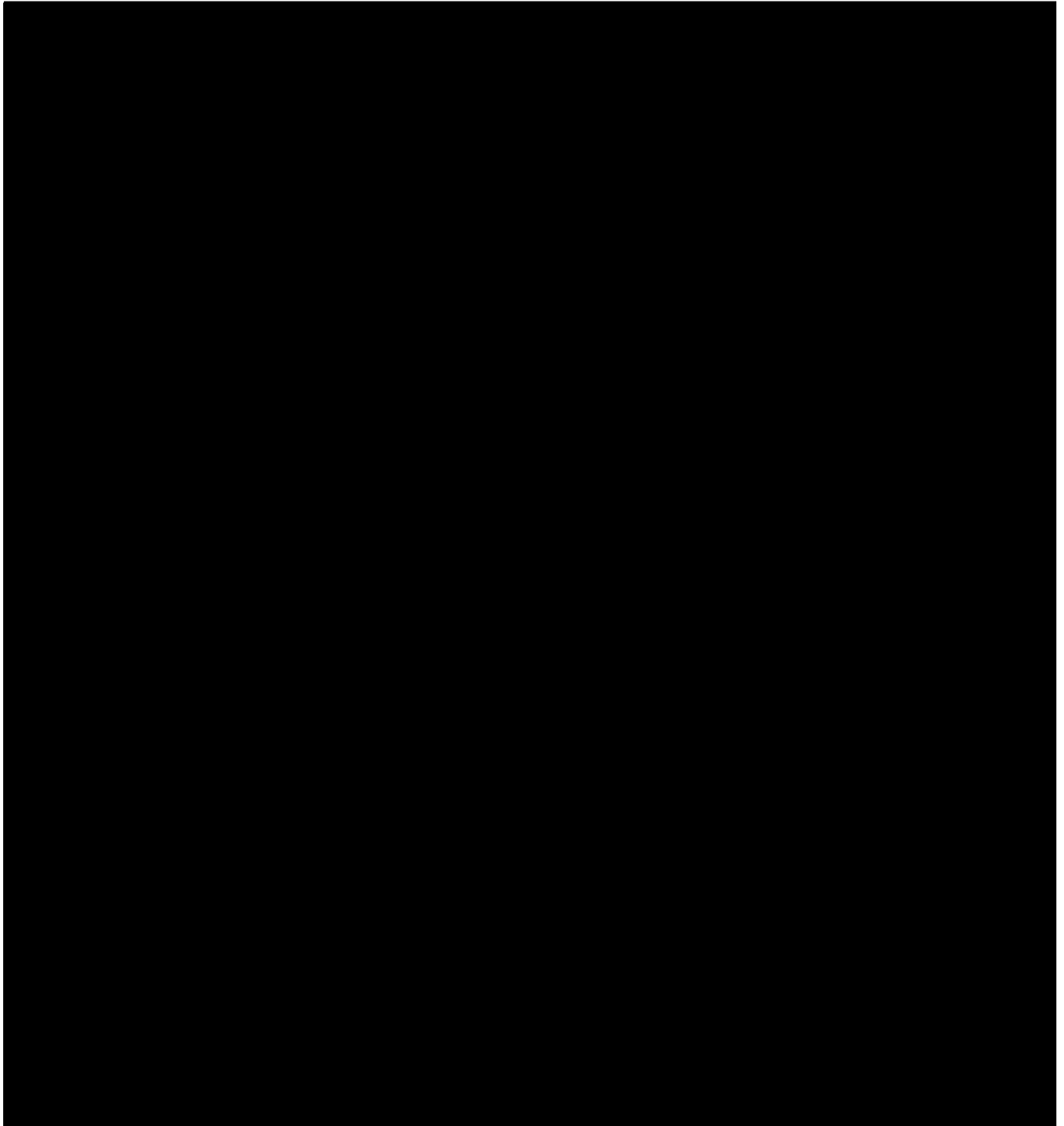
Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 8

[REDACTED]

FD-302a (Rev. 10-6-95)



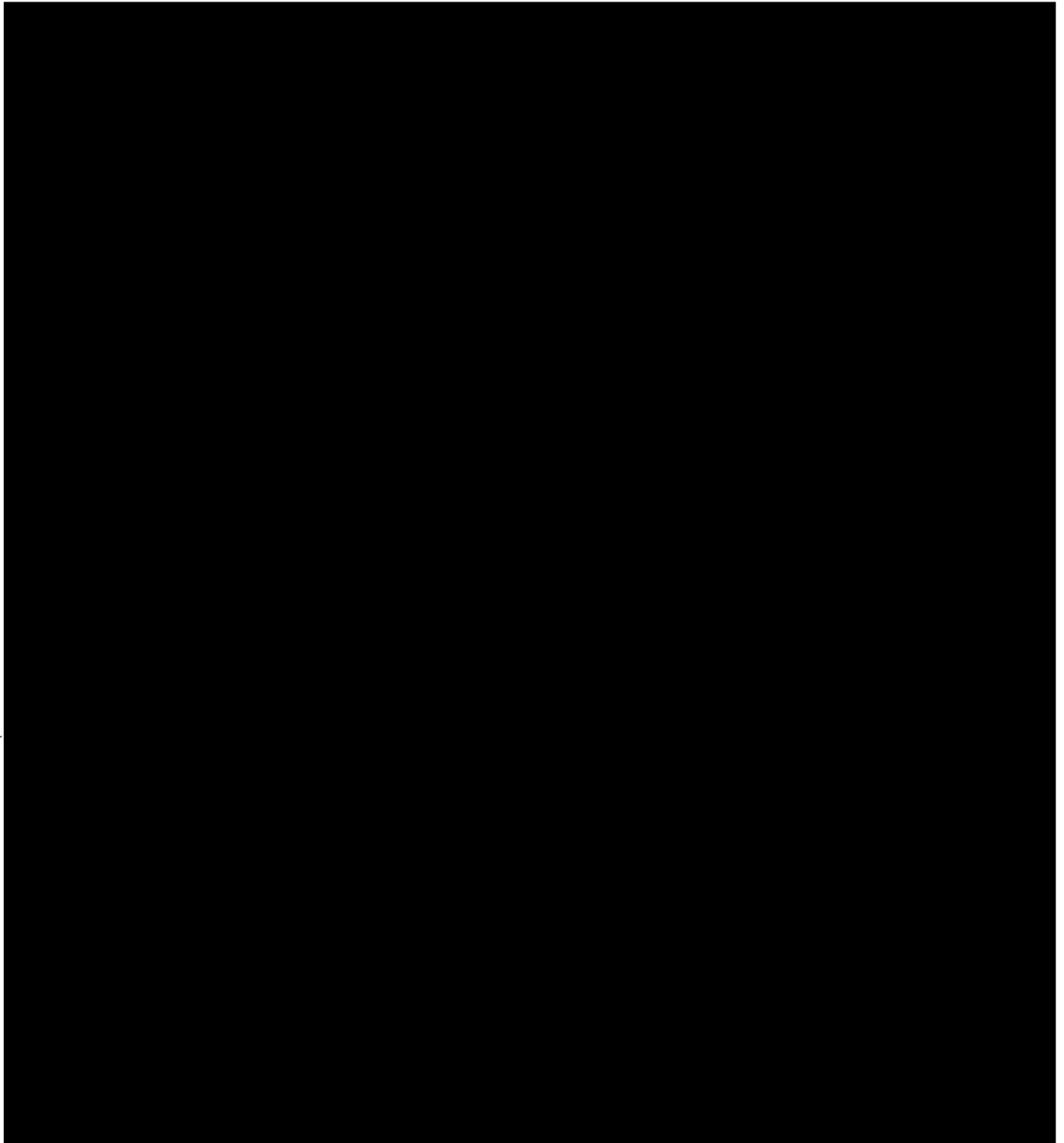
Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 9



FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 10



FD-302a (Rev. 10-6-95)

[REDACTED]

Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 11

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FD-302a (Rev. 10-6-95)

[REDACTED]

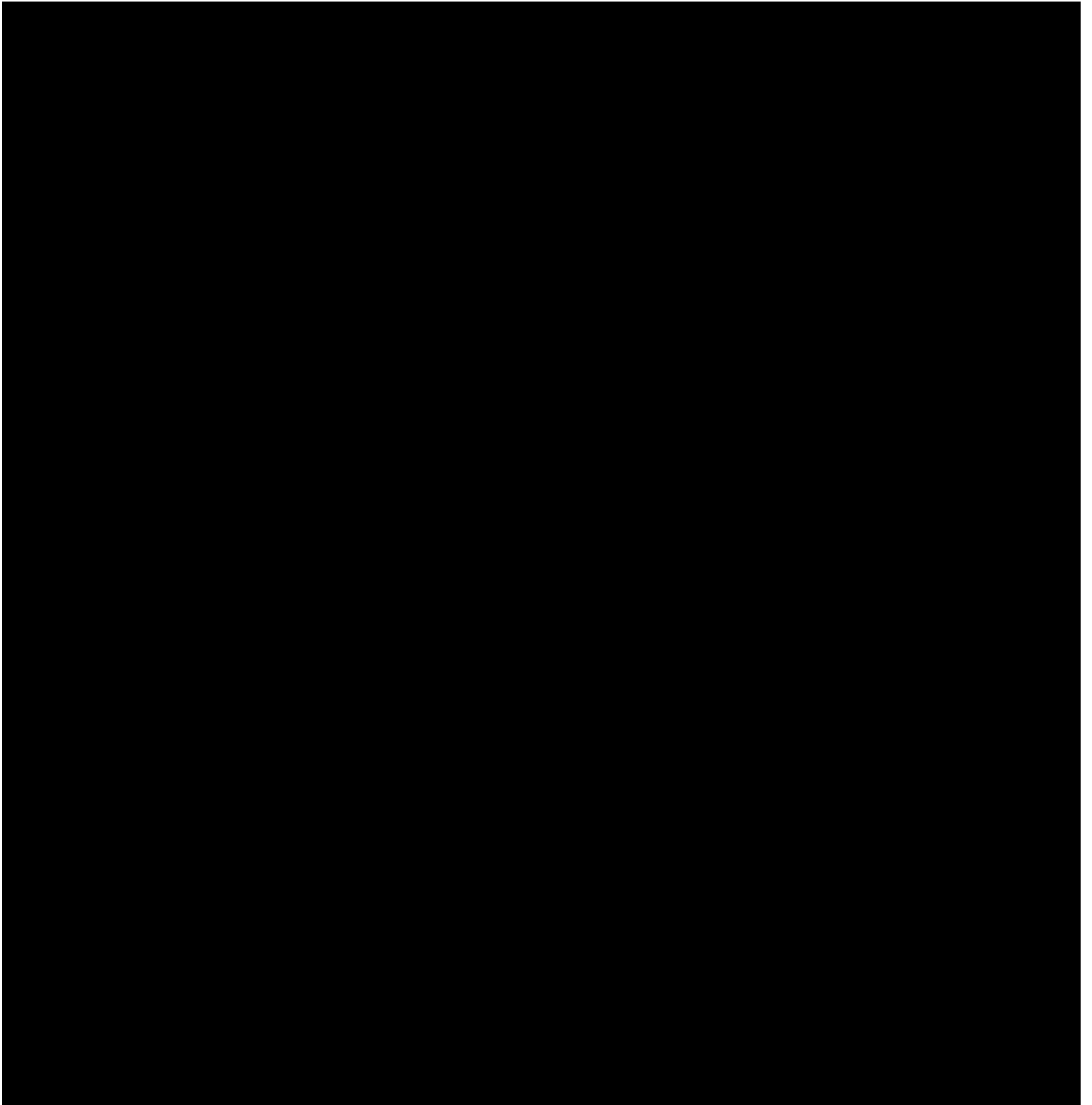
Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 12

[REDACTED]

FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 13



FD-302a (Rev. 10-6-95)



Continuation of FD-302 of BERNARD MADOFF, On 12/16/2008, Page 14

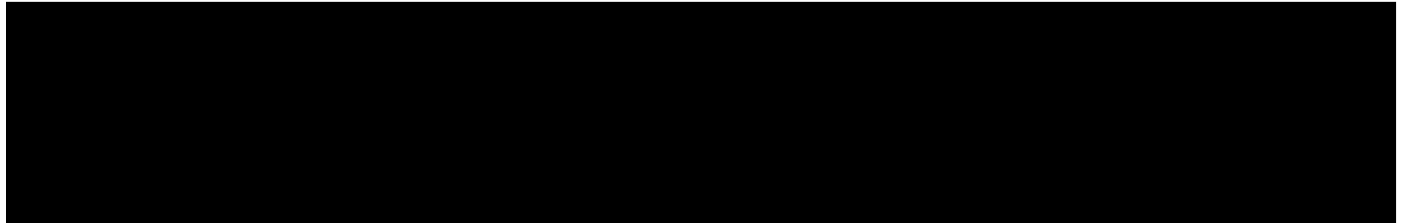


EXHIBIT C



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

May 17, 2017

VIA EMAIL

David J. Sheehan, Esq.
Fernando A. Bohorquez, Jr., Esq.
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111

Re: *In re Touhy Request for FBI Statements and Notes Regarding Bernard L. Madoff*

Dear Messrs. Sheehan and Bohorquez:

I write on behalf of the U.S. Attorney's Office (the "Office") and the Federal Bureau of Investigation ("FBI") (collectively, the "Government") to respond to your letter dated April 24, 2017, which requests the production of FBI forms FD-302 (the "302 Statements") and associated notes (the "302 Notes") generated in connection with two Government proffer interviews of Bernard L. Madoff ("Madoff") on December 16, 2008 and January 6, 2009 (collectively, the "*Touhy Request*."). As set forth in the *Touhy Request*, you requested the 302 Statements and 302 Notes in order to confront Madoff during depositions with prior statements he made regarding when his fraud scheme began. You have asserted that these statements contradict Madoff's more recent testimony that his fraud began in the 1990s, as opposed to much earlier.

Pursuant to Department of Justice ("DOJ") regulations, the official responsible for considering your request is the United States Attorney for the Southern District of New York. *See, e.g.*, 28 C.F.R. §§ 16.21-16.29; 16.22(b) ("The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part."). For the reasons which follow, this Office grants your request in part and denies it in part.

A. The Government Approves the Partial Release of the December 16, 2008, Madoff 302 Statement

The *Touhy Request* states that the requested documents are relevant to confront Madoff's recent deposition testimony that his Ponzi scheme began no earlier than 1992. You also state that defendants in the BLMIS liquidation proceedings have "seized on this testimony" as proof that the Trustee's calculations of customer claims should be altered based on the 1992 inception date. *See Touhy Request* at 1-2. Accordingly, you seek Madoff proffer statements in which he discusses the inception date and/or the timing of his fraudulent activities.

The Government has reviewed the two 302 Statements and will agree to produce information in the 302 Statements responsive to this issue. Only Madoff's first proffer session, dated December 16, 2008, contains statements concerning the time frame of the inception of Madoff's *Ponzi* scheme. That 302 Statement, bearing bates stamps USAO-MADOFF 00001-00014, is enclosed. All statements made by Madoff from that proffer session concerning the timing of the inception of his fraud and memorialized in that 302 Statement have been produced. All other information except for the introductory paragraph has been redacted, for the reasons stated below in connection with this Office's denial of your remaining request.

B. The Government Denies the Production of the Remaining Non-Responsive Material and 302 Notes

The Government denies the remainder of your *Touhy* Request. As stated above, the remaining redacted sections of the 302 Statements are not germane to your inquiry. Nor will we produce 302 Notes relating to these proffer sessions. Pursuant to the Federal "housekeeping statute," 5 U.S.C. § 301, and 28 C.F.R. § 16.26(b), disclosure of Government materials is prohibited by any DOJ official in response to a *Touhy* request when, *inter alia*, such disclosure would violate a rule of procedure, would reveal a confidential source or informant, or the disclosure would reveal investigatory records compiled for law enforcement purposes. *See e.g.*, 28 C.F.R. § 16.26(b). These concerns are present here.

First, the remaining materials sought are work-product protected. In *United States v. Gupta*, 848 F. Supp. 2d 491 (S.D.N.Y. 2012), Judge Rakoff described the defendants' request in that case for SEC attorney's notes and memoranda as "classic work product" protected under Rule 26(b)(3) of the Federal Rules of Civil Procedure, citing a series of cases for that proposition. *Gupta*, 848 F. Supp. 2d 496. Judge Rakoff then explained that the work product privilege can be overcome, but not without the defendant showing a "substantial need" for such documents and a showing that defendant "cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.* In *Gupta*, Judge Rakoff ultimately held that defendants *had* demonstrated a substantial need for the SEC materials, but he did so only to the extent that *Gupta* sought disclosure of the notes and memoranda that were classified as *Brady* material in his pending criminal case. *Id.*

Here, in contrast, there is no pending criminal case. Indeed, in *Gupta*, Judge Rakoff denied co-defendant Raj Rajaratnam's motion because he was "not a party to the criminal case" and presumably, was therefore unable to demonstrate the compelling "substantial need" necessary to breach the work product protection for purposes of his civil case. *Id.* at 496-97. The court in *United States v. Villa*, No. 12 Cr. 40, 2014 WL 280400, at *5 (D. Conn. Jan. 24, 2014), cited *Gupta* for that exact proposition: "[T]he SEC's assertion of work product protection [was] overcome by Gupta's substantial need for *Brady* material, but only to the extent of any *Brady* material in the SEC's notes and memoranda, and not otherwise." Accordingly, unlike *Gupta*, in this case there is no compelling ground such as *Brady* concerns that would warrant breaching the Government's work product protection. Moreover, the Government notes that information concerning the timing of Madoff's fraud is also publicly available in the form of trial testimony and public allocutions of various defendants convicted in connection with the Madoff fraud. Thus, there are also alternative sources (*i.e.*, a "substantial equivalent") for the

information you seek. Additionally, the Government has produced the sections of the relevant 302 Statement relating to your request.

Second, as *Villa* discusses, Rule 16 of the Federal Rules of Criminal Procedure also exempts from disclosure “internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.” Fed. R. Crim. P. 16(a)(2); *Villa*, 2014 WL 280400, at *5. There can be no question that the Madoff 302 Statements and Notes were made by Government agents in connection with prosecuting Madoff. Accordingly, Rule 16 precludes disclosure of these materials in the follow-on bankruptcy case.

Nevertheless, to avoid unnecessary issues, we can confirm that the 302 Notes do not contain anything inconsistent with the Madoff 302 Statement provided to you. Accordingly, this Office (and the FBI) has released to you all information derived from the proffer sessions concerning the timing of the inception of the Madoff fraud.

Very truly yours,

JOON H. KIM
Acting United States Attorney

By:



Louis A. Pellegrino
Assistant United States Attorney
(212) 637-2617

EXHIBIT D



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

May 23, 2017

VIA EMAIL

David J. Sheehan, Esq.
Fernando A. Bohorquez, Jr., Esq.
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111

Re: *In re Touhy Request for FBI Statements and Notes Regarding Bernard L. Madoff*

Dear Messrs. Sheehan and Bohorquez:

Enclosed is a supplement to the Government's *Touhy* production dated May 17, 2017. The document is bates stamped USAO-MADOFF 00001A-00014A.

Very truly yours,

JOON H. KIM
Acting United States Attorney

By:

A handwritten signature in blue ink, appearing to read "Louis A. Pelligrino", is written over a horizontal line.

Louis A. Pelligrino
Assistant United States Attorney
(212) 637-2617

Encl.