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**Comments of**

**TechFreedom**

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**In the Matter of**

*Public Consultation on the Introduction of a Merger Control Framework for Addressing Below-Threshold Mergers Likely to Harm Competition*

*(Autorité de la Concurrence, France)*

**February 20, 2025**

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## INTRODUCTION

TechFreedom[1] welcomes the opportunity to participate in the Autorité de la Concurrence's ("Authority") "public consultation on the introduction of a merger control framework for addressing below-threshold mergers likely to harm competition"[2] ("Consultation").

The Consultation proposes two options with significantly different jurisdictional triggers for notice of an otherwise non-reportable transaction, and a third option of ex-post enforcement of violations of competition law against the surviving party to a merger, if warranted. The Consultation appears to be a reaction to: (i) a concern that certain transactions not subject to mandatory notification are consummated prior to identifying likely or actual

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[1] Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

Bilal Sayyed, the primary drafter of this comment, has over twenty years of practical experience with the U.S. premerger notification regime, including experience in private practice counseling clients and as an employee of the U.S. Federal Trade Commission. As Director of the FTC's Office of Policy Planning from May 2018 through January 2021, he initiated a study of the non-reportable acquisitions of certain large technology firms. See *FTC To Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies. He left the FTC prior to the study's release in September 2021. See *Federal Trade Commission, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019* (September 2021) (hereinafter "Report" or "FTC Report"), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf. The "Special Order" for information and documents issued to the companies subject to the study are publicly available. See *Order to File Special Report* (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/6b_platform_study_sample_order.pdf.

[2] Autorité de la Concurrence, Public Consultation on the Introduction of a Merger Control Framework for Addressing Below-Threshold Mergers Likely to Harm Competition (Jan. 14, 2025) (hereinafter "Consultation"), https://www.autoritedelaconcurrence.fr/sites/default/files/2025-01/2025.01.14_Consultation%20publique%20concentrations%20sous%20les%20seuils_ENG.pdf.

Our comment uses the term "merger" throughout; it includes transactions that are not mergers but that transfer control of one entity to another, and includes transactions that might otherwise be described as an acquisition, a combination, joint venture, etc. Transactions that do not transfer control but that provide the acquiring entity with decisive influence over another are not mergers, but are otherwise referenced in the comment.

anticompetitive effects;[3] and/or (ii) limitations in the ability to refer a non-notifiable transaction to the European Commission.

Neither option is closely tailored to capture transactions already not notifiable under existing law that may raise competitive concerns. This comment proposes alternative notification criteria for the Authority to consider in designing its supplement to the current merger notification regime. In addition, consideration should be given to including transactions that result in an acquiring firm obtaining "decisive influence" over another entity, minority investments, and of the acquisition of assets sufficient to constitute a business.[4] Appropriate exemptions or threshold requirements can be adopted such that ordinary course acquisitions of assets or voting securities are not captured by the supplemental notification regime under consideration.

## I. Summary of Consultation's Proposals

Option One of the Consultation proposes the Authority be granted the right to "call-in" a transaction for review where the transaction meets certain quantitative and qualitative criteria: (i) the parties' meet some required cumulative turnover in France and (ii) the transaction threatens to significantly affect competition in France.[5] The call-in power would be limited as to time, with the order to notify sent no later than a limited time after the consummation of the transaction (and could be sent prior to consummation).[6]

Option Two of the Consultation proposes the addition of a new mandatory notification requirement for transactions where at least one party to the transaction: (i)(a) had a prior merger (or similar transaction) prohibited by the Authority or European Commission; or (b) entered into commitments with the Authority or European Commission for clearance of a merger (or similar transaction); or (ii) was subject to a fine or commitments with respect to a finding of anticompetitive conduct under Article 102 TFEU or Article L. 420-2 of the French Commercial Code; or (iii) has been designated a gatekeeper by the European Commission

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[3] These concerns are discussed in recent reports of the Authority. See, e.g., Autorité de la Concurrence, Opinion 23-A-08, *On Competition in the Cloud Sector* (June 29, 2023) at 157-163, https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2023-09/23a08_EN.pdf.

[4] These concerns are discussed in recent reports of the Authority. See, e.g., Autorité de la Concurrence, Opinion 24-A-05, *On the Competitive Functioning of the Generative Artificial Intelligence Sector* (June 28, 2024) at 74-81, https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/2024-09/24a05_eng.pdf.

[5] Consultation, at 3-4.

[6] The Consultation does not indicate whether transactions subject to call-in would be required to suspend closing of the transaction during a review, or whether the parties would be required to agree to a hold-separate or standstill agreement if the transaction has been consummated but is then "called-in."

under the Digital Markets Act.[7] Some connection with France or French territory would be necessary to trigger mandatory notification.

Option Three of the Consultation proposes no change to the current notification scheme, but merely clarifies that transactions not notified to the Authority remain subject to enforcement of French and European Commission law prohibiting anticompetitive practices, after consummation of the merger.[8] This comment takes no position on Option 3, except to note that it seems insufficient to the task of preventing anticompetitive transactions prior to their consummation, and may facilitate only incomplete remedies of the negative effects of such transactions with post-consummation enforcement.

## II. The Proposed Notification Triggers Are Not Sufficiently Tailored to Avoid Either Over- or Under-Reporting

The purpose of the Consultation is to supplement the reach of an already existing merger regime, not to establish a comprehensive merger notification regime. France's existing merger notification law[9] is overinclusive; it requires filings for many transactions that are unlikely to raise even the specter of competitive concerns. As the Authority recognizes, it is also underinclusive. Both are a common feature of all merger notification regimes.[10] Because the Authority contemplates extending rather than redrafting the existing merger law, the Authority should not adopt overinclusive triggers as it attempts to address the underinclusive aspects of the current law.

A merger notification regime, whether mandatory, voluntary, or a hybrid, must balance a few considerations. It should avoid being overinclusive because that may waste resources of both the parties and the competition agency and delay consummation of otherwise

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[7] Consultation at 4-5. By the proposal's terms, a company that was previously but not currently designated a gatekeeper appears to be captured. It is unclear if this is intended. Long-ago matters falling into categories (i) and (ii) would not likely trigger a filing requirement.

[8] Consultation, at 5.

[9] France's merger notification provisions are codified at Article L. 430-2 of the French Commercial Code (national merger control) and Article 3 of the Council Regulation (EC) No 139/2004 of 20 January 2004 (defining thresholds for mergers notified to the European Commission).

[10] Exemptions can be used to temper the over-inclusiveness of jurisdictional thresholds. For example, the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), the U.S. law setting forth the basic jurisdictional tests for pre-merger notification, contains significant exemptions. See 15 U.S.C. § 18a(c), https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section18a&edition=prelim. The rules implementing the HSR Act incorporate those exemptions and adopt additional exemptions. See 16 C.F.R. § 802, https://www.ecfr.gov/current/title-16/chapter-I/subchapter-H/part-802.

competitively neutral or procompetitive transactions. Overinclusive notification schemes can also have congestion effects, where the competition agency misses potentially harmful transactions because it must review too many filings and cannot efficiently separate those that raise concerns from those that do not. Notification regimes with size-of-transaction or size-of-person threshold requirements are underinclusive; they are likely to miss transactions that are anticompetitive but fail to meet the notification requirements. If such transactions are otherwise brought to the attention of the competition agency, investigations often proceed without the procedural protections of the pre-merger notification regime, unless separately negotiated with the parties. Notification thresholds or "triggers" should allow businesses to determine with very significant certainty whether a transaction must be notified. In theory, notification thresholds should be tied to likelihood of substantive concerns, but such factors are varied and difficult to collapse into one or two jurisdictional requirements. In practice, most common metrics are likely to be both over- and under-inclusive; they may also be subjective and create some uncertainty around merger notification requirements.

Transaction value is unlikely to be closely related to likelihood of anticompetitive effects,[11] although larger transactions may be associated with a higher magnitude of anticompetitive effects because they may involve larger firms or larger markets. Notification thresholds based on transaction value may raise uncertainty; for some transactions, perhaps especially those involving new firms or firms selling new or not-as-yet-commercialized products, the transaction value is unknown because consideration may be tied to post-merger performance metrics.[12]

Notification thresholds based on global or local turnover (revenue) or assets are unlikely to be closely related to the likely competitive effect of a transaction, and are significantly likely to under-identify potentially anticompetitive transactions involving nascent competitors or future competition from non-incumbent firms. They may also be over- or under-inclusive, depending on whether the triggering value is too low or too high.

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[11] The jurisdictional threshold for the U.S. premerger notification regime is based on the size of the transaction, and, in some instances, the size of the parties to the transaction. See 15 U.S.C. § 18a(a)(1),(2). The Rules governing implementation of the HSR Act are set forth at 16 C.F.R. § 801-803, https://www.ecfr.gov/current/title-16/chapter-I/subchapter-H.

[12] The U.S. practice in such situations is to require the acquiring person (or its designee) to do a fair market valuation of the transaction, and that valuation determines reporting responsibilities. See 16 C.F.R. § 801.10 (Value of Voting Securities, Non-Corporate Interests, or Assets to be Acquired).

Notification thresholds based on market share, aggregated market share, or changes in market share are more likely to be associated with potential competitive effects, but market definition is sometimes difficult, and neither exact (although it could be tied to prior European Commission or Authority market definition determinations) nor stable. Market definition, especially where no prior guidance exists, is sometimes subjective; decisions made in good faith may lead to disputes between the Authority and merging parties and may lead to a party's inadvertent failure to comply with a merger notification requirement.

Information necessary to calculate market share may not be available, or may be incomplete or require significant speculation, and parties acting in good faith may make mistakes, potentially resulting in an inadvertent failure to comply with notification requirements. Market share thresholds are also less useful for identifying anticompetitive effects in non-horizontal transactions, or transactions involving nascent or future competition from non-incumbent firms, although individual (non-aggregate) market share requirements for each party in a non-horizontal relationship can help identify transactions that may raise competitive concerns. [13]

Notification requirements based on participation in an allegedly anticompetitive merger (in the near or not-so-near past) are unlikely to be related to the competitive effects of a new transaction unless the transaction is occurring in the same relevant market as the past anticompetitive transaction. Such requirements are likely to miss transactions, particularly in dynamic or developing markets. Requirements based on participation in *past* anticompetitive conduct may capture firms with a past propensity to engage in anticompetitive conduct (including anticompetitive transactions), but the relationship between past price fixing (for example) and acquisitions of significant competitors seems likely to be quite weak. Both triggers are undoubtedly underinclusive of parties who may, in the future, propose a merger that may raise competitive concerns.

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[13] The combination of firms in a non-horizontal relationship where each have relatively low market shares in the relevant and related markets is unlikely to create or enhance either or both of the incentive and ability of the combined firm to foreclose competitors of the combined firm in upstream or downstream markets. See U.S. Department of Justice and Federal Trade Commission, VERTICAL MERGER GUIDELINES (2020),https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (replaced by U.S. Department of Justice and Federal Trade Commission, MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf. The primary author of this comment participated in the drafting of the 2020 Vertical Merger Guidelines.

Gatekeeper firms may have market power in one or more relevant markets; requiring notification of all transactions by such firms may still be overinclusive, as it is unlikely that even most such transactions will raise competitive concerns.[14] Requiring that gatekeeper firms provide notice and observe a waiting period for all acquisitions will unnecessarily delay transactions that are procompetitive.[15] The overinclusive effect may be limited because of the relatively small number of gatekeepers, but historically the firms presently designated as such engage in a significant number of transactions (although not all or even many may have a direct nexus to France).

A "call-in" regime may allow the Authority to limit over-inclusiveness and better focus its review on those transactions more likely to raise competitive concerns, yet it may not provide sufficient certainty for businesses planning their transactions. Where the regime contemplates both pre- and post-consummation call-in, the Authority's investigation may be hampered by a lack of procedural protections, such as suspension of the transaction pending approval, unless separately negotiated with the merging parties or the surviving entity. The combined firm bears the significant uncertainty of potentially having to unwind a transaction. A call-in regime allows for significant flexibility for the regulator – to investigate and challenge/unwind those transactions that catch its interest – but at the expense of certainty for businesses. A mandatory regime may be over- or under-inclusive but also

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[14] Although designed to allow the Commission to consider whether the series of acquisitions studied in the FTC's Report on non-reportable acquisitions by select technology platforms (each of which has subsequently been designated a gatekeeper under the DMA) were reasonably likely to raise competitive concerns, the Report, in its final form, did not do so. However, a review of the FTC Report should indicate to the reader that many, perhaps most, of the 819 transactions reviewed were unlikely to raise competitive concerns.

[15] It may also unnecessarily delay transactions among gatekeepers that are procompetitive. Digital platform markets often have or create and benefit from economies of scale. Such markets may be most efficiently organized with just a few large operators. Acquisitions of competing platforms or assets used to create, operate, or expand platforms may increase the volume of business flowing through a platform and may allow the platform to benefit from scale economies and become a lower cost or otherwise more efficient competitor. Increasing scale or increasing scope of products or services through merger can create efficiencies. Vertical integration—which can occur via merger – may appear to be restrictive, but also can offer procompetitive benefits. Transactions that facilitate vertical integration can *improve* competition by, for example, reducing transaction costs, eliminating double marginalization, and otherwise aligning companies' incentives in a way that benefits consumers. Acquisitions of nascent or future competitors can lead to more certain or earlier distribution of new products, new features, or new capabilities.

better reduce the possibility of an anticompetitive merger being consummated without review.

## III. Recommendations For More Targeted Metrics for Triggering a Filing Requirement (or Call-In Right)

The Consultation does not identify the category of transactions that are not presently notified but that the Authority believes should be notified because they may be anticompetitive. Such transactions likely fall into three categories[16]:

1. the complete or partial combination of two (or more) of a few present horizontal competitors, likely operating in small or nascent markets (as measured by revenue), or involving one or more firms that can be described as a "nascent" competitor;
2. the complete or partial combination of two (or more) firms where one or more are small, nascent, or future competitors in the same present or future market (which may be small or large); or,
3. the complete or partial combination of two or more firms operating in a non-horizontal relationship where one or more firms have a significant position in their respective market(s).

Alternatives to the proposed jurisdictional triggers of both Option 1 and Option 2 will better support the Authority's objectives. The supplemental merger notification regime under consideration should be limited to requiring pre-consummation notice (or allowing call-in) of transactions that fulfill one of the following conditions:

(i) **Horizontal Combination of Present Competitors**: An acquisition of more than a de-minimis percentage of voting securities[17] of one entity by another entity, or an acquisition of substantial assets [18] of one entity by another entity, or a

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[16] These concerns are discussed in recent reports of the Authority with regards to specific industries. *See, e.g.,* Autorité de la Concurrence, Opinion 24-A-05, *On the Competitive Functioning of the Generative Artificial Intelligence Sector* (June 28, 2024), https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/2024-09/24a05_eng.pdf; Autorité de la Concurrence, Opinion 23-A-08, *On Competition in the Cloud Sector* (June 29, 2023), https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2023-09/23a08_EN.pdf.

[17] Fixing the percentage of voting securities acquired that triggers notification may be an objective standard that implements an otherwise potentially subjective "decisive influence" standard. References to voting securities should be understood to include partnership interests and similar interests of entities that do not issue voting securities, or that grant influence or control rights.

[18] The grant or acquisition of an exclusive right to the use of intellectual property, exclusive even to a field of use or limited geographic area, may be considered the acquisition of an asset.

combination of two or more firms, directly or through the formation of a new entity, is reportable (or subject to a call-in right):

a. where at least two of the parties to the transaction earn more than a de-minimis level of revenue[19] within France or French territory in,
b. either
    i. the same relevant market (where such a market has been defined in a merger or non-merger decision of the Authority or European Commission) or
    ii. the same line of business, where a line of business is defined by a pre-existing common national or international categorization system (as subject to periodic modification) as pre-identified by the Authority or European Commission[20] or,
    iii. through the sale or licensing of intellectual property designated as a standard or essential by a national, international or European standard setting body.[21]

(ii) **Non-Horizontal Combination:** An acquisition of more than a de-minimis percentage of voting securities of one entity by another entity, or an acquisition of substantial assets of one entity by another entity, or a combination of two or more firms, directly or through the formation of a new entity, is reportable (or subject to a call-in right):

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[19] Revenue thresholds that exceed a de-minimis level of revenue should be defined with reference to economic conditions within France or French territory. They could be substantially below the general (non-sector specific) revenue thresholds set out in Article L. 430-2 of the French Commercial Code (national merger control) and Article 3 of the EC Merger Regulation.

[20] TechFreedom proposed a similar categorization in its response to the U.S. Federal Trade Commission's proposed revisions to the U.S. Premerger Notification Form. See Comments of Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form (Sept. 27, 2023) at 8-11, https://techfreedom.org/wp-content/uploads/2023/09/Proposed-HSR-Form-Changes.pdf. A version of the recommendation was adopted. The U.S. Premerger Notification Form requires filing parties to report revenues within business lines defined in the North American Industry Classification System ("NAICS codes") used by the U.S. Census Bureau. While NAICS codes are often not equivalent to antitrust markets, they are useful in identifying overlapping business operations. Listings and descriptions of NAICS codes are available at the website of the U.S. Census Bureau, https://www.census.gov/naics/. There is some subjectivity to identifying the lines of business an entity operates in; guidance on how parties should address this can be provided by the Authority or some standard of care can be required. Note that it would not be unusual for a firm to operate in multiple lines of business.

[21] A standard setting body can be a private or public entity.

a. where at least two parties to the transaction earn more than a de-minimis level of revenue within France or French territory, and
b. at least one party to the transaction is a significant[22] supplier or provider of one or more products, services, and/or technologies, or a licensor of intellectual property designated as a standard or essential by a national, international or European standard setting body:
    i. to at least one other party to the transaction,
    ii. for, or related to, operations occurring in France or French territory, at any time within the past two years. [23]

(iii) **Combination of Non-Incumbent with Present Competitor or Two Non-Incumbent Firms:** An acquisition of more than a de-minimis percentage of voting securities of one entity by another entity, or an acquisition of substantial assets of one entity by another entity, or a combination of two or more firms, directly or through the formation of a new entity, is reportable (or subject to a call-in right):
a. where at least one party to the transaction earns more than a de-minimis level of revenue within France or French territory and
b. two or more parties to the transaction each project earnings or revenue in France of French territory greater than a de-minimis amount within a relevant period[24],

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[22] "Significant" supplier can be identified by reference to a specific value of total commerce/sales or, in the case of intellectual property, licensing or royalty revenue, e.g., €10,000,000.

[23] TechFreedom proposed a similar categorization in its response to the U.S. Federal Trade Commission's proposed revisions to the U.S. Premerger Notification Form. See Comments of Bilal Sayyed in the Matter of Proposed Changes to the HSR Notice and Reporting Form (Sept. 27, 2023) at 8-11, https://techfreedom.org/wp-content/uploads/2023/09/Proposed-HSR-Form-Changes.pdf. A version of the recommendation was adopted. The FTC has challenged transactions combining competing or complementary technologies. See Bilal Sayyed, *Non-Price Effects in Mergers: Examples from Federal Trade Commission Enforcement, 1992-2023*, CPI Antitrust Chronicle (Jan. 2024) (discussing technology markets at 6-8), https://www.pymnts.com/wp-content/uploads/2024/01/2-NON-PRICE-EFFECTS-IN-MERGERS-EXAMPLES-FROM-FEDERAL-TRADE-COMMISSION-ENFORCEMENT-1992-2023-Bilal-Sayyed.pdf. The FTC has also alleged technology markets in non-merger cases. See Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines, Examples from FTC Enforcement*, 1993-2022 (Draft Working Paper) (Dec. 2022) at 43-44, https://techfreedom.org/wp-content/uploads/2022/12/Actual-Potential-Entrants-Nascent-Competitors-and-the-Merger-Guidelines-Examples-from-FTC-Enforcemen.pdf.

[24] A relevant period could be one-two years prior to and including the year the transaction was signed, and /or projections covering one-two years after the year the transaction was signed. Longer periods may also be appropriate.

i. in the same relevant antitrust market or
ii. in the same line of business or,
iii. in a class of intellectual property designated as a standard or essential by a national, international or European standard setting body,

c. as indicated in documents submitted to, or briefings provided to, any of each of the firms' investors, officers, board of directors, or to a state, national or supranational governmental authority, or through a prospectus or offering on a national or European-wide securities exchange.

We also suggest that the Authority require identification, in the merger notification filing, of previous acquisitions of voting securities and assets occurring in the same relevant market (or line of business), same related market(s) (for non-horizontal transactions), and of any acquisitions of an exclusive right to the use of intellectual property, as the transaction notified (or subject to call-in) pursuant to these categories of transactions. This reporting obligation may be limited to reporting of transactions occurring in a 3–5-year period prior to the transaction being notified.

## IV. Conclusion

Pre-merger notification and waiting period requirements are intended to give the reviewing competition agency the opportunity to identify potentially anticompetitive mergers. The optimal notification regime would require filings for only those transactions likely (or certain) to raise competitive concerns. But such a regime would be hard to design ex ante. Jurisdictional triggers based on transaction size and / or party size, are likely to require filings for many transactions that raise no competitive concerns and are likely not to require filings for at least some transactions that do raise competitive concerns, particularly but not exclusively transactions that involve one or more non-incumbent firms.

Here, the Authority is considering a supplemental notification regime for transactions presently not subject to notification. It should attempt to design with a scalpel, not a net. The Authority's proposals, while not fully fleshed out, will scoop too broadly yet also continue to miss potentially anticompetitive transactions involving small firms and newly formed firms operating in small, nascent, or future markets. Such firms, or transactions involving such firms, often do not meet size-of-person, size-of-transaction, size-of-market or market share notification thresholds. The Authority should attempt to design its supplemental notification regime by adopting criteria more closely related to current or future competitive relationships between combining firms, or that would allow the partial or full exclusion of competitors from relevant or related markets. The Authority should also extend reporting obligations to partial acquisitions and asset acquisitions.

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Respectfully submitted,

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