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BY EMAIL

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British Columbia Securities Commission
Financial and Consumer Services Commission, New Brunswick
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Ontario Securities Commission
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
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Dear Sirs/Mesdames:

Climate-related Disclosure Update and CSA Notice and Request for Comment – Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*

We are writing in response to CSA Notice and Request for Comment – Proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (the "**Proposed Instrument**").

We commend the Canadian Securities Administrators (the **"CSA"**) for its recognition of the serious economic and social risks posed by global climate change, and the important role that mandatory climate-related disclosure can play in providing investors and other stakeholders with the information and data needed to make informed investment and voting decisions. We recognize that in preparing the Proposed Instrument, the CSA has made efforts to balance the potential benefits to investors and stakeholders against the risk of placing too great of a burden (whether financial or administrative) on issuers. Subject to our comments below, we believe that the CSA has struck an appropriate balance between those competing interests.

Capitalized terms used and not otherwise defined herein have the meaning ascribed thereto in the Proposed Instrument.

RESPONSES TO SELECT QUESTIONS IN THE PROPOSED INSTRUMENT

We have provided responses below to certain of the specific questions posed by the CSA in respect of the Proposed Instrument. We have not provided responses in respect of certain questions more appropriately addressed by reporting issuers or other market participants.

Question relating to experience with TCFD recommendations

1. For reporting issuers that have provided climate-related disclosures voluntarily in accordance with the TCFD recommendations, what has been the experience generally in providing those disclosures?

It has been our experience that working towards the goal of aligning our clients' climate-disclosure practices, processes and procedures with the TCFD recommendations is a multi-year endeavor. While many, but by no means all, of our clients already have procedures in place to collect at least some of the data called for pursuant to the TCFD's metrics disclosure recommendations, ensuring that our clients' internal governance structures provide suitable board and managerial oversite over climate-related risks and opportunities, and that such risks and opportunities have been properly integrated into the organization's broader risk assessment mechanism, is a complex, time-consuming process.

Based on our experience working with reporting issuers implementing the TCFD recommendations, it is our view that the proposed one-year adoption period contemplated for non-venture reporting issuers may not be sufficient for many reporting issuers. As a result, we would recommend that the CSA consider a two-year adoption period, with voluntary early adoption recommended for reporting issuers who have already implemented the TCFD recommendations.

*The CSA should strongly consider aligning the implementation of the Proposed Instrument with the implementation of the mandatory climate disclosure rules currently being developed by the U.S. Securities and Exchange Commission (**"SEC"**). Given the integrated nature of the Canadian and U.S. economies, such an alignment would serve to mitigate the competitive advantage that may be afforded to U.S. firms operating under a less stringent regulatory regime. One of the aims of the proposed climate-related disclosure requirements is to improve reporting issuer access to global capital markets, by aligning Canadian disclosure standards with the expectations of international investors. In our view, the international investors on which most Canadian reporting issuers are focused include those located in the U.S., given our countries' close relationship and the relative sizes of our capital markets. Reducing or eliminating the need for U.S. investors to "translate" disclosure provided by Canadian reporting issuers into the equivalent for U.S. registrants would improve Canadian reporting issuers' access to such investors. The proposed disclosure requirements are also aimed at establishing an equal playing field amongst reporting issuers. While the CSA is likely primarily concerned with establishing a level playing field as between Canadian reporting issuers, consideration should also be given to ensuring an equal playing field from an international perspective. In our view, it would not be in the best interests of Canadian reporting issuers to have them subject to a more stringent disclosure regime than their U.S. counterparts, as such a regulatory imbalance would necessarily make Canadian reporting issuers less competitive on a global scale.*

Questions relating to disclosure of GHG emissions and scenario analysis

4. Under the Proposed Instrument, scenario analysis would not be required. Is this approach appropriate? Should the proposed Instrument require this disclosure? Should issuers have the option to not provide this disclosure and explain why they have not done so?

We agree with the CSA's decision not to require scenario analysis at this time under the Proposed Instrument. Although the use of scenario analysis continues to grow – the CDP reported in 2020 that 60% of financial companies completing CDP's climate questionnaire used scenario analysis – from the reporting issuer's point of view, scenario analysis has consistently been regarded as one of the more challenging and burdensome aspects of climate-related disclosure. By way of illustration, our analysis of the 2020 climate-disclosure made by 19 of the top global mining companies revealed that only 63% had undertaken, or were currently undertaking, scenario analysis. Furthermore, the recently released final report of the Bank of Canada and the Office of the Superintendent of Financial Institutions' Climate Scenario Analysis Pilot, published in January 2022, characterized scenario analysis as "still in its infancy", noting that standardized climate risk assessment methodologies remain in development, with the pilot participants expressing concerns over the comparability and consistency of the results of such assessments.

Although a recommendation to conduct scenario analysis is reasonable in the context of a voluntary disclosure framework, inclusion of scenario analysis in a mandatory reporting framework should be reserved for a future iteration of the Proposed Instrument, so as to afford reporting issuers time to gain sufficient experience with the fundamentals of climate-related disclosure, and to provide for the *convergence of scenario analysis assumptions, definitions and criteria in a manner that promotes meaningful understanding of such disclosure.*[1]

5. The TCFD recommendations contemplate disclosure of GHG emissions, where such information is material.

- ***The Proposed Instrument contemplates issuers having the option to disclose GHG emissions or explain why they have not done so. Is this approach appropriate?***
- ***As an alternative, the CSA is consulting on requiring issuers to disclose Scope 1 GHG emissions. Is this approach appropriate? Should disclosure of Scope 1 GHG emissions only be required where such information is material?***
- ***Should disclosure of Scope 2 GHG emissions and Scope 3 GHG emission be mandatory?***
- ***For those issuers who are already required to report GHG emissions under existing federal or provincial legislation, would the requirement in the Proposed Instrument to include GHG emissions in the issuer's AIF or annual MD&A (if an issuer elects to disclose these emissions) present a timing challenge given the respective filing deadlines? If so, what is the best way to address this timing challenge?***

*As a preliminary matter, we wish to note our concerns with what appears to be a shifting standard for materiality under Canadian securities law. In its consultation, the CSA states or implies that information is likely material if a reasonable investor's decision whether or not to buy, sell or hold securities in the issuer would likely be influenced or changed if the information in question was omitted or misstated. The CSA also refers to its role in promoting disclosures that yield "decision-useful information for investors", which is "achieved by requiring reporting issuers to disclose material information…". While we appreciate that securities legislation in certain CSA jurisdictions define "materiality" with reference to this reasonable investor test, most do not. In Ontario, for example, material facts and material changes are both determined with reference to whether the fact or change would reasonably be expected to have a significant effect on the market price or value of an issuer's securities. This is also how material changes are defined in National Instrument 51-102 Continuous Disclosure Requirements ("**NI 51-102**"), and how materiality is described in National Policy 51-201 Disclosure Standards, both of which have national application. While the two tests may appear to be substantially similar, in our view, a reasonable investor test represents a markedly lower standard than a market impact test. While we appreciate that the CSA may be describing materiality with reference to the reasonable investor test as a form of short-hand that is more easily understood by market participants, we are concerned by any implication or statement that the standard for materiality has changed, as such a fundamental shift would itself require an extensive consultation process.*

We agree with the proposal to require reporting issuers to disclose GHG emissions or explain why they have not done so. Although guidance issued by the TCFD states that all organizations should disclose

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[1] If/when scenario analysis is added into the Proposed Instrument, a distinction could be drawn between large and small issuers, with only the former being subject to the obligation.

absolute Scope 1 and Scope 2 GHG emissions (independently of a materiality assessment) and strongly encourages all organizations to disclose Scope 3 GHG emissions, in our view, a "comply or explain" regime represents a reasonable balance between investor-friendly disclosure and issuer exigencies. Disclosure in respect of all three categories of GHG emissions should remain the goal, as such disclosure provides investors and stakeholders with the core metrics needed to fully evaluate a reporting issuer's carbon footprint and progress towards the reporting issuer's climate targets. Furthermore, demand for such disclosure is arguably at an all-time high: our review of the responses provided by key players and stakeholders to SEC's climate disclosure consultations indicated overwhelming support for mandatory disclosure of Scope 1, 2 and 3 GHG emissions data, albeit with size and/or materiality thresholds, and a gradual phase-in approach, for Scope 3 emissions.

*Notwithstanding the foregoing, the fact remains that not all reporting issuers are in a position to provide Scope 3 GHG emissions disclosure at present, or in the near term, and that the preparation of Scope 3 GHG emissions disclosure may be challenging and burdensome for certain reporting issuers for years to come, as the data required to prepare such disclosure can be difficult to collect, measure, compile and verify. For instance, our recent study of the 2020 climate-disclosure made by 19 of the top global mining companies indicated that only 58% had disclosed Scope 3 GHG emissions, and our review of the SEC consultation responses indicated that 83% of reviewed responses expressed support for deferring mandatory disclosure of Scope 3 emissions data for the time being. It is also noteworthy that the Corporate Net-Zero Standard published by the Science-Based Targets initiative (**"SBTi"**) in October 2021 only requires near-term Scope 3 GHG emissions reduction targets where such emissions account for 40% or more of a company's total emissions, and of companies involved in the sale or distribution of fossil fuels.[2] This approach is a reflection of the ongoing challenges faced by reporting issuers in quantifying, reporting and reducing, Scope 3 GHG emissions.*

Furthermore, under the approach taken in the Proposed Instrument, where a reporting issuer is not in a position to satisfy the requirement to provide GHG emissions disclosure, the reporting issuer's corresponding explanation will itself serve as a useful data point for investors and stakeholders, as a reporting issuer's inability, or unwillingness, to provide such disclosure will itself provide valuable insight to investors and other stakeholders. We expect that in explaining their inability to disclose the mandated GHG emissions data, many reporting issuers will provide useful information and guidance on their efforts and progress towards making such disclosure in the future. So as to ensure that such explanations are meaningful and investor-friendly, the CSA should consider specifying in the Proposed Instrument, or in associated guidance, the types of considerations that must form the basis of an acceptable explanation of a reporting issuer's failure to disclose the requisite GHG emissions data.

*We have seen the benefits of a comply or explain regime in Canada through National Instrument 58-101 Disclosure of Corporate Governance Practices (**"NI 58-101"**). Implementing such a regime in relation to climate-related disclosure would be responsive to the vastly different circumstances and stages of adoption and formalization of climate-related disclosure practices and procedures by the wide array of Canadian reporting issuers. While the incremental change that will be brought about by such a regime will be deemed unsatisfactory by certain segments of the investment community, the increased rigour, consideration and quantification in relation to climate-related disclosure by Canadian reporting*

2 All companies, however, are required to establish long-term Scope 3 emissions reduction targets.

issuers as a result of the adoption of the Proposed Instrument will undoubtedly improve climate-related disclosure practices and benefit market participants. We expect to see improved quality, quantity and compliance with the Proposed Instrument over time, consistent with the Canadian experience following the adoption of the comply or explain regime in NI 58-101.

6. The Proposed Instrument contemplates that issuers that provide GHG disclosures would be required to use a GHG emissions reporting standard in measuring their GHG emissions, being the GHG Protocol or a reporting standard comparable with the GHG Protocol (as described in the Proposed Policy). Further, where an issuer uses a reporting standard that is not the GHG Protocol, it would be required to disclose how the reporting standard used is comparable with the GHG Protocol.

- ***As issuers have the option of providing GHG disclosures, should a specific reporting standard, such as the GHG Protocol, be mandated when such disclosures are provided?***

- ***Is the GHG Protocol appropriate for all reporting issuers? Should issuers be given the flexibility to use alternative reporting standards that are comparable with the GHG Protocol?***

- ***Are there other reporting standards that address the disclosure needs of users or the different circumstances of issuers across multiple industries and should they be specifically identified as suitable methodologies?***

We agree with the approach taken in the Proposed Instrument regarding GHG emissions reporting standards. Although use of the GHG Protocol is widespread, we note that the CDP has opted not to favour any particular reporting standard. Guidance published by the CDP states that CDP makes no judgment on standards or methodologies applied by companies to produce their GHG emissions inventories, although the CDP has expressed an expectation that any reporting standard or methodology used should follow the best practices reflected in, and observe the important aspects of, the GHG Protocol. The requirement in the Proposed Instrument to use the GHG Protocol, or a comparable standard, is a reasonable means of ensuring adherence to the key elements of the GHG Protocol, without being unnecessarily restrictive. We note, however, that reporting issuers would be well-served by a list of standards and methodologies that have been pre-approved by the CSA as comparable to the GHG Protocol, and we would recommend that the CSA include on such a list any reporting protocol or standard that has already been incorporated or adopted into any federal or provincial regulatory regime.

7. The Proposed Instrument does not require the GHG emissions to be audited. Should there be a requirement for some form of assurance on GHG emissions reporting?

We agree with the approach taken in the Proposed Instrument with respect to the auditing of GHG emissions data. While CDP supports verification and assurance as good practice in environmental reporting, and has taken the position that GHG emissions information should preferably be verified or assured, CDP accepts unverified emissions estimates, so long as there is transparency with respect to the estimation approach. Closer to home, the GHG reporting required under the Canadian

Environmental Protection Act, 1999 does not require third-party verification of submissions, although the information reported must be verifiable. Based on our experience to date, many of our reporting issuer clients are still formalizing their own climate-related disclosure practices and procedures, and we expect that additional time will be needed before the auditing of such disclosure practices and procedures would provide a meaningful benefit, without unduly burdening reporting issuers.

We would, however, recommend that the CSA consider modifying the Proposed Instrument such that, where a reporting issuer is required to disclose audited or verified GHG emissions data under any federal or provincial regulatory regime, the GHG emissions data disclosed by that reporting issuer pursuant to the Proposed Instrument should be consistent with such audited or verified data.

We would also recommend that the CSA undertake an analysis of the relative costs and benefits of imposing a requirement on reporting issuers to audit their GHG emissions data (with the results of such analysis to be made available for public comment), prior to incorporating any such requirement into a future iteration of the Proposed Instrument.

8. The Proposed Instrument permits an issuer to incorporate GHG disclosure by reference to another document. Is this appropriate? Should this be expanded to include other disclosure requirements of the Proposed Instrument?

We are of the view that a reporting issuer should be permitted to satisfy the disclosure requirements contained in Form 51-107A and Form 51-107B of the Proposed Instrument through incorporation by reference to another document filed by the reporting issuer on SEDAR. We expect that many reporting issuers will still want to prepare comprehensive ESG, climate or sustainability reports for the benefit of their stakeholders and investors, and that permitting incorporation by reference from such documents, to the extent that they are filed on SEDAR, will promote rather than detract from best disclosure practices. More generally, incorporation by reference would reduce unnecessary regulatory burden by allowing issuers to avoid having to provide duplicative disclosure where that disclosure is otherwise easily accessible by investors and other market participants. Incorporation by reference is not new to the Canadian regulatory experience. Indeed, it is a cornerstone of our short form prospectus regime. Consistent with the CSA's rationale for what we anticipate is the impending adoption of an access-equals-delivery model,[3] extending the availability of incorporation by reference would be a cost-efficient solution for issuers that would be consistent with the evolution of our capital markets, and which would not compromise investor protection.

The CSA could further achieve these goals by permitting cross-references to include hyperlinks to the previously-filed documents. In this regard, it would be helpful if Instruction (3) of Form 51-107B was amended to contemplate automatic hyperlinking to the cross-referenced document. Permitting such cross-referencing amongst SEDAR filings would serve as a reasonable middle-ground between the

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[3] See, e.g., CSA Staff Notice 51-353 Up*date on CSA Consultation Paper 51-404 Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*, published on March 27, 2018, CSA Consultation Paper 51-405 *Consideration of an Access Equals Delivery Model for Non-Investment Fund Reporting Issuers*, published on January 9, 2020, and Proposed Amendments to National Instrument 51-102 *Continuous Disclosure Obligations and Other Amendments and Changes Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers and Seeking Feedback on a Proposed Framework* published on May 20, 2021.

goal of having all relevant climate disclosure in a single document, and the goal of modernizing and simplifying disclosure practices and procedures.

Questions relating to the usefulness and benefits of disclosures contemplated by the Proposed Instrument

10. What are the anticipated benefits associated with providing the disclosures contemplated by the Proposed Instrument? How would the Proposed Instrument enhance the current level of climate-related disclosures provided by reporting issuers in Canada?

The primary anticipated benefit associated with the climate disclosure contemplated by the Proposed Instrument is that it will provide investors and stakeholders with clear, consistent and comparable information and data with respect to a reporting issuer's carbon footprint, climate-related risks and opportunities, and the reporting issuer's strategy for mitigating such risks and/or capitalizing on such opportunities. The provision of such information and data is not an end in-itself, but rather has value only to the extent that investors and stakeholders utilize that disclosure to effect a more efficient allocation of capital, thereby mitigating the social, environmental and economic risks associated with global climate change. We anticipate that the adoption of the Proposed Instrument will foster more widespread development of climate risk evaluation and disclosure best practices in Canada, which we expect will strengthen incorporation of climate-risk planning into reporting issuer business strategy and planning, and improve the overall climate change resiliency of Canada's public companies.

The climate disclosure contemplated in the Proposed Instrument would enhance the disclosure currently made by reporting issuers by: (a) requiring, with few exceptions, reporting issuers to provide certain climate disclosure relating to governance and risk management, whether or not a materiality threshold has been met; (b) promoting convergence around the TCFD recommendations; (c) fostering the adoption, implementation and compliance with the GHG Protocol, or other comparable standards to further GHG emission disclosure by Canadian reporting issuers; and (d) ensuring that reporting issuers have integrated climate-related disclosure best practices into their business planning, and are accountable to investors and stakeholders by requiring disclosure of material targets and metrics used by the reporting issuer in its ongoing business planning.[4] *All of these anticipated benefits will serve the goal of increasing investor and stakeholder access to meaningful, reliable and comparable climate-related information and data.*

Furthermore, from the perspective of the reporting issuer, providing the disclosure required under the Proposed Instrument may afford an opportunity to establish a competitive advantage and build trust and goodwill amongst both investors and stakeholders.

Questions relating to costs and challenges of disclosures contemplated by the Proposed Instrument

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4 Our recent study of the 2020 climate-disclosure made by 19 of the top global mining companies indicated that approximately 37% of the target companies were making their climate-disclosure primarily in voluntary reports, 47% in voluntary reports and financial filings in equal measure, and 15% primarily in their financial filings.

13. The costs of obtaining and presenting new disclosures may be proportionally greater for venture issuers that may have scarce resources. Would more accommodations for venture issuers be needed? If so, what accommodations would address these concerns while still balancing the reasonable information needs of investors? Alternatively, should venture issuers be exempted from some or all of the requirements of the Proposed Instrument?

In recognition of the reality that venture issuers encompass a broad range of small to medium sized enterprises at different stages of development, the CSA should consider requiring compliance with the metrics and targets provisions and GHG emissions provisions in items 3 and 4 of Form 51-107B only by those venture issuers that prepare AIFs. Venture issuers sufficiently advanced in their stage of development to have begun voluntarily preparing an AIF should be prepared and expected to comply with all applicable provisions of the Proposed Instrument. In our view, all venture issuers should comply with the governance, strategy and risk management provisions of the Proposed Instrument.

Questions relating to guidance on disclosure requirements

14. We have provided guidance in the Proposed Policy on the disclosure required by the Proposed Instrument. Are there any other tools, guidance or data sources that would be helpful in preparing these disclosures that the Proposed Policy should refer to?

In October 2021 the TCFD published Guidance on Metrics, Targets, and Transition Plans, which would be useful to add to Section 3 of the Proposed Policy. We also note that the publication listed in Section 3(a) of the Proposed Policy, Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017), has been superseded by an October 2021 version of the publication, which the Proposed Policy should refer to in place of the June 2017 version.

As indicated by our comments in the foregoing paragraph, it is quite likely that the disclosure contained in Section 3 of the Proposed Policy will be dated very quickly following adoption of the Proposed Instrument. It is not clear to us that Part 3 of the Proposed Policy will actually be useful to reporting issuers in the future and we expect that this portion of the Proposed Policy could be deleted without in any way impairing the utility of the Proposed Policy or the interpretation of the Proposed Instrument.

15. Does the guidance set out in the Proposed Policy sufficiently explain the interaction of the risk disclosure requirement in the Proposed Instrument with the existing risk disclosure requirements in NI 51-102?

In our view, the Proposed Policy is sufficiently clear in its explanation of the interaction of the risk disclosure requirements in the Proposed Instrument with the existing risk disclosure obligations contained in NI 51-102.

Question relating to prospectus disclosure

16. Form 41-101F1 Information Required in a Prospectus does not contain the climate-related disclosure requirements contemplated by the Proposed Instrument. Should an issuer be required to include the disclosure required by the Proposed Instrument in a long form

prospectus? If so, at what point during the phased-in implementation of the Proposed Instrument should these disclosure requirements apply in the context of a long form prospectus?

*It is our view that the existing risk factor and business description disclosure obligations contained in Form 41-101F1 Information Required in a Prospectus (**"Form 41-101F1"**) will overlap with the climate-related disclosure obligations of the Proposed Instrument to some extent, but that adding additional disclosure obligations to Form 41-101F1 to incorporate the specific disclosure obligations of the Proposed Instrument would be overly heavy-handed, and would not afford such disclosure the prominence that it deserves given the comprehensive nature and length of the disclosure mandated by Form 41-101F1.*

It would be preferable, from a disclosure perspective, and would provide more visibility for investors and stakeholders, if the requirements of Form 51-107A are not incorporated into Form 41-101F1 and are left to be complied with by reporting issuers in their management information circulars. This approach would be consistent with recently proposed amendments to Form 41-101F1 contained in the Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Other Amendments published on May 20, 2021 in which the CSA is proposing to remove the obligation to disclose social and environmental policies currently contained in item 5.1(4) of Form 41-101F1.

Similarly, we believe that the requirements of Form 51-107B could be left to be complied with by the reporting issuer in its MD&A or AIF, as applicable. Alternatively, if the CSA determines to incorporate aspects of Form 51-107B into Form 41-101F1, we would recommend that such requirements be limited to items 1 and 2 of such Form, to lessen the burden of compliance on reporting issuers undergoing the already onerous Form 41-101F1 filing process and in an effort to ensure that such disclosure has the prominence that it deserves within the context of the reporting issuer's disclosure.

Questions relating to phased-in implementation

17. The Proposed Instrument contemplates a phased-in transition of the disclosure requirements with non-venture issuers subject to a one-year transition phase and venture issuers subject to a three-year transition phase. Assuming the Proposed Instrument comes into force December 31, 2022 and the issuer has a December 31 year-end, these disclosures would be included in annual filings due in 2024 and 2026 for non-venture issuers and venture issuers, respectively.

- ***Would the transition provisions in the Proposed Instrument provide reporting issuers with sufficient time to review the Proposed Instrument and prepare and file the required disclosures?***

- ***Does the phased-in implementation based on non-venture or venture status address the concerns, if any, regarding the challenges and costs associated with providing the disclosures contemplated by the Proposed Instrument, particularly for venture issuers? If not, how could these concerns be addressed?***

Please see our responses to Questions 1 and 13 in relation to these matters. We are proposing that reporting issuers, other than venture issuers, be given at least a two-year transition period and that venture issuers who do not file AIFs be excluded from the requirement in Form 51-107B to respond to items 3 and 4 of such Form.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

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Yours very truly,

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