



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

March 14, 2022

Elizabeth Ising
Gibson, Dunn & Crutcher LLP

Re: PepsiCo, Inc. (the "Company")
Incoming letter dated March 11, 2022

Dear Ms. Ising:

This letter is in regard to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Myra K. Young et al. (the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Your letter indicates that the Proponents have withdrawn the Proposal and that the Company therefore withdraws its December 24, 2021 request for a no-action letter from the Division. Because the matter is now moot, we will have no further comment.

Copies of all of the correspondence related to this matter will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Conrad MacKerron
As You Sow

December 24, 2021

VIA E-MAIL

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *PepsiCo, Inc.*
Shareholder Proposal of Myra K. Young et al.
Securities Exchange Act of 1934 (“Exchange Act”)—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, PepsiCo, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the “2022 Proxy Materials”) a shareholder proposal (the “Proposal”) and statements in support thereof (the “Supporting Statement”) submitted by As You Sow on behalf of Myra K. Young and James McRitchie, Catherine Raphael and Handlery Hotels Inc. (collectively, the “Proponents”).

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Securities and Exchange Commission (the “Commission”) or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponents that if the Proponents elect to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal states, in relevant part:

RESOLVED: Shareholders request the board of directors issue a report, at reasonable expense and excluding proprietary information, describing the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging.

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 2

SUPPORTING STATEMENT: Proponent suggest [sic] that the approaches the Company should evaluate in the report, at board and management discretion, include:

- Expanding and supporting global refillables systems and infrastructure;
- Evaluating opportunities for setting multiple aggressive refillables goals and deadlines at the country or regional level;
- Establishing uniform measurement metrics on refillables use; and
- Publicly disclosing company refillables metrics.

In further support of these requests, and as particularly relevant here, the recitals to the Proposal state, in part:

Pepsi's packaging generates enormous amounts of plastic pollution with 2.3 million tons of plastic packaging annually, the equivalent of 140,000 bottles per minute. Single-use bottles are far more likely to be improperly disposed of and to become ocean pollution, harming marine life. Less than 30% of PET plastic bottles are recycled in the U.S., leaving the vast majority to be landfilled or leak into the environment. Each refillable bottle can displace a single-use bottle and, with a 95% collection rate in well-managed systems, refillables are far less likely to end up as plastic waste.

A copy of the Proposal and the Supporting Statement, as well as related correspondence with the Proponents, is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

For the reasons discussed below, we respectfully request that the Staff concur with our view that the Proposal may be excluded from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because the Proposal relates to the Company's litigation strategy and would affect the conduct of ongoing litigation to which the Company is a party.

Specifically, the Proposal (which advances some of the same allegations made by the plaintiff in a pending lawsuit involving the Company) seeks to require the Company to issue a report addressing the Company's use of single-use plastic packaging and the feasibility of "alternative packaging designs" such as refillables, which would harm its legal defense in a pending lawsuit against the Company that involves public nuisance and products liability claims. As demonstrated in the precedent disclosed below, Rule 14a-8(i)(7) permits the exclusion of

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 3

shareholder proposals like the Proposal that would interfere with the Company's legal strategy and thus relate to the Company's ordinary business operations.

ANALYSIS

The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Deals With Matters Related To The Company's Ordinary Business Operations

A. Overview Of Rule 14a-8(i)(7)

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word, but instead the term "is rooted in the corporate law concept of providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. As relevant here, one of these considerations was that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)).

In addition, framing a shareholder proposal in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Release No. 20091 (Aug. 16, 1983). The Staff, likewise, has indicated that "[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under rule 14a-8(i)(7)." *Johnson Controls, Inc.* (avail. Oct. 26, 1999).

B. The Proposal Is Excludable Because It Relates To The Company's Litigation Strategy And Would Affect The Conduct Of Litigation To Which The Company Is A Party

We believe that the Proposal may be excluded from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal relates to the Company's ordinary business operations as it implicates the Company's litigation strategy in a pending lawsuit involving the Company and would affect the conduct of that litigation.

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 4

The Staff regularly concurs with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that implicate and seek to oversee a company's ordinary business operations, including when the subject matter of the proposal is the same as or similar to the subject matter of litigation in which a company is then involved. *See, e.g., Amazon.com, Inc. (New York City Teachers' Retirement System et al.)* (avail. Apr. 7, 2021) (concurring with the exclusion of a proposal requesting a report on the adequacy of the company's efforts to reduce or mitigate health and safety risks from the COVID-19 pandemic while the company was involved in lawsuits alleging inadequate health and safety measures implemented in response to the COVID-19 pandemic); *Chevron Corp. (Sisters of St. Francis of Philadelphia et al.)* (avail. Mar. 30, 2021) (concurring with the exclusion of a proposal requesting a report analyzing how the company's policies and practices perpetuate racial injustice and inflict harm on communities of color while the company was involved in litigation seeking to hold the company liable for its alleged role in climate change and alleged resulting injuries, including the alleged harmful impacts of climate change on communities of color); *Walmart Inc.* (avail. Apr. 13, 2018) (concurring with the exclusion of a proposal requesting a report on risks associated with emerging public policies on the gender pay gap while the company was involved in numerous pending lawsuits regarding gender-based pay discrimination and related claims before the U.S. Equal Employment Opportunity Commission, as "affect[ing] the conduct of ongoing litigation relating to the subject matter of the [p]roposal to which the [c]ompany is a party"); *General Electric Co.* (avail. Feb. 3, 2016) (concurring with the exclusion of a proposal requesting a report assessing all potential sources of liability related to PCB discharges in the Hudson River while the company was defending multiple pending lawsuits related to its alleged past release of chemicals into the Hudson River); *Chevron Corp.* (avail. Mar. 19, 2013) (concurring with the exclusion of a proposal requesting that the company review its "legal initiatives against investors" because "[p]roposals that would affect the conduct of ongoing litigation to which the company is a party are generally excludable"); *Johnson & Johnson* (avail. Feb. 14, 2012) (concurring with the exclusion of a proposal where implementation would have required the company to report on any new initiatives instituted by management to address the health and social welfare concerns of people harmed by LEVAQUIN®, thereby taking a position contrary to the company's litigation strategy); *Reynolds American Inc.* (avail. Mar. 7, 2007) (concurring with the exclusion of a proposal requesting that the company provide information on the health hazards of secondhand smoke, including legal options available to minors to ensure their environments are smoke-free, while the company was defending several cases alleging injury as a result of exposure to secondhand smoke and a principal issue concerned the health hazards of secondhand smoke); *AT&T Inc.* (avail. Feb. 9, 2007) (concurring with the exclusion of a proposal requesting that the company issue a report containing specified information regarding the alleged disclosure of customer records to governmental agencies, while the company was defending multiple pending lawsuits alleging unlawful acts related to such disclosures); *Reynolds American Inc.* (avail. Feb. 10, 2006) (concurring with the exclusion of a proposal requesting that the company notify African Americans of the unique health hazards to them associated with smoking menthol cigarettes, which would be inconsistent with the company's pending litigation position of denying such

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 5

health hazards); *Exxon Mobil Corp.* (avail. Mar. 21, 2000) (concurring with the exclusion of a proposal requesting immediate payment of settlements associated with the Exxon Valdez oil spill as relating to litigation strategy); *Philip Morris Companies Inc.* (avail. Feb. 4, 1997) (concurring with the exclusion of a proposal where the Staff noted that although it “has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business,” the proposal “primarily addresses the litigation strategy of the [c]ompany, which is viewed as inherently the ordinary business of management to direct”).

Consistent with the aforementioned precedent, the Proposal unquestionably involves the same subject matter as, and would directly and negatively impact the Company’s litigation strategy in, a pending lawsuit involving the Company, captioned *Earth Island Institute v. Crystal Geyser Water Co., et al.*, No. 20-CIV-01213 (San Mateo Super. Ct.). That lawsuit alleges that the Company and nine other defendants are financially liable for plastic pollution in the marine environment and asserts, among other causes of actions, public nuisance and products liability claims based on the Company’s use of single-use plastic packaging instead of other materials. *See* Complaint, Dkt.1, at ¶ 17 (San Mateo Super. Ct. Feb. 26, 2020) (the “Complaint”) (“Defendants are major food, beverage, and consumer products businesses—some of them are in fact the world’s largest—and are responsible for a substantial portion of the total plastic pollution currently present in California’s waterways and coasts.”); *see also id.* ¶ 18 (“Defendants have created the condition of plastic pollution in California’s coasts and waterways 1) by refusing to switch to more sustainable materials in order to reap higher profits from cheap, virgin plastic”); *id.*, Prayer for Relief (seeking “[c]ompensatory damages,” an “[o]rder requiring the [d]efendants to disburse the funds and resources necessary to remediate the harm they have caused,” “abatement of the nuisance,” “that [d]efendants refrain from marketing and promotion” of certain products, “corrective advertising,” “attorneys’ fees,” and “[c]osts of suit”).

The claims the plaintiff is asserting against the Company in the *Earth Island* litigation will require a determination of the exact same issue the Proposal asks the Company to evaluate and take a public position on—“the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging.” The plaintiff seeks to hold the Company liable under a public nuisance theory, alleging that the Company and the other defendants “created, contributed to, and/or assisted in creating conditions which constitute a nuisance by causing plastic pollution in California waterways and coasts.” Complaint ¶ 169. Under California law, the “primary test” for determining whether conduct is a public nuisance “is whether the gravity of the harm outweighs the social utility of the defendant’s conduct, taking a number of factors into account.” *San Diego Gas & Elec. Co. v. Sup. Ct.*, 13 Cal. 4th 893, 938 (1996) (citing Restatement (Second) of Torts §§ 826–831 (Am. Law. Inst. (1979))). The *Earth Island* Complaint thus alleges that “[t]he social benefit of plastic packaging associated with Defendants’ Products is outweighed by the availability of alternative products,” and “[i]t was practical for Defendants, in light of their knowledge, to develop alternatives.” Complaint ¶ 172. The “plastic

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 6

packaging” and the “alternative products” referenced in the Complaint include the “single-use plastic packaging” and the “refillables systems” (respectively) referenced in the Proposal.

The plaintiff also asserts strict liability and negligence claims, alleging, as relevant here, that the Company’s products are defectively designed because the gravity of harm to the marine environment outweighs any benefits of plastic packaging. Complaint ¶ 202. The strict liability claim will be evaluated under the “risk-benefit test,” which considers, among other things, “[t]he feasibility of an alternative safer design at the time of manufacture”; “[t]he cost of an alternative design”; and “[t]he disadvantages of an alternative design.” Judicial Council of California Civil Jury Instructions, CACI No. 1204 (2020 ed.). To that end, the Complaint alleges that “the social benefit of placing single-use and other types of plastic packaging into the stream of commerce is vastly outweighed by the availability of alternative packaging options,” and that “[i]t was practical for Defendants, in light of their extensive knowledge of the hazards of placing single-use and other types of plastic packaging into the stream of commerce, to pursue and adopt known, practical, and available alternative technologies and business practices that would have mitigated their contribution to marine plastic pollution.” Complaint ¶ 202. Similarly, the plaintiff alleges that the Company and the other defendants negligently “breached their duty of care by,” among other things, “[f]ailing to . . . pursu[e] and adopt[] known, practical, and available technologies and business practices that would have mitigated their contribution to marine plastic pollution; shift[] to non-plastic packaging; . . . and pursu[e] other available alternatives that would have prevented or mitigated the injures to Plaintiff caused by marine plastic pollution.” *Id.* ¶ 210.

In connection with all of these claims, the plaintiff alleges that the Company and the other defendants have violated California law because they “have a wide range of options for eliminating or reducing the amount of plastics in their products”—including “switching to materials that are biodegradable or compostable (e.g., natural polymers and other natural materials), using materials that are more readily recycled or reused (e.g., glass and aluminum), redesigning the Products to use less packaging, and implementing closed loop systems (e.g., bottle deposit systems)”—but “refuse to implement these more sustainable options because . . . virgin plastic is cheap, and therefore results in lower overhead and higher profits.” Complaint ¶¶ 113–14. The plaintiff also alleges that “[t]he sheer volume of plastic in Defendants’ [p]roducts is astounding, and their refusal to limit plastics in their [p]roducts or use more sustainable materials and methods is a direct cause of the millions of tons of plastics that end up in the world’s oceans and waterways each year.” *Id.* ¶ 118.

This lawsuit targeting the Company’s production, sale, and marketing of products in plastic packaging is ongoing and, to date, there has been no adverse judgment against the Company. The Company’s management has a responsibility to defend the Company’s interests against unwarranted litigation, which it is committed to doing in this case. A shareholder proposal that interferes with this obligation is inappropriate, particularly when the company is involved in

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 7

defending in pending litigation the same business practices on which the Proposal is specifically focused.

The report and analysis requested by the Proposal unquestionably relate to the very same subject matter as the public nuisance and products liability claims asserted in the lawsuit—*i.e.*, “the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging.” The Supporting Statement further demonstrates this fact given that it requests that the Company report on: “[e]xpanding and supporting global refillables systems and infrastructure”; “[e]valuating opportunities for setting multiple aggressive refillables goals and deadlines at the country or regional level”; “[e]stablishing uniform measurement metrics on refillables use”; and “[p]ublicly disclosing company refillables metrics.” The Proposal itself also advances the very allegations made by the plaintiff in the litigation. For example, the Proposal alleges that “Pepsi has not committed to investing in refillables equipment nor the system infrastructure that will be needed” related to “refillables operations” and “Pepsi should consider how to build a refillables presence . . . including setting refillable packaging goals and timelines to ensure expedited reduction of plastic use and plastic waste.” Similarly, the plaintiff alleges that the Company and the other defendants negligently “breached their duty of care by,” among other things, “[f]ailing to . . . pursu[e] and adopt[] known, practical, and available technologies and business practices that would have mitigated their contribution to marine plastic pollution; shift[] to non-plastic packaging; . . . and pursu[e] other available alternatives that would have prevented or mitigated the injures to Plaintiff caused by marine plastic pollution.” Complaint ¶ 210.

Requiring the creation and disclosure of the report requested by the Proposal would adversely affect the Company’s litigation strategy in the pending lawsuit. The Proposal would obligate the Company to prepare a report directly addressing the subject matter of the litigation, to publicly evaluate and critique the reasonableness of its current business practices, and to publicly evaluate and critique the availability, costs, and reasonableness of alternatives to its current use of single-use plastic packaging. In the *Earth Island* litigation, the Company is actively *defending* these current practices, and the plaintiff seeks to hold the Company strictly liable based on the very evaluations requested by the Proposal. Moreover, implementation of the Proposal would compel the Company to publicly disclose plans relating to alternatives to single-use plastic packaging, which may prematurely disclose the Company’s litigation strategy to its opposing parties in pending litigation and prejudice the Company’s competitive position. Finally, the Proposal’s references to the Company not being “committed to investing in refillables” and needing to “consider how to build a refillables presence . . . to ensure expedited reduction of plastic use and plastic waste” demonstrate that the Proposal seeks to have the Company address in the requested report that, contrary to its litigation position, the harms resulting from the Company’s use of single-use plastic packaging (harms it disputes) are outweighed by the benefits, given the cost and availability of reasonable alternative designs and materials.

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 8

As demonstrated in precedent like *Walmart Inc.*, *General Electric Co.*, and *Johnson & Johnson*, it is not proper for Rule 14a-8 to be used to require the Company to commission a report designed to harm its legal defenses and increase the likelihood that it will be found liable in pending litigation. Such a proposal harms the Company's legal strategy and thus interferes with the Company's ordinary business operations. Therefore, as explained above, the Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that, like the Proposal, implicate a company's litigation conduct or litigation strategy.

As a final matter, we note that a proposal relating to ordinary business matters such as ongoing litigation is excludable under Rule 14a-8(i)(7) regardless of whether or not it touches upon a significant policy issue. Although the Commission has stated that "proposals relating to such [ordinary business] matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable," the Staff has expressed the view that proposals relating to both ordinary business matters and significant social policy issues may be excluded in their entirety in reliance on Rule 14a-8(i)(7). As an example, although smoking is often considered a significant policy issue, as noted above, the Staff has concurred with the exclusion of proposals that touched upon this issue where the subject matter of the proposal (e.g., the health effects of smoking) was the same as or similar to that which was at the heart of litigation in which the company was then involved. *See, e.g., Philip Morris Companies Inc.* (avail. Feb. 4, 1997) (noting that although the Staff "has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business," the company could exclude a proposal that "primarily addresses the litigation strategy of the Company, which is viewed as inherently the ordinary business of management to direct").

Similarly, the subject matter of the Proposal (e.g., "the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging") encompasses the subject matter of litigation in which the Company is currently involved. Thus, because the Proposal implicates the Company's litigation strategy, which is an ordinary business matter, the Proposal is excludable under Rule 14a-8(i)(7).

In summary, the Proposal requests that the Company take action that would directly undermine the Company's position in pending litigation against the Company at the same time that the Company is challenging the plaintiff's allegations on the very issues implicated by the Proposal. The Proposal seeks to substitute the judgment of shareholders for that of the Company by requiring the Company take action that would harm its legal defenses in pending litigation. Implementing the Proposal would intrude upon Company management's exercise of its day-to-day business judgment with respect to pending litigation in the ordinary course of its business operations. Accordingly, we believe that the Proposal may be properly excluded from the

Office of Chief Counsel
Division of Corporation Finance
December 24, 2021
Page 9

Company's 2022 Proxy Materials under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2022 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287, or Alicia Lee, the Company's Senior Counsel, Corporate Governance, at (914) 253-2198.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Alicia Lee, PepsiCo, Inc.
Conrad MacKerron, As You Sow

EXHIBIT A

From: Shareholder Engagement
[REDACTED]

Date: 23 November 2021 at 15:25:00 GMT-5

To: "Flavell, David {PEP}" <david.flavell@pepsico.com>, SPA -
PepsiCo Investor Relations <PepsiCoInvestorRel@pepsico.com>

Cc: Conrad MacKerron [REDACTED], Kelly McBee
[REDACTED], James McRitchie [REDACTED],
Gail Follansbee [REDACTED], Rachel Lowy
[REDACTED]

Subject: Pepsico - Shareholder Proposal Documents

Dear Mr. Flavell,

Attached please find the lead-filer and co-filer filing document packets submitting a shareholder proposal for inclusion in the company's 2022 proxy statement. A printed copy of these documents has been sent to your offices via FedEx and our records show that it has been delivered today, November 23rd at 1:51pm.

It would be much appreciated if you could please confirm receipt of this email.

Thank you and best regards,
Rachel Lowy

Rachel Lowy (she/her/hers)
Shareholder Relations Associate

As You Sow

[REDACTED]
[REDACTED]
[REDACTED] | www.asyousow.org



VIA FEDEX & EMAIL

November 22, 2021

David Flavell
Executive Vice President, General Counsel and Corporate Secretary
PepsiCo Inc.
700 Anderson Hill Road
Purchase, New York 10577
david.flavell@pepsico.com

Dear Mr. Flavell,

As You Sow is filing a shareholder proposal on behalf of Myra K. Young and James McRitchie ("Proponent"), a shareholder of PepsiCo Inc., for inclusion in PepsiCo's 2022 proxy statement and for consideration by shareholders in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

A letter from the Proponent authorizing *As You Sow* to act on its behalf is enclosed. A representative of the Proponent will attend the stockholder meeting to move the resolution as required.

We are available to discuss this issue and are optimistic that such a discussion could result in resolution of the Proponent's concerns.

To schedule a dialogue, please contact me at [REDACTED], and Kelly McBee, Waste Program Coordinator at [REDACTED]. Please send all correspondence **with a copy to** [REDACTED].

Sincerely,

Conrad MacKerron
Senior Vice President

Enclosures

- Shareholder Proposal
- Shareholder Authorization

cc: investor@pepsico.com

WHEREAS: Despite taking actions to reduce virgin plastic use and increase recycling, PepsiCo has been cited as a top global plastic packaging polluter for four consecutive years. Experts believe refillable bottles are key to addressing plastic pollution and can increase financial return, yet the company reports zero percent of packaging delivered in refillable containers, lagging its peers.

Pepsi's packaging generates enormous amounts of plastic pollution with 2.3 million tons of plastic packaging annually, the equivalent of 140,000 bottles per minute. Single-use bottles are far more likely to be improperly disposed of and to become ocean pollution, harming marine life. Less than 30% of PET plastic bottles are recycled in the U.S., leaving the vast majority to be landfilled or leak into the environment. Each refillable bottle can displace a single-use bottle and, with a 95% collection rate in well-managed systems, refillables are far less likely to end up as plastic waste.

Refillables provide opportunities for faster, larger cuts in single-use plastic. Competitor Coca-Cola distributes 11% of products in refillable containers and states, "Refillable growth rates have increased during COVID-19," citing research that the pandemic "has made consumers more aware of packaging waste and driven preference for refillable packages." An HSBC beverage industry analyst concluded "...to cut the number of bottles produced globally, only higher penetration of multi-use refillable bottles can move the system from mostly 'linear' to one that is materially more 'circular'."

Coca-Cola states that refillables are among its best packaging options for reducing the company's carbon footprint. Boosting market share of refillables by 10% in coastal countries could reduce plastic pollution by 22%, a 20% increase could cut pollution by 39%.¹

The growing plastic pollution problem will be more economically challenging for companies not investing adequately in alternative packaging solutions. Austria, Chile, and Germany have enacted refillables quotas. Governments may impose further limits or punitive taxes on single-use plastic bottles.

Pepsi has not committed to investing in refillables equipment nor the system infrastructure that will be needed to keep pace with Coca-Cola's refillables operations in many countries. Pepsi should consider how to build a refillables presence in global markets, including setting refillable packaging goals and timelines to ensure expedited reduction of plastic use and plastic waste.

RESOLVED: Shareholders request the board of directors issue a report, at reasonable expense and excluding proprietary information, describing the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging.

SUPPORTING STATEMENT: Proponent suggest that the approaches the Company should evaluate in the report, at board and management discretion, include:

- Expanding and supporting global refillables systems and infrastructure;
- Evaluating opportunities for setting multiple aggressive refillables goals and deadlines at the country or regional level;
- Establishing uniform measurement metrics on refillables use; and
- Publicly disclosing company refillables metrics.

¹ <https://oceana.org/reports/just-one-word-refillables/>

October 30, 2021

Andrew Behar
CEO
As You Sow

[REDACTED]
[REDACTED]

Re: Authorization to File Shareholder Resolution

Dear Mr. Behar,

In accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934, the undersigned ("Stockholder") authorizes *As You Sow* to file or co-file a shareholder resolution on Stockholder's behalf with the named Company for inclusion in the Company's 2022 proxy statement. The resolution at issue relates to the below described subject.

Stockholder: Myra K. Young and James McRitchie

Company: PepsiCo

Subject: Sustainable Packaging Policies for Plastics

The Stockholder has continuously owned over \$2,000 worth of Company stock, with voting rights, since before January 4, 2020 and will hold the required amount of stock through the date of the Company's annual meeting in 2022.

The Stockholder gives *As You Sow* the authority to address, on the Stockholder's behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing Stockholder in engagements with the Company, entering into any agreement with the Company, and designating another entity as lead filer and representative of the shareholder. The Stockholder understands that the Stockholder's name may appear on the company's proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder's name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available for a meeting with PepsiCo regarding this shareholder proposal, at the following days/times: between: 11/29/2021 - 12/17/2021 Monday – Friday and between the hours of 9:00am and 5:30pm, Eastern Standard Time
Stockholder should provide 2 dates within the following time frame:

Date 12/2/21 Time 1:30pm

Date 12/2/21 Time 2:00pm

The Stockholder can be contacted at the following email address to schedule a dialogue during one of the above dates [REDACTED]

Any correspondence regarding meeting dates must **also be sent to my representative:**

Conrad MacKerron, Senior Vice President at [REDACTED]

Kelly McBee, Waste Program Coordinator at [REDACTED]

and to [REDACTED].

The Stockholder also authorizes *As You Sow* to send a letter of support of the resolution on Stockholder's behalf.

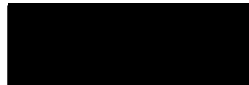
Sincerely,

DocuSigned by:

James McRitchie

James McRitchie

Shareholder



VIA FEDEX & EMAIL

November 22, 2021

David Flavell
Executive Vice President, General Counsel and Corporate Secretary
PepsiCo Inc.
700 Anderson Hill Road
Purchase, New York 10577
david.flavell@pepsico.com

Dear Mr. Flavell,

As You Sow is co-filing a shareholder proposal on behalf of the following PepsiCo Inc. shareholders for action at the next annual meeting of PepsiCo:

- Catherine Raphael
- Handlery Hotels Inc

Shareholders are co-filers of the enclosed proposal with Myra K. Young and James McRitchie, who is the Proponent of the proposal. *As You Sow* has submitted the enclosed shareholder proposal on behalf of Proponent for inclusion in the 2022 proxy statement in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. Co-filers will either: (a) be available on the dates and times offered by the Proponent for an initial meeting, or (b) authorize *As You Sow* to engage with the Company on their behalf, within the meaning of Rule 14a-8(b)(iii)(B).

As You Sow is authorized to act on Catherine Raphael and Handlery Hotels Inc's behalf with regard to withdrawal of the proposal. A representative of the lead filer will attend the stockholders' meeting to move the resolution as required.

Letters authorizing *As You Sow* to act on co-filers' behalf are enclosed.

We are hopeful that the issue raised in this proposal can be resolved. To schedule a dialogue, please contact me at [REDACTED], and Kelly McBee, Waste Program Coordinator at [REDACTED]

Please send all correspondence with a copy to [REDACTED]

Sincerely,

Conrad MacKerron
Senior Vice President

Enclosures

- Shareholder Proposal
- Shareholder Authorization

cc: investor@pepsico.com

WHEREAS: Despite taking actions to reduce virgin plastic use and increase recycling, PepsiCo has been cited as a top global plastic packaging polluter for four consecutive years. Experts believe refillable bottles are key to addressing plastic pollution and can increase financial return, yet the company reports zero percent of packaging delivered in refillable containers, lagging its peers.

Pepsi's packaging generates enormous amounts of plastic pollution with 2.3 million tons of plastic packaging annually, the equivalent of 140,000 bottles per minute. Single-use bottles are far more likely to be improperly disposed of and to become ocean pollution, harming marine life. Less than 30% of PET plastic bottles are recycled in the U.S., leaving the vast majority to be landfilled or leak into the environment. Each refillable bottle can displace a single-use bottle and, with a 95% collection rate in well-managed systems, refillables are far less likely to end up as plastic waste.

Refillables provide opportunities for faster, larger cuts in single-use plastic. Competitor Coca-Cola distributes 11% of products in refillable containers and states, "Refillable growth rates have increased during COVID-19," citing research that the pandemic "has made consumers more aware of packaging waste and driven preference for refillable packages." An HSBC beverage industry analyst concluded "...to cut the number of bottles produced globally, only higher penetration of multi-use refillable bottles can move the system from mostly 'linear' to one that is materially more 'circular'."

Coca-Cola states that refillables are among its best packaging options for reducing the company's carbon footprint. Boosting market share of refillables by 10% in coastal countries could reduce plastic pollution by 22%, a 20% increase could cut pollution by 39%.¹

The growing plastic pollution problem will be more economically challenging for companies not investing adequately in alternative packaging solutions. Austria, Chile, and Germany have enacted refillables quotas. Governments may impose further limits or punitive taxes on single-use plastic bottles.

Pepsi has not committed to investing in refillables equipment nor the system infrastructure that will be needed to keep pace with Coca-Cola's refillables operations in many countries. Pepsi should consider how to build a refillables presence in global markets, including setting refillable packaging goals and timelines to ensure expedited reduction of plastic use and plastic waste.

RESOLVED: Shareholders request the board of directors issue a report, at reasonable expense and excluding proprietary information, describing the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging.

SUPPORTING STATEMENT: Proponent suggest that the approaches the Company should evaluate in the report, at board and management discretion, include:

- Expanding and supporting global refillables systems and infrastructure;
- Evaluating opportunities for setting multiple aggressive refillables goals and deadlines at the country or regional level;
- Establishing uniform measurement metrics on refillables use; and
- Publicly disclosing company refillables metrics.

¹ <https://oceana.org/reports/just-one-word-refillables/>

11/9/2021 | 8:21:17 AM PST

Andrew Behar
CEO
As You Sow



Re: Authorization to File Shareholder Resolution

Dear Andrew Behar,

The undersigned (“Stockholder”) authorizes As You Sow to file or co-file a shareholder resolution on Stockholder’s behalf with the named Company for inclusion in the Company’s 2022 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934. The resolution at issue relates to the below described subject.

Stockholder: Catherine Raphael (S)
Company: PepsiCo
Subject: Sustainable Packaging Policies for Plastics

The Stockholder has continuously owned an amount of Company stock for a duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company’s proxy statement. The Stockholder intends to hold the required amount of stock through the date of the Company’s annual meeting in 2022.

The Stockholder gives As You Sow the authority to address, on the Stockholder’s behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing Stockholder in engagements with the Company, entering into any agreement with the Company, and designating another entity as lead filer and representative of the shareholder. The Stockholder understands that the Stockholder’s name and contact information will be disclosed in the proposal. The Securities and Exchange Commission has confirmed that they remove personally identifiable information from No-Action requests and related correspondence before making these materials publicly available on the Commission’s website. The Stockholder acknowledges that their name, however, may appear on the company’s proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder’s name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available for a meeting with the Company regarding this shareholder proposal. The dates/times will be provided by As You Sow.

The Stockholder can be contacted at the following email address to schedule a dialogue during one of the above dates:



Any correspondence regarding meeting dates must **also be sent to my representative:**



The Stockholder also authorizes As You Sow to send a letter of support of the resolution on Stockholder's behalf.

Sincerely,

DocuSigned by:
Catherine Raphael
29EB720C3306423...

Name: Catherine Raphael

Title: Ms.

11/14/2021 | 9:32:45 PM EST

Andrew Behar
CEO
As You Sow



Re: Authorization to File Shareholder Resolution

Dear Andrew Behar,

The undersigned (“Stockholder”) authorizes As You Sow to file or co-file a shareholder resolution on Stockholder’s behalf with the named Company for inclusion in the Company’s 2022 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities and Exchange Act of 1934. The resolution at issue relates to the below described subject.

Stockholder: Handlery Hotels Inc
Company: PepsiCo
Subject: Sustainable Packaging Policies for Plastics

The Stockholder has continuously owned an amount of Company stock for a duration of time that enables the Stockholder to file a shareholder resolution for inclusion in the Company’s proxy statement. The Stockholder intends to hold the required amount of stock through the date of the Company’s annual meeting in 2022.

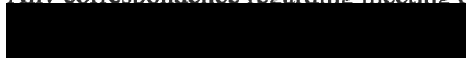
The Stockholder gives As You Sow the authority to address, on the Stockholder’s behalf, any and all aspects of the shareholder resolution, including drafting and editing the proposal, representing Stockholder in engagements with the Company, entering into any agreement with the Company, and designating another entity as lead filer and representative of the shareholder. The Stockholder understands that the Stockholder’s name and contact information will be disclosed in the proposal. The Securities and Exchange Commission has confirmed that they remove personally identifiable information from No-Action requests and related correspondence before making these materials publicly available on the Commission’s website. The Stockholder acknowledges that their name, however, may appear on the company’s proxy statement as the filer of the aforementioned resolution, and that the media may mention the Stockholder’s name in relation to the resolution. The Stockholder supports this proposal.

The Stockholder is available for a meeting with the Company regarding this shareholder proposal. The dates/times will be provided by As You Sow.

The Stockholder can be contacted at the following email address to schedule a dialogue during one of the above dates:

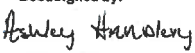


Any correspondence regarding meeting dates must also be sent to my representative:



The Stockholder also authorizes As You Sow to send a letter of support of the resolution on Stockholder's behalf.

Sincerely,

DocuSigned by:

163B90A22BA14D9...

Name: Ashley Handlery

Title: Director, Handlery Hotels Inc.

From: Lee, Alicia {PEP}

Sent: Monday, December 6, 2021 4:39 PM

To: 'Conrad MacKerron' [REDACTED]

Cc: Nastanski, Cynthia {PEP} <Cynthia.Nastanski@pepsico.com>; [REDACTED]

[REDACTED]; [REDACTED]

[REDACTED]; [REDACTED];

[REDACTED]; [REDACTED]

[REDACTED]

Subject: PepsiCo

Dear Mr. MacKerron,

I am writing on behalf of PepsiCo, Inc., which received on November 23, 2021, the shareholder proposal you submitted on behalf of Myra K. Young and James McRitchie; Catherine Raphael (S); and Handlery Hotels Inc. Please see the attached letter, which we will also send today by UPS overnight mail. Please confirm receipt of this email and the attached letter. Thank you.

Best regards,

Alicia

Alicia Lee

Senior Counsel, Corporate Governance

PepsiCo, Inc.

700 Anderson Hill Road | Purchase | New York | 10577 | USA

Tel: [REDACTED]

alicia.lee@pepsico.com



700 Anderson Hill Road, Purchase, New York, 10577 www.pepsico.com

ALICIA LEE
SENIOR COUNSEL, CORPORATE GOVERNANCE
Tel: [REDACTED]
alicia.lee@pepsico.com

December 6, 2021

VIA OVERNIGHT MAIL AND EMAIL

Conrad MacKerron
As You Sow



Dear Mr. MacKerron:

I am writing on behalf of PepsiCo, Inc. (the “**Company**”), which received on November 23, 2021, the shareholder proposal that you submitted on November 22, 2021 (the “**Submission Date**”) on behalf of Myra K. Young and James McRitchie; Catherine Raphael (S); and Handlery Hotels Inc (each a “**Proponent**” and, collectively, the “**Proponents**”) pursuant to Securities and Exchange Commission (“**SEC**”) Rule 14a-8 for inclusion in the proxy statement for the Company’s 2022 Annual Meeting of Shareholders (the “**Proposal**”).

The Proposal contains certain procedural deficiencies, which SEC regulations require us to bring to your attention. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that a shareholder proponent must submit sufficient proof of its continuous ownership of company shares. Thus, with respect to the Proposal, Rule 14a-8 requires that each Proponent demonstrate that the Proponent has continuously owned at least:

- (1) \$2,000 in market value of the Company’s shares entitled to vote on the Proposal for at least three years preceding and including the Submission Date;
- (2) \$15,000 in market value of the Company’s shares entitled to vote on the Proposal for at least two years preceding and including the Submission Date;
- (3) \$25,000 in market value of the Company’s shares entitled to vote on the Proposal for at least one year preceding and including the Submission Date; or
- (4) \$2,000 of the Company’s shares entitled to vote on the Proposal for at least one year as of January 4, 2021, and that the Proponent has continuously maintained a minimum investment amount of at least \$2,000 of such shares from January 4, 2021 through the Submission Date (each an “**Ownership Requirement**,” and collectively, the “**Ownership Requirements**”).

The Company's stock records do not indicate that the Proponents are the record owners of sufficient shares to satisfy any of the Ownership Requirements. In addition, to date we have not received proof that the Proponents have satisfied any of the Ownership Requirements.

To remedy this defect, each Proponent must submit sufficient proof that such Proponent alone has satisfied at least one of the Ownership Requirements. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of either:

- (1) a written statement from the "record" holder of the Proponent's shares (usually a broker or a bank) verifying that, at the time the Proponent submitted the Proposal (the Submission Date), the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above; or
- (2) if the Proponent was required to and has filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, demonstrating that the Proponent met at least one of the Ownership Requirements above, a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level and a written statement that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.

If any Proponent intends to demonstrate ownership by submitting a written statement from the "record" holder of the Proponent's shares as set forth in (1) above, please note that most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as record holders of securities that are deposited at DTC. You can confirm whether the Proponent's broker or bank is a DTC participant by asking the Proponent's broker or bank or by checking DTC's participant list, which is available at <http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>. In these situations, shareholders need to obtain proof of ownership from the DTC participant through which the securities are held, as follows:

- (1) If the Proponent's broker or bank is a DTC participant, then the Proponent needs to submit a written statement from the Proponent's broker or bank verifying that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.
- (2) If the Proponent's broker or bank is not a DTC participant, then the Proponent needs to submit proof of ownership from the DTC participant through which the shares are held verifying that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above. You should be able to find out the identity of the DTC participant by asking the Proponent's broker

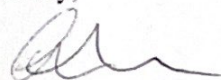
Mr. Conrad MacKerron
December 6, 2021
Page 3

or bank. If the Proponent's broker is an introducing broker, you may also be able to learn the identity and telephone number of the DTC participant through the Proponent's account statements, because the clearing broker identified on the account statements will generally be a DTC participant. If the DTC participant that holds the Proponent's shares is not able to confirm the Proponent's individual holdings but is able to confirm the holdings of the Proponent's broker or bank, then the Proponent needs to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that the Proponent continuously held Company shares satisfying at least one of the Ownership Requirements above: (i) one from the Proponent's broker or bank confirming the Proponent's ownership, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at 700 Anderson Hill Road, Purchase, NY 10577. Alternatively, you may transmit any response by email to me at alicia.lee@pepsico.com.

If you have any questions with respect to the foregoing, please contact me at [REDACTED]. For your reference, I enclose a copy of Rule 14a-8 as amended for meetings that occur on or after January 1, 2022 but before January 1, 2023, Staff Legal Bulletin No. 14F and Staff Legal Bulletin No. 14L.

Sincerely,



Alicia Lee
Senior Counsel, Corporate Governance

Enclosures

cc: Myra K. Young and James McRitchie
Catherine Raphael
Ashley Handlery, Director, Handlery Hotels Inc
Kelly McBee, Waste Program Coordinator, As You Sow
[REDACTED]

#424770-1

SANFORD J. LEWIS, ATTORNEY

PO Box 231
Amherst, MA 01004-0231
413 549-7333
sanfordlewis@strategiccounsel.net

January 24, 2022

Via electronic mail

Office of Chief Counsel
Division of Corporate Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Shareholder Proposal to PepsiCo. on Behalf of Myra K. Young et al.

Ladies and Gentlemen,

As You Sow has submitted a shareholder proposal (“the Proposal”) on behalf of Myra K. Young and James McRitchie, Catherine Raphael and Handlery Hotels Inc. (collectively, the “Proponents”), beneficial owners of common stock of PepsiCo. (“the Company”). I have been asked by the Proponents to respond to the letter dated December 24, 2021 sent to the Securities and Exchange Commission by Elizabeth A. Ising (“the Company Letter”). In that letter, the Company contends that the Proposal may be excluded from the Company’s 2022 proxy statement by virtue of Rule 14a-8(i)(7). A copy of this letter is being transmitted concurrently to Elizabeth Ising.

SUMMARY

The Proposal (appended to this letter) requests that the Company issue a report describing the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging, including specifically reusable bottles. The background statement and supporting statement of the proposal emphasize the need for the company to step up efforts to expand and support global refillables systems and infrastructure, including refillables goals and deadlines at the country or regional level, establishing uniform measurement metrics on refillables use, and publicly disclosing company refillables metrics.

The Company argues that the Proposal is a matter of ordinary business, that it undermines the Company’s position in ongoing litigation, and is therefore excludable under Rule 14a-8(i)(7).

However, the Proposal does not dictate the Company’s litigation strategy, does not address the crux of the litigation, nor does it seek information that would harm its defense of alleged violations of law. The ongoing litigation is based on the Company’s past harms and practices, not its future ability to reduce dependence on single-use packaging. Finally, the Proposal focuses on a significant policy issue of shareholder interest. Therefore, the Proposal’s exclusion under 14a-8(i)(7) is improper.

ANALYSIS

The Company claims that the Proposal “implicates the Company’s litigation strategy in a pending lawsuit involving the Company and would affect the conduct of that litigation.” (Company Letter, p. 3). The Company concludes that the Proposal implicates the company’s litigation conduct or strategy because it is “designed to harm its legal defenses and increase the likelihood that it will be found liable in pending litigation” and “encompasses the subject matter of litigation in which the Company is currently involved.” (Company Letter, p. 8). However, as explained below, the Proposal does not harm the Company’s legal defense and the fact that it addresses a subject matter similar to the Company’s ongoing litigation is insufficient to support omission of the Proposal. The Proposal is prospective in its requests, while the subject of the litigation is historical actions. The information contested in the litigation is also publicly available. Finally, the Proposal does not affect the conduct of the Company’s ongoing Litigation.

I. The Proposal Does Not Implicate the Company’s Litigation Strategy for Purposes of 14a-8(I)(7)

A. The Proposal Does Not Address the Crux of the Litigation

The Company claims “the report and analysis requested by the Proposal unquestionably relate to the very same subject matter as the public nuisance and products liability claims asserted in the lawsuit. The Company further frames the allegations of the Complaint as “the potential and options for the Company to rapidly reduce dependence on single-use plastic packaging,” which is the subject of the Proposal, not the litigation. (Company Letter, p. 7).

While both the Earth Island litigation and the Proposal can broadly be considered to address a similar subject matter -- plastic packaging – the similarities stop there. The crux of the Proposal and litigation are distinct. The Complaint alleges that the Company: violated the California Consumer Legal Remedies Act for deceiving consumers as to the recyclability of the products it sold; created a public nuisance through plastic packaging of products it sold; breached its express warranty regarding sold products’ recyclability; failed to warn consumers about its products’ harms to waterways; sold products with a defective design; was negligence in its duty to use due care in developing, designing, testing, inspecting and distributing the plastic packaging incorporated into the products it sold; and failed to warn for the same issues.

The Proposal, on the other hand, asks the Company for a report on how the company can, prospectively, reduce single-use packaging by increasing infrastructure for refillables and creating metrics and goals related to refillables. Such a request will not undermine the Company’s litigation position or defense which revolves around the past sale of its products.

In cases such as this, the Staff has denied exclusion of proposals that have a similar subject as ongoing litigation but do not overlap strategically or factually with the litigation. See, Chevron Corp. (avail. March 28, 2018) (denied exclusion of a proposal requesting a report on actions to prospectively minimize methane emissions where company argued that it overlapped “both factually and strategically” with the crux of ongoing litigation addressing the Company’s proportional share of methane emissions attributable to its historical “production, promotion, marketing, and use of fossil fuel products”). The crux of the Proposal and the litigation here are similarly distinct. While both the Complaint and the Proposal do both address the company’s use

of plastics, the two do not overlap factually or strategically enough for the report requested in the Proposal to affect the conduct of the ongoing litigation.

No-action letters cited by the Company are inapposite, describing instances where proposals specifically sought to dictate a company's litigation strategy, its actions related to litigation, or sought information that would prematurely disclose the Company's litigation plans to opposing parties. See, *Exxon Mobil Corp.* (avail. Mar. 21, 2000) (concurring with the exclusion of a proposal requesting immediate payment of settlements associated with the Exxon Valdez oil spill as relating to litigation strategy); *Chevron Corp.* (avail. Mar. 19, 2013) (concurring with the exclusion of a proposal requesting that the company review its "legal initiatives against investors," including the Company's public relations campaign and attacks on New York State, a major institutional investor, and potential witness in an ongoing lawsuit, and the Company's subpoena requesting seven years of emails and correspondence from two investors. These requests were directly related to ongoing litigation and the proposal was excluded on the basis that it could affect the conduct of ongoing litigation to which the company is a party"). *Merck & Co. Inc.* (avail. February 3, 2009) (concurring with exclusion of a proposal which asked Merck to take various actions relating to Vioxx litigation, including that Merck should publicly declare that criminal acts have occurred and that, instead of paying for lawyers, Merck should use the funds to compensate the victims of Vioxx and their families).

The Staff has denied exclusion in cases where proposals involving similar issues as ongoing litigation were not likely to affect the conduct of that litigation. Most recently, the Staff denied a no action request in *The Walt Disney Company* (January 19, 2022). In *Walt Disney*, the company asserted that information requested in the Proposal -- aggregated gender and racial pay gap data for its worldwide workforce -- could be used in litigation regarding the gender pay equity of its California employees. Although the data treated a similar subject matter, pay equity, the information requested in the proposal allowed the company to opt out of providing privileged information, so that it could exclude California data, and therefore would not affect the California specific litigation. The Staff found that the proposal "does not deal with the Company's litigation strategy or the conduct of litigation to which the company is a party." The same is true in the present matter.

Also see, *Cabot Oil & Gas Corp.* (avail. January 28, 2010) (denying that a proposal seeking a report on "potential material risks, short or long term, to the company's future finances or operations, due to environmental concerns regarding [hydraulic] fracturing" implicated the company's strategy in ongoing litigation involving alleged historical well contamination from the company's hydraulic fracturing operations). See also, *Chevron Corp.* (avail. March 28, 2018) (denying exclusion of a proposal seeking a report on company's current practices to minimize methane emissions, on the basis that it did not implicate the company's strategy in ongoing litigation involving climate change related injuries).

The Proposal at issue here requests a report describing future potential options for the Company to rapidly reduce dependence on single-use plastic packaging, including options for expanding the use of refillables. It does not dictate the company's litigation strategy about inaccurate or fraudulent representations made to consumers, ask it to describe or address the harms prior sales of products had on the environment, or address how negligent the company may have been in its past sales or claims, nor does it ask the Company to disclose information related to the Company's litigation plans. Moreover, as in *The Walt Disney Company* decision, the Company

has control over what information it chooses to put into the report, therefore it can respond to the request in a manner that does not disclose its litigation strategy.

B. Information contested in the litigation is publicly available

The Commission has previously ruled against exclusion of proposals in cases where there is publicly available information regarding the subject of ongoing litigation and information requested in a proposal. See, *Cabot Oil & Gas Corp.* (avail. January 28, 2010) (extensive public information was available regarding the harms associated with hydraulic fracturing and the existence of safer alternative materials for hydraulic fracturing).

Factually contested information in the Company's ongoing litigation includes whether the company provided accurate information to its consumers and also whether its plastic packaging from products it sold has caused harm or nuisance. Information of harm from its products is publicly available, such as information from Break Free From Plastic's 2019 Global Brand Audit, which cites the Company's plastic waste as among the highest levels of waste collected in data samples (Earth Island Complaint, p. 4). Additional public sources of data regarding the Company's plastic pollution include a report from the Ellen McArthur Foundation, which states the Company produced 2.35 million metric tonnes of plastic in 2020, 0% of which was reusable.¹

The Proposal does not ask the Company to address issues that are the crux of the litigation and, even if it did, sufficient information about the recyclability and impact of the Company's plastic packaging and its recyclability is publicly available.

Additionally, although the Company has not fulfilled the Proposal asking for the company to describe options to reduce dependence on single-use packaging, including expanding and supporting global refillables systems and infrastructure, it has publicly reported on a number of other actions it has taken to reduce single use packaging. For example, in its current sustainability report, it states that through continued growth of its SodaStream business (which allows consumers to create carbonated drinks at home with no packaging) an estimated 78 billion single use plastic bottles will be avoided by 2025.² The SodaStream site³ states that one bottle of SodaStream rids the world of up to 3,000 single-use plastic bottles." Beyond SodaStream, the Company has also publicly discussed and promoted other alternatives to single-use plastics, such as its latest "hydration platform," which prompts customers to fill their own reusable bottles⁴ and its "Drinkfinity" product, which allows users to use a single bottle with 20 different flavor pods.⁵

Having already publicly discussed and promoted various measures to reduce single use plastic by avoiding use of bottles, the Proposal's request for a report focusing on additional measures to reduce single-use plastics through refillable bottles is simply an expansion on the company's existing discussions and promotion of its activities in this area. As the Proposal does not implicate the Company's litigation strategy, and the facts contested in ongoing litigation are publicly available, exclusion is improper under 14a-8(i)(7), consistent with the above precedent.

¹ <https://ellenmacarthurfoundation.org/global-commitment/overview>

² https://www.pepsico.com/docs/album/sustainability-report/2020-csr/2020_sustainability_report_summary.pdf?sfvrsn=2b435ae0_8 (p. 8)

³ <https://sodastream.com/blogs/explore/fight-plastic>

⁴ <https://fortune.com/2019/04/22/pepsico-earth-day-hydration-platform/>

⁵ <https://www.fastcompany.com/90160623/pepsi-redesigns-the-water-bottle>

C. The Proposal does not seek information that would harm the Company's legal defense

Shareholder proposals have historically been excluded under 14a-8(i)(7) when they implicate discovery issues or harm the company's legal defense. See, *General Electric Co.* (avail. Feb. 3, 2016) (concurring with the exclusion of a proposal requesting a report assessing all potential sources of liability related to PCB discharges in the Hudson River while the company was defending multiple pending lawsuits related to its alleged past release of chemicals into the Hudson River).

The no-action letters cited by the Company involve proposals with requests for information that would harm a company's legal defense, including requests that would require an admission of liability or fault or seek contested information. See, *AT&T Inc.* (avail. Feb. 9, 2007) (concurring with the exclusion of a proposal requesting that the company issue a report regarding the disclosure of customer records to governmental agencies while the company was a defendant in multiple pending lawsuits alleging unlawful acts by the company in relation to such disclosures); *Johnson & Johnson* (avail. Feb. 14, 2012) (concurring with the exclusion of a proposal where implementation would have required the company to report on any new initiatives instituted by management to address the health and social welfare concerns of people specifically harmed by LEVAQUIN®, thereby taking a position contrary to the company's litigation strategy).

On the other hand, when proposals have not involved contested factual questions, the Staff has denied arguments for their exclusion on an ordinary business basis. See, *Sprint Corporation* (avail. February 18, 2003) (though the proposal was excluded, the Staff rejected the company's ordinary business argument that the proposal involved contested factual questions that were the subject of discovery in a pending lawsuit). See also, *Chevron Corp.* (avail. March 28, 2018) (denying exclusion and Chevron's argument that implementation of the proposal asking for information on Chevron's methane emissions would prematurely disclose information outside the litigation context for use in support of the Plaintiffs' theory that the Company is responsible (and to what extent) for an alleged proportional share of historic global greenhouse gas emissions.).

Though the current Proposal may touch on the broad subject matter of the litigation, it does not seek factual information that would harm the Company's legal defense. The Company argues that the Proposal seeks to have the Company publicly evaluate and critique the reasonableness of its business practices to the detriment of its legal position. A plain reading of the Proposal demonstrates that it does not seek a critique of its past or current business practices. (Company Letter, p. 7). The Company argues that an evaluation of the "reasonableness of alternatives to its current use of single-use plastic packaging" could undermine its defense, but information on the availability of alternatives to plastic packaging is already extensively available, including from the Company itself. Further, the litigation addresses the Company's past practices and harms, not potential future programs. For example, as noted by the Company's Letter (p. 6), the strict liability claim will be evaluated on, among other things, "the feasibility of an alternative safer design *at the time of manufacture. . .*," not in the future. (emphasis added). The Proposal's request that the Company evaluate the feasibility of reducing single use plastics in the future, in particular expanding and exploring global refillables, does not require the company to take a position on the contested factual questions in the litigation. The litigation is retrospectively focused, while the Proposal is prospective in its requests, i.e., what the Company can do in the future. Technologies, laws, market conditions, infrastructure, and consumer demand change over time. Information regarding a possible future trajectory does not require disclosure of facts

regarding past actions by the Company or the legality or impact of those actions. The current Proposal does not call for the Company to disclose its prior decisions regarding alternative packaging. The Proposal also does not mention environmental damage caused by the Company nor does it ask the Company to discuss it in any way.

The Company also argues the report requested is “designed to harm” its legal defense. This is a baseless claim. There is no evidence presented to support a claim that the shareholder Proposal was designed to harm or have any impact on the Company’s legal defense.

The Staff has previously ruled against 14a-8(i)(7) exclusion of Proposals with a prospective focus, where ongoing litigation had a retrospective focus. See, *Chevron Corp.* (avail. March 28, 2018) (denying exclusion of a proposal that requested information on how the company currently managed its methane emissions and what its current emissions were, while the company was involved in eight separate lawsuits alleging that the Company should have historically altered its business model to transition away from fossil fuels, and that plaintiffs had suffered damages due to the Company's failure to do so).

D. Global plastic pollution is a significant policy issue

Even if it could be argued the Proposal impacts the Company’s ongoing litigation, which it does not, the Commission has previously denied exclusion of such proposals that nevertheless focus on a significant policy issue. See, *JP Morgan Chase & Co.* (avail. March 24, 2011) (denying exclusion of a proposal requesting that the company’s board oversee the development of policies to ensure loan modification methods are applied uniformly to both loans owned by the company and those serviced for others; the Company's loan modification practices were a central issue in a class action suit at the time, yet the Staff found that public debate concerning loan modification practices constituted a significant policy issue).

The focus of the Proposal, global plastic pollution, is a widely recognized, public policy issue affecting oceans globally, and causing a host of legislative, legal, consumer, and company response. The current Proposal does not address the company’s litigation strategy or the conduct of the litigation. Instead it makes a reasonable inquiry important to investors – additional information on how the Company can respond to this growing public policy concern. Investors appropriately seek to understand the potential and options for the Company to rapidly reduce dependence on single use plastic packaging and thereby reduce significant environmental and societal impacts, and material risk associated with Company operations.

The Ellen MacArthur Foundation recently released its statement on Extended Producer Responsibility (EPR), of which the Company is a signatory. The statement reads as follows: "To stop packaging pollution we need a circular economy where we eliminate what we don't need, innovate towards new packaging, products and business models, and circulate all the packaging we do use, keeping it in the economy and out of the environment. . . ."⁶ In signing this statement, the Company has recognized the significant policy issue of global plastic pollution and the need to reduce single-use plastics reliance.

The Company is also a signatory to the UK Plastics Pact. The Pact states "Pact members will eliminate problematic plastics reducing the total amount of packaging on supermarket shelves,

⁶ <https://plastics.ellenmacarthurfoundation.org/epr#Statement>

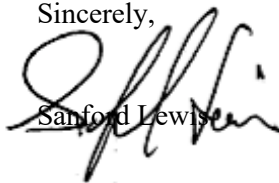
stimulate innovation and new business models and help build a stronger recycling system in the UK. Together we will ensure that plastic packaging is designed so it can be easily recycled and made into new products and packaging and, with the support of governments, ensure consistent UK recycling is met.”⁷ Through participation in this Pact, the Company has acknowledged the need to reduce and eliminate plastics.

The Company states on its website that “packaging not disposed of properly has the potential for environmental impacts.”⁸ The Company’s website also states that “PepsiCo’s sustainable plastics vision is to help build a world where packaging never becomes waste by driving the shift from a linear solution to a circular economy.”⁹ A circular economy that benefits the Company and its stakeholders is precisely what the Proposal is attempting to accomplish. The above commitments by the Company highlight its recognition that plastic use and refillable systems are a significant policy issue. As the proposal addresses a response to this significant policy issue of significant investor interest, exclusion is improper.

CONCLUSION

For these reasons, we urge the Staff to conclude that the Proposal is not excludable on the basis of Rule 14a-8(i)(7). As such, we respectfully request that the Staff inform the Company that it is denying the no action letter request.

Sincerely,



Sanford Lewis

⁷ <https://wrap.org.uk/taking-action/plastic-packaging/the-uk-plastics-pact>

⁸ <https://www.pepsico.com/sustainability-report/packaging>

⁹ <https://www.pepsico.com/sustainability-report/strategy> (under the “Post-Consumer” interactive tab)

March 11, 2022

VIA E-MAIL

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *PepsiCo, Inc.*
Shareholder Proposal of Myra K. Young et al.
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

In a letter dated December 24, 2021, we requested that the staff of the Division of Corporation Finance concur that our client, PepsiCo, Inc. (the “Company”), could exclude from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders a shareholder proposal (the “Proposal”) and statements in support thereof submitted by As You Sow on behalf of Myra K. Young and James McRitchie, Catherine Raphael and Handlery Hotels Inc. (collectively, the “Proponents”).

Enclosed as Exhibit A is confirmation from Conrad MacKerron, dated March 11, 2022, withdrawing the Proposal on behalf of the Proponents. In reliance on this communication, we hereby withdraw the December 24, 2021 no-action request.

Please do not hesitate to call me at (202) 955-8287 or Alicia Lee, the Company’s Senior Counsel, Corporate Governance, at (914) 253-2198 if you have any questions.

Sincerely,



Enclosures

cc: Alicia Lee, Senior Counsel, Corporate Governance, PepsiCo, Inc.
Conrad MacKerron, As You Sow

EXHIBIT A



Main Post Office, P.O. Box 751
Berkeley, CA 94704

www.asyousow.org
BUILDING A SAFE, JUST, AND SUSTAINABLE WORLD SINCE 1992

VIA EMAIL

March 11, 2022

David Flavell
Executive Vice President, General Counsel and Corporate Secretary
PepsiCo Inc.
700 Anderson Hill Road
Purchase, New York 10577
david.flavell@pepsico.com

Re: Withdrawal of 2022 Resolution on Sustainable Packaging Policies for Plastics

Dear Mr. Flavell:

As You Sow appreciates the constructive dialogue we have had with PepsiCo on our shareholder proposal asking for actions to rapidly reduce dependence on single use plastic packaging. Following subsequent discussion, we have agreed to the following:

PepsiCo has shared with us their plan to announce by end of 2022 an additional, time-bound goal focused on scaling business models for its beverage business that minimize or avoid single-use packaging, for example models that reuse, refill, prepare at home or utilize concentrates such as powders or drops.

The goal will expand existing efforts of PepsiCo's Sustainable Packaging strategy and will be achieved through different levers consistent with the Ellen MacArthur Foundation's framework on reusable packaging. It will be global in scope and tied to a recent baseline year.

The company agrees to brief *As You Sow* on the details of the new goal when it is released.

Additionally, the company agrees to increasing its level of transparency on these efforts by publicly disclosing further information on these business models. These additional disclosures will be made as part of the 2022 ESG reporting cycle and will include:

- A consolidated overview of the different types of solutions provided to consumers and the role of reuse models in the company's sustainable packaging agenda;
- The total number of markets in which these are available;
- Insights into what is required to successfully scale these solutions.

In recognition of these actions, *As You Sow* agrees to withdraw its shareholder proposal. In turn, the company will withdraw its SEC no action letter. *As You Sow* may speak publicly about the commitments



AS YOU SOW

cited above. This agreement will become effective on the date the last party below executes this agreement.

AS YOU SOW:

3-11-22

Conrad MacKerron
Senior Vice President
As You Sow

Date

PEPSICO, INC:

3.11.22

David Flavell
Corporate Secretary
PepsiCo Inc.

Date