

December 29, 2020

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 The John Bishop Montgomery Trust (John Chevedden)*  
*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 2021 Annual Meeting of Shareholders (collectively, the "2021 Proxy Materials") a shareholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") received from John Chevedden on behalf of The John Bishop Montgomery Trust (the "Proponent").

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2021 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent.

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 Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects 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.

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## THE PROPOSAL

The Proposal states:

RESOLVED, shareholders ask that the board commission and disclose a report on the external public health costs created by the food and beverage business of our company (the “Company”) and the manner in which such costs affect the vast majority of its shareholders who rely on overall market returns.

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

## BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2021 Proxy Materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company’s ordinary business operations; and
- Rule 14a-8(i)(3) because the Proposal is impermissibly vague and indefinite so as to be inherently misleading.

## ANALYSIS

### **I. The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Involves Matters Related To The Company’s Ordinary Business Operations.**

#### *A. Background.*

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

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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.” Examples of the tasks cited by the Commission include “management of the workforce, such as the hiring, promotion, and termination of employees, *decisions on production quality and quantity*, and the retention of suppliers” (emphasis added). 1998 Release. In the instant case, the Proposal relates to the Company’s decisions and considerations regarding whether or not to offer its food and beverage products to customers.

The 1998 Release further distinguishes proposals pertaining to ordinary business matters from those involving “significant social policy issues.” *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While “proposals . . . focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered excludable,” the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not “transcend the day-to-day business matters” discussed in the proposals. 1998 Release. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers “both the proposal and the supporting statement as a whole.” Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005).

Finally, 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 Act Release No. 20091 (Aug. 16, 1983); *Johnson Controls, Inc.* (avail. Oct. 26, 1999) (“[Where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under [R]ule 14a-8(i)(7).”); *see also Ford Motor Co.* (avail. Mar. 2, 2004) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company publish a report about global warming/cooling, where the report was required to include details of indirect environmental consequences of its primary automobile manufacturing business).

Similar to the well-established precedents and consistent with the Commission and Staff guidance cited above, the Proposal requests that the Company’s Board of Directors (the “Board”) commission a report involving subject matters that address the Company’s ordinary business operations and therefore may be excluded under Rule 14a-8(i)(7).

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*B. The Proposal May Be Excluded Because Its Subject Matter Relates To The Products And Services That The Company Offers To Its Customers.*

The Proposal is excludable pursuant to Rule 14a-8(i)(7) because it relates to the Company's ordinary business operations, in that it directly relates to the thousands of products developed and offered for sale by the Company, which is a core component of the Company's ordinary business as a leading global food and beverage company.

Through its complementary portfolio of brands, operations, authorized bottlers, contract manufacturers and other third parties, the Company develops, markets, distributes, and sells a wide variety of convenient beverages, foods, and snacks, serving customers and consumers in more than 200 countries and territories. Specifically, the Company offers a wide variety of these products, from cold-pressed juices and smoothies, coffee, and sparkling water to baked apple chips and grain snacks, nutrition bars, and hummus, among numerous others. The Company's day-to-day business revolves around developing food and beverages products to be offered to its customers. Decisions regarding the products the Company develops and sells, including the ingredients or materials contained in the Company's products and packaging, implicate myriad factors that must be considered by the Company's management, including the tastes and preferences of customers, the products offered by the Company's competitors, the laws where the Company's products are sold, the availability of sufficient quantity and quality of products to meet demand, and the prices charged by the Company's suppliers. Balancing such interests is a complex issue and is "so fundamental to management's ability to run a company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight." 1998 Release.

The Staff consistently has recognized that decisions relating to the products and services offered by a company, including decisions regarding the development of certain products, are part of a company's ordinary business operations and has concurred with their exclusion. In *Amazon.com, Inc.* (avail. Mar. 11, 2016) ("*Amazon 2016*"), the Staff concurred with the exclusion of a proposal requesting that the company "issue a report addressing animal cruelty in the supply chain," where the supporting statement requested that the report "articulate whether the company has guidelines, above and beyond legal compliance, for identifying animal cruelty associated with products sold on its website; explain inconsistencies with respect to cruel production methods in the current selection of items offered for sale; propose policy options for strengthening any existing guidelines." The Staff concurred with the exclusion of the proposal under Rule 14a-8(i)(7), noting in particular that "the proposal relates to the products and services offered for sale by the company." As the Staff further explained, "[p]roposals concerning the sale of particular products and services are generally excludable under [R]ule 14a-8(i)(7)." Similarly, in *Mondelēz Int'l, Inc.* (avail. Feb. 23, 2016), a shareholder proposal sought a report on the company's use of nanomaterials, including a description of products or packaging that contained nanoparticles, an explanation as to why nanoparticles were being used, and a description of what actions management was

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taking to reduce or eliminate nanoparticles' risks to human health and the environment. It also sought to eliminate the use of nanomaterials until or unless long-term testing proved they were safe. The company argued that the proposal related to its ordinary business decisions. Specifically, the company argued that "the [p]roposal address[ed] the [c]ompany's decisions regarding the ingredients or materials contained in the [c]ompany's products and/or packaging" and fell into a "well-established" category of proposals "relating to the development of products and product lines, including the choices of processes and supplies used in the preparation of a company's products and any packaging [that were] excludable as relating to a company's ordinary business operations." The Staff concurred with the proposal's exclusion as the proposal related to the company's product development. *See also Amazon.com, Inc.* (avail. Mar. 27, 2015) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company disclose the "reputational and financial risks that it may face . . . pertaining to the treatment of animals used to produce products it sells" as relating to "the products and services offered for sale by the company"); *Papa John's International Inc.* (avail. Feb. 13, 2015) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company include more vegan offering in its restaurants, despite assertion the proposal would promote animal welfare, as related to "the products offered for sale by the company"); *Wal-Mart Stores, Inc.* (avail. Mar. 20, 2014) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting board oversight of determinations as to whether selling certain products that endanger public safety and well-being could impair the reputation of the company and/or would be offensive to family and community values, on the basis that the proposal related to "the products and services offered for sale by the company"), *aff'd and cited in Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 327 (3d Cir. 2015); *Wells Fargo & Co.* (avail. Jan 28, 2013, *recon. denied* Mar. 4, 2013) ("*Wells Fargo 2013*") (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company prepare a report discussing the adequacy of the company's policies in addressing the social and financial impacts of the company's direct deposit advance lending service, noting in particular that "the proposal relates to the products and services offered for sale by the company"); *Dominion Resources, Inc.* (avail. Feb. 3, 2011) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal that would require the company to "provide financing to home and small business owners for installation of rooftop solar or wind power renewable generation," noting that "the proposal relates to the products and services offered for sale by the company"); *General Electric Co.* (avail. Feb. 4, 1999) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting the board review "the suitability of [its long-term care insurance business] and determine what measures should be taken to prevent [such business from bringing] disrepute to [the company]" as "relating to its ordinary business operations (i.e., offering of a particular product)").

Here, as in the precedents discussed above, the Proposal specifically relates to the Company's decisions concerning the products and services that it develops and offers to its

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customers. Similar to the proposals in *Amazon 2016*, *Mondelēz*, and *Wells Fargo 2013* where the proposals expressed the individual proponents' concerns as to the possible impacts of the products and services developed and offered by each company, including possible health impacts, the Proposal requests a report regarding the Company's development and provision of particular products (those offered by the Company's food and beverage business) that the Proponent is concerned may have "external public health costs" impacting those Company shareholders that "rely on overall market returns." The Supporting Statement underscores the Proposal's focus on the Company's decisions concerning the products and services it offers, referencing the costs "of [the Company's] business," which is to develop and offer its beverages, foods, and snacks to customers. Consistent with the precedents cited above, the Proposal is therefore excludable under Rule 14a-8(i)(7) because it fundamentally focuses on the core products the Company offers to its customers, and thus relates to the operations of the Company's day-to-day food and beverage business. Decisions regarding the development of particular products or services, including the choices of processes and supplies used in the preparation of the Company's products and any packaging thereof, and whether or not to offer a particular product or service are a bedrock aspect of the Company's day-to-day operations.

Similarly, the Staff has also concurred with the exclusion of a proposal when it relates to potential impacts of a company's operations and activities, including economic costs, on the company's shareholders. For example, in *Ameren Corp.* (avail Feb. 8, 2018), the proposal requested a report "*estimating shareholder losses* for the continued storage of high-level waste at Callaway 1," including the potential range of shareholder losses over the course of different year-ranges into the future (emphasis added). Ameren argued that the proposal "would focus solely on financial issues – operational and compliance costs and 'shareholder losses'" and not on any significant policy issues to the company, and the Staff concurred with exclusion under Rule 14a-8(i)(7). *See also McDonald's Corp.* (avail. Mar. 22, 2019) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal seeking a report "disclos[ing] the economic risks [the company] faces as a result of campaigns targeting the [c]ompany over concerns about cruelty to chickens," where the company argued that such an assessment of potential economic costs are fundamental aspects of the company's ordinary business operations and therefore are inappropriate for direct shareholder oversight).

Here, although the Proposal seeks a report on potential external costs (economic or otherwise) to Company shareholders as a result of the Company's food and beverage products, the consequences of the Company's actions on its shareholders are even more tangential than those consequences at issue in *Ameren*. Specifically, the Proposal seeks a report on how costs derived from Company actions ultimately affect "the majority of [Company] shareholders who rely on overall market returns." Thus, the potential consequences of the Company's actions flow through to Company shareholders not directly via their ownership interests in the Company, but indirectly through such shareholders'



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ownership interests in other companies, funds and indexes. Remote or otherwise, the Company's evaluation of its operations and activities, including how and whether the foregoing may generate costs external to the Company, are central considerations for the Company's management of its ordinary business operations. As in *Ameren*, a proposal focusing on a report of this nature is excludable under Rule 14a-8(i)(7).

Thus, consistent with Staff precedent, the Proposal, by focusing on the Company's food and beverage products, addresses issues that are ordinary business matters for the Company and is properly excludable under Rule 14a-8(i)(7).

*C. The Proposal Does Not Focus On Any Significant Policy Issue That Transcends The Company's Ordinary Business Operations.*

The well-established precedents set forth above demonstrates that the Proposal squarely addresses ordinary business matters and, therefore, is excludable under Rule 14a-8(i)(7). The 1998 Release distinguishes proposals pertaining to ordinary business matters from those involving "significant social policy issues." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While "proposals . . . focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered to be excludable," the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not "transcend the day-to-day business matters" discussed in the proposals. 1998 Release. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers "both the proposal and the supporting statement as a whole." Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005). Moreover, as Staff precedent has established, merely referencing topics in passing that might raise significant policy issues, but which do not define the scope of actions addressed in a proposal and which have only tangential implications for the issues that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business.

Here, the Proposal seeks a report on the "external public health costs" created by the Company's food and beverage business, and does not focus on any significant policy issues that transcend the Company's ordinary business operations. Instead, as discussed above, the Proposal's principal focus is the development and offering for sale of specific Company products. The Supporting Statement's assertion that the Proposal touches on a "social issue of great importance" and the confusing and cursory references to issues ranging from public health and obesity to corporate purpose, shareholder primacy, and corporate "direction, domicile, structure, or form" do not alter the fact that the Proposal is focused on ordinary business matters. Notably, the Proposal does not actually seek to affect the Company's corporate form or the Company's impact on its shareholders vis-à-vis the value of its own stock. Instead, the Proposal is squarely focused on requesting a report of "external public health costs" created by certain Company products and a request to analyze how such costs

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might impact diversified Company shareholders (to the extent such shareholders rely on overall market returns).

Notwithstanding its limited references to obesity, the Proposal is fundamentally concerned with economic considerations related to all of the Company's food and beverage products, not matters of improving public health or fighting obesity. Because of its focus on all aspects of the Company's food and beverage business, the Proposal is readily distinguishable from proposals that focused solely on negative impacts to the environment and public health related to a company's ordinary business operations. *See, e.g., Arch Coal, Inc.* (avail. Feb. 10, 2012) (unable to concur with the exclusion of a report on the company's "efforts to reduce environmental and health hazards associated with" the company's mining operations); *Newmont Mining Corp.* (avail. Feb. 5, 2007) (unable to concur with the exclusion of a proposal requesting a report "on the potential environmental and public health damage resulting from the company's mining and waste disposal operations"). Here, the Proposal is focused on the external public health costs of all Company food and beverage products, which would necessarily include the Company's wide range of healthy, nutritious products. Thus, unlike the proposals at issue in *Arch Coal* and *Newmont Mining*, the Proposal is not actually focused on the possible negative consequences to public health, but is more broadly focused on economic considerations related to the Company's entire food and beverage business. (We also note that even if the Proposal focused on such issues, it would still be excludable under Rule 14a-8(i)(7). *See, e.g., United Continental Holdings, Inc.* (avail. Mar. 23, 2018) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting the board report on "regulatory risk and discriminatory effects of smaller cabin seat sizes on overweight, obese, and tall passengers" as "relating to its ordinary business operations"); *Viacom Inc.* (avail. Dec. 18, 2015) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting the board issue a report assessing the company's policy responses to public concerns as to linkages of food and beverage advertising to impacts on children's health as "relat[ing] to the nature, presentation and content of advertising").)

Even if the Proposal were to raise a significant policy issue, the Staff has frequently concurred that a proposal that touches, or may touch, upon significant policy issues is nonetheless excludable if the proposal does not focus on such issues. For example, in *Wells Fargo (Harrington Investments, Inc.)* (avail. Feb. 27, 2019) ("*Wells Fargo 2019*"), the proposal requested that the board commission an independent study and then report to shareholders on "options for the board[] to amend [the] [c]ompany's governance documents to enhance fiduciary oversight of matters relating to customer service and satisfaction." In spite of language relating to various compliance and governance issues at the company, the Staff concurred with exclusion of the proposal based on ordinary business. While it is possible that one or more of those issues related to policy issues that transcend ordinary business and may have been significant to the company, the "Resolved" clause focused on the products and services offered by the company, rendering the proposal excludable under



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Rule 14a-8(i)(7). Similarly, in *Amazon.com, Inc. (Domini Impact Equity Fund and the New York State Common Retirement Fund)* (avail. Mar. 28, 2019) (“*Amazon 2019*”), where the proposal arguably touched on sustainability concerns, the proposal was broadly worded, encompassed a wide range of issues relating to the company’s business and did not focus on any single issue. As a result, the Staff granted no-action relief under Rule 14a-8(i)(7), noting that “the [p]roposal relates generally to ‘the community impacts’ of the [c]ompany’s operations and does not appear to focus on an issue that transcends ordinary business matters.”

Here, the Proposal presents an even stronger case for exclusion than *Wells Fargo 2019* and *Amazon 2019*, as the Proposal does not focus on any significant policy issues. Instead, the Proposal’s focus is on the external public health costs of the Company’s choice to offer particular products to customers and the tangential impact that business might have on the value of shareholders’ external investments more broadly. The Proposal’s focus on ordinary business matters is not diminished by the Supporting Statement’s glancing assertion that “[t]his is a . . . social issue of great importance” or the Supporting Statement’s other references to “obesity,” “corporate direction, domicile, structure, or form,” “shareholder primacy” and impacts on the “economy.” Instead, the Proposal broadly focuses on “external public health costs” and other economic considerations relating to certain of the Company’s products and services, and as such relates primarily to ordinary business matters. Thus, as in *Wells Fargo 2019* and *Amazon 2019*, the Proposal fails to focus on any issue that might rise to the level of significance that would preclude exclusion.

As discussed above, the Proposal relates to ordinary business matters: decisions regarding the products and services that the Company offers. More specifically, the Proposal focuses on these ordinary business matters as they relate to a discrete aspect of the Company’s operations: its development and offering of food and beverage products to customers. Accordingly, because the Proposal’s request is directly related to the Company’s ordinary business operations and does not transcend those ordinary business operations, similar to the proposals in the precedents discussed above, the Proposal may be excluded under Rule 14a-8(i)(7).

## **II. The Proposal May Be Excluded Under Rule 14a-8(i)(3) Because It Is Impermissibly Vague And Indefinite So As To Be Inherently Misleading.**

Rule 14a-8(i)(3) permits the exclusion of a shareholder proposal if the proposal or supporting statement is contrary to any of the Commission’s proxy rules or regulations, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff consistently has taken the position that vague and indefinite shareholder proposals are inherently misleading and therefore excludable under Rule 14a-8(i)(3) because “neither the [share]holders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what

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actions or measures the proposal requires.” Staff Legal Bulletin No. 14B (Sept. 15, 2004). *See also Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) (“[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the [share]holders at large to comprehend precisely what the proposal would entail.”); *Capital One Financial Corp.* (avail. Feb. 7, 2003) (concurring with the exclusion under Rule 14a-8(i)(3) of a proposal where the company argued that its shareholders “would not know with any certainty what they are voting either for or against”). As described below, the Proposal is so vague and indefinite that neither the Company nor the Company’s shareholders could comprehend what the requested report would entail, nor is the subject matter of the requested report reasonably clear. Therefore, the Proposal is excludable under Rule 14a-8(i)(3).

Under this standard, the Staff has routinely concurred with the exclusion of proposals that fail to define key terms or otherwise fail to provide sufficient clarity or guidance to enable either shareholders or the company to understand how the proposal would be implemented. For example, the Staff recently concurred that a company could exclude, as vague and indefinite, a proposal requesting that a company “reform the company’s executive compensation committee.” *eBay Inc.* (avail. April 10, 2019). The proposal’s supporting statement did not request any specific reforms, but instead made observations about various elements of executive compensation. These statements did not indicate whether those elements of the company’s executive compensation program needed reform or how they should or could be affected by reform of the compensation committee. In its response, the Staff noted that “neither shareholders nor the [c]ompany would be able to determine with any reasonable certainty the nature of the ‘reform’ the [p]roposal is requesting. Thus, the [p]roposal, taken as a whole, is so vague and indefinite that it is rendered materially misleading.”

Additionally, in *Apple Inc. (Zhao)* (avail. Dec. 6, 2019), the company sought exclusion of a proposal under Rule 14a-8(i)(3) because the proposal recommended the company “improve guiding principles of executive compensation” but failed to define or explain what improvements the proponent sought to the “guiding principles.” The Staff noted that the proposal “lack[ed] sufficient description about the changes, actions or ideas for the [c]ompany and its shareholders to consider that would potentially improve the guiding principles” and concurred with exclusion of the proposal as “vague and indefinite.” *See also Alaska Air Group, Inc.* (avail. Mar. 10, 2016) (concurring with the exclusion under Rule 14a-8(i)(3) of a proposal requesting an amendment to the company’s bylaws and any other appropriate governing documents to require management to “strictly honor shareholders rights to disclosure identification and contact information” where the company asserted that the proposal “[did] not describe or define in any meaningfully determinate way the standard for [the] supposed ‘shareholder[s] rights’” and that “it appear[ed] the [p]roponent ha[d] a different view of what those rights entail[ed] than is supported by generally understood

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principles of corporate law”); *AT&T Inc.* (avail. Feb. 21, 2014) (concurring with the exclusion under Rule 14a-8(i)(3) of a proposal requesting that the board review the company’s policies and procedures relating to the “directors’ moral, ethical and legal fiduciary duties and opportunities” where the phrase “moral, ethical and legal fiduciary” was not defined or meaningfully described); *Morgan Stanley* (avail. Mar. 12, 2013) (concurring with the exclusion under Rule 14a-8(i)(3) of a proposal where the key term “extraordinary transactions” could have multiple interpretations); *AT&T Inc.* (avail. Feb. 16, 2010, *recon. denied* Mar. 2, 2010) (concurring with the exclusion under Rule 14a-8(i)(3) of a proposal requesting a report on political contributions and payments used for “grassroots lobbying communications” as “vague and indefinite,” where the company argued such term was not defined and constituted a material element of the proposal).

Here, the Proposal fails to define a number of key terms and phrases essential to the Proposal. The Proposal seeks a report “on *the external public health costs* created by the food and beverage business of” the Company, as well as “the manner in which *such [external] costs affect* the vast majority of its shareholders” (emphases added). Notably, and in the Proposal’s own words, “[t]his information is essential” for shareholders to understand (emphasis added). Therefore, it is necessary for shareholders to understand these terms and phrases in order to reasonably determine what actions or measure the Proposal requires and, more importantly, whether or not the shareholders are in favor of having the Board commission the requested report.

The Proposal fails to define or provide any context around the key term “external public health costs,” and, similar to the proposals in the precedents cited above, the term does not have a commonly understood uniform meaning. Neither the “Resolved” clause nor the Supporting Statement provides sufficient clarity or direction as to what these “external costs” actually entail. For example, they do not specify whether the Proponent intends for the requested report to focus on actual monetary costs, broader, intangible social costs, or some combination thereof. The Supporting Statement refers repeatedly to “harm” investors will suffer (e.g., by lowered gross domestic product, which reduces equity market values), but the relationship between such “harm” and the external public health costs within the scope of the requested report is fundamentally vague. More broadly, the Proposal provides no guidance as to what level of review would be deemed to satisfy the requested report, as it is not clear whether “external public health costs” are limited to only negative impacts, like lost value, or encompass any type of impact (positive or negative). This lack of clarity would make it difficult, for example, for the Company, in implementing any such report, to know whether or how to account for perceived benefits from offering certain food and beverage products (e.g., income generated to the Company and its shareholders from sales of its food and beverage products, or benefits accruing to communities that receive support as part of the Company’s efforts to fight insecurity through the donation of food and beverages to communities in need).

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The final phrase of the Resolved clause also renders the Proposal inherently vague. The Proposal requests that the report address “the manner in which *such [external public health] costs affect the vast majority of its shareholders who rely on overall market returns*” (emphases added). However, the Proposal fails to define the term “shareholders who rely on overall market returns,” and neither the Proposal nor the Supporting Statement provides sufficient context to explain the scope of the requested assessment. For example, does the Proposal require the Company to assume that all of its shareholders “rely on overall market returns” and assess the external public health costs with respect to the “vast majority” of them? Or, alternatively, is the Company required to first identify those shareholders who rely on overall market returns and then assess the impact of external public health costs on the majority of that subset of shareholders? In either case, such vague and unexplained distinctions among the Company’s shareholders are complicated by the fact that the Company’s shareholder base changes every day. Accordingly, without further explanation or context, it is unclear what shareholders are the focus of the requested report.

In the absence of further guidance regarding the scope and nature of the requested report, shareholders would inevitably be left to grapple with multiple and conflicting interpretations about the Proposal’s central request. Among other possible interpretations, the Proposal could be interpreted as requiring the Board to commission a broad macro-economic report analyzing all impacts, direct and indirect, social, financial, reputational, environmental and otherwise, that the Company’s “food and beverage business” could conceivably create. Alternatively, the Proposal could be interpreted as narrowly focused on the Company’s cost and pricing model for its food and beverage products and their impacts on customers’ overall budgets and the nature and amount of the products that they buy (leading them potentially toward healthier or less healthy options). A shareholder may be in favor of supporting a report addressing the nutritional content of the Company’s food and beverage products and how they affect the daily calorie intakes of consumers. However, that same shareholder may not support a report focused on the suppliers with whom the Company’s food and beverage business works and their processes and ingredients, which may impact the health of their workers, and benefits (or not) of the products the Company then sells. Different still, a shareholder may be in favor of this Proposal based on the expectation that the requested report would somehow inform such shareholder’s own investment portfolio, since the Proposal purports to relate to “the manner in which such costs affect the vast majority of [Company] shareholders who rely on overall market returns,” despite there being no certainty whatsoever that any such report could or would ultimately link the Company’s sale of food and beverage products to macro-economic impacts that both affect “overall market returns” and the majority of the Company’s own shareholder base, whom the Proposal presumes are deeply diversified investors.

Given the inherent vagueness of the Proposal, there is likewise little assurance that, even if the Proposal received majority support, the Company would implement it in the manner that

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the majority of shareholders expected. This is the kind of situation the Staff has consistently sought to avoid when concurring with the exclusion of similarly inherently vague proposals in the past. In this regard, the Proposal is similar to that at issue in *Bank of America Corp.* (avail. Feb 22, 2010), which sought to establish a board committee on “US Economic Security.” The Staff concurred with Bank of America’s argument that the proposal was excludable as impermissibly vague because the proposal failed to define the term “US Economic Security” and instead contained a vague litany of factors to be considered, including the “long term health of the economy,” the “well-being of US citizens” and “levels of domestic and foreign control.” As in *Bank of America*, despite the Proposal’s request for a report regarding “external public health costs” it fails to offer any definition or explanation of the term. And the Supporting Statement offers only scattershot references to, among other topics, the Business Roundtable Statement of the Purpose of Corporation, the diversification of the Company’s shareholders and whether the Company should seek “a change in corporate direction, domicile, structure or form” without explaining how those factors and issues relate to the “external public health costs” of the Company’s food and beverage business that are purportedly the focus of the Proposal.

Thus, as in *Apple*, *eBay*, *Bank of America* and *AT&T*, as based on the language in the Proposal, neither the Company nor its shareholders would be able to determine with any reasonable certainty how to implement the Proposal, nor what information the requested report is intended to address. Just as *eBay* hinged on the vagueness of a simple and seemingly innocuous term, “reform,” where the proposal failed to provide any hints or indication as to the manner and scope of reform being sought, so too here do the terms “external public health costs” and “affect,” among others, as used in this Proposal, leave the Company and its shareholders unable to determine with any reasonable certainty the scope and nature of the requested undertaking. As such, the Proposal lacks sufficient specificity to indicate to the Company and to its shareholders what actions the Proposal requires and the Proposal as a whole is thus rendered materially misleading. This is not a question of marginal ambiguity that the Board or management could, in exercising its discretion, resolve. Rather, it is an inherent vagueness in the central subject matter that forms the cornerstone of the Proposal’s request. Similar to *eBay*, when a proposal fails to define a term or key phrase that is essential to an understanding and execution of the proposal, the Proposal is excludable under Rule 14a-8(i)(3) as vague and indefinite.

## 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 2021 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](mailto:shareholderproposals@gibsondunn.com). If we can be of any further

# GIBSON DUNN

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Division of Corporation Finance  
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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.  
John Chevedden  
John Montgomery, The John Bishop Montgomery Trust



**EXHIBIT A**

**From:** John Montgomery <JMontgomery@lexultima.com>  
**Sent:** Thursday, November 19, 2020 2:35 PM  
**To:** Carriello, Amy {PEP} <Amy.Carriello@pepsico.com>  
**Cc:** Hurley, Megan {PEP} <Megan.Hurley@pepsico.com>; SPA - PepsiCo Investor Relations <PepsiCoInvestorRel@pepsico.com>; 'olmsted7p@earthlink.net' <olmsted7p@earthlink.net>  
**Subject:** PEP Shareholder Proposal

Dear Ms. Carriello,

I am a PepsiCo shareholder through my trust, the John Bishop Montgomery Trust UA 4/4/2019 of which I am the sole trustee. I am submitting a shareholder proposal requesting a report on External Public Health Cost Disclosure.

Enclosed is a pdf of the cover letter and the shareholder proposal.

Sincerely,

John Montgomery  
President  
Lex Ultima  
65 3<sup>rd</sup> Street, Suite 25  
Point Reyes Station, CA 94956

650-430-4732  
[jmontgomery@lexultima.com](mailto:jmontgomery@lexultima.com)  
[www.lexultima.com](http://www.lexultima.com)

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November 19, 2020

Mr. David Yawman  
Corporate Secretary  
PepsiCo, Inc.  
700 Anderson Hill Road  
Purchase NY 10577  
Via: Amy Carriello, Senior Legal Director  
[amy.carriello@pepsico.com](mailto:amy.carriello@pepsico.com)

Dear Mr. Yawman,

I am pleased to be a PepsiCo shareholder through my trust, The John Bishop Montgomery Trust of which I am the sole trustee. I appreciate the leadership our company has shown on numerous issues.

I am submitting the attached *shareholder proposal requesting a report on External Public Health Cost Disclosure*. I will meet Rule 14a-8 requirements including the continuous ownership of the required stock value until after the date of the respective shareholder meeting. My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

This is my delegation to John Chevedden and/or his designee to act as my agent regarding this Rule 14a-8 proposal, and/or modification and presentation of it before and during the forthcoming shareholder meeting. This delegation does not cover proposals that are not rule 14a-8 proposals and does not grant the power to vote.

Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden (PH: 310-371-7872, 2215 Nelson Ave., No. 205, Redondo Beach, CA 90278) at: [olmsted7p@earthlink.net](mailto:olmsted7p@earthlink.net) to facilitate prompt and verifiable communications. Please identify this proposal as my proposal exclusively.

Your consideration and the consideration of the Board of Directors is appreciated in responding to this proposal. Of course, I would welcome a dialogue and negotiations over the terms of the proposal. We expect to forward a broker letter soon, so if you simply acknowledge our proposal in an email message to [olmsted7p@earthlink.net](mailto:olmsted7p@earthlink.net), it may not be necessary for you to request such evidence of ownership.

Sincerely,

John Montgomery *Trustee*  
*John Bishop Montgomery Trust VA 4/4/2019*  
cc: Amy Carriello [amy.carriello@pepsico.com](mailto:amy.carriello@pepsico.com)  
Senior Legal Director  
Megan Hurley [Megan.Hurley@pepsi.com](mailto:Megan.Hurley@pepsi.com)  
Jamie Caulfield [investor@pepsico.com](mailto:investor@pepsico.com)

November 19, 2020

Date

ITEM 4\* – External Public Health Cost Disclosure

**RESOLVED**, shareholders ask that the board commission and disclose a report on the external public health costs created by the food and beverage business of our company (the “Company”) and the manner in which such costs affect the vast majority of its shareholders who rely on overall market returns.

Our Company recently signed the Business Roundtable Statement of the Purpose of a Corporation (the “Statement”), which reads, “we share a fundamental commitment to all of our stakeholders. . . . We commit to deliver value to all of them, for the future success of our companies, our communities and our country.”

However, the Company is a conventional corporation, so that directors’ fiduciary duties emphasize the company and its shareholders, but not stakeholders (except to the extent they create value for shareholders over time). Accordingly, when the interests of shareholders and stakeholders such as workers or customers clash, the Company’s primary duty excludes all but shareholders. North Carolina has not adopted any laws to let corporations avoid this duty.<sup>1</sup>

The World Health Organization assesses the unpriced social burdens of obesity as equaling almost 3% of global GDP annually.<sup>2</sup> This cost, year after year, is devastating to economic growth. Yet the Company does not disclose any methodology to address the public health costs of its business. Thus, shareholders have no guidance as to costs the Company is externalizing and consequent economic harm. This information is essential to shareholders, the majority of whom are beneficial owners with broadly diversified interests. As of the 2020 proxy statement, the Company’s top three holders were Vanguard, BlackRock and State Street, which are generally indexed or otherwise broadly diversified.

Such shareholders and beneficial owners are unalterably harmed when companies follow Delaware’s “shareholder primacy” model and impose costs on the economy that lower GDP, which reduces equity value.<sup>3</sup> While the Company may profit by ignoring costs it externalizes, diversified shareholders will ultimately pay these costs, and they have a right to ask what they are.

The company’s prior disclosures and prior shareholder proposals do not address this issue, because they do not address the *costs the public health costs that the business imposes on shareholders as diversified investors who must fund retirement, education, public goods and other critical social needs*. This is a separate social issue of great importance. A study would help shareholders determine whether to seek a change in corporate direction, domicile, structure, or form in order to better serve their interests and to match the commitment made in the Statement.

Please vote for: External Public Health Cost Disclosure – Proposal [4\*]



[This line and any below, except footnotes, are *not* for publication]  
Number 4\* to be assigned by the Company

<sup>1</sup> <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4777&context=nclr>

<sup>2</sup> <https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf>.

<sup>3</sup> See, e.g., <https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP “is probably the best single measure of where valuations stand at any given moment”) (quoting Warren Buffet).



*The graphic above is intended to be published with the rule 14a-8 proposal.*

*The graphic would be the same size as the largest management graphic (and accompanying bold or highlighted management text with a graphic) or any highlighted management executive summary used in conjunction with a management proposal or a rule 14a-8 shareholder proposal in the 2021 proxy.*

*The proponent is willing to discuss the in unison elimination of both shareholder graphic and management graphic in the proxy in regard to specific proposals.*

*Reference SEC Staff Legal Bulletin No. 14I (CF) [\[16\]](#) Companies should not minimize or otherwise diminish the appearance of a shareholder's graphic. For example, if the company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics. If a company's proxy statement appears in black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.*

**From:** John Chevedden <[olmsted7p@earthlink.net](mailto:olmsted7p@earthlink.net)>

**Sent:** Tuesday, December 1, 2020 11:47 AM

**To:** Carriello, Amy {PEP} <[Amy.Carriello@pepsico.com](mailto:Amy.Carriello@pepsico.com)>

**Cc:** Hurley, Megan {PEP} <[Megan.Hurley@pepsico.com](mailto:Megan.Hurley@pepsico.com)>; SPA - PepsiCo Investor Relations <[PepsiCoInvestorRel@pepsico.com](mailto:PepsiCoInvestorRel@pepsico.com)>; Nastanski, Cynthia {PEP} <[Cynthia.Nastanski@pepsico.com](mailto:Cynthia.Nastanski@pepsico.com)>

**Subject:** Rule 14a-8 Proposal (PEP) blb

Dear Ms. Carriello,

Please see the attached broker letter.

Please confirm receipt.

Sincerely,

John Chevedden





**Wealth  
Management**

One PPG Place  
Suite 2900  
Pittsburgh, PA 15222

Office: 412.201.7200  
Fax: 412.201.7279

November 30, 2020

John Montgomery, President  
Lex Ultima  
65 3<sup>rd</sup> Street, Suite 25  
PO Box 1270  
Point Reyes Station, CA 94956

Dear Mr. Montgomery:

Pursuant to your request, this letter is to confirm that as of the date of this letter, The John Bishop Montgomery Trust, UA 4/4/2019 held, and had held continuously for at least 13 months, 800 shares of PepsiCo Inc. (PEP) common stock in his account ending in 930 at RBC Wealth Management, a division of RBC Capital Markets, LLC. The DTC clearinghouse number for RBC Wealth Management, a division of RBC Capital Markets, LLC is 0235.

Sincerely,

Tammy Graybill  
Assistant Complex Manager

cc: Peter Strek

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• Not a deposit of, or guaranteed by, the bank or an affiliate of the bank • May lose value

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