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January 3, 2012

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 Sarah Giltner
Exchange Act of 1934—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 2012 Annual Meeting of Shareholders (collectively, the "2012 Proxy Materials") a shareholder proposal (the "Proposal") and statement in support thereof received from Sarah Giltner (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 2012 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 this 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:

> Resolved: Shareholders request that the Board of Directors adopt a corporate policy that recognizes human rights and employs ethical standards which do not involve using the remains of aborted human beings in both private and collaborative research and development agreements.

A copy of the Proposal, as well as related correspondence from the Proponent, is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2012 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters related to the Company's ordinary business operations.

ANALYSIS

The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Pertains To Matters Relating To The Company's Ordinary Business Operations.

The Company may exclude the Proposal pursuant to Rule 14a-8(i)(7) because it deals with matters relating to the Company's ordinary business operations. According to the Commission 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 explained that the ordinary business exclusion rests on two central considerations. The first consideration is the subject matter of the proposal; the 1998 Release provides 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.* The second consideration is the degree to which the proposal attempts to "micro-manage" a company by "probing too deeply into matters of a complex nature upon which shareholders as a group, would not be in a position to make an informed judgment." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). As discussed below, the Proposal implicates both of these considerations and may be omitted as relating to the Company's ordinary business operations.

A. The Proposal is Excludable Because it Relates to the Manner in which the Company Conducts Product Research, Development and Testing.

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to ordinary business operations because it attempts to involve shareholders in the management of the Company's business with respect to the specific methods the Company may use in conducting its product research, development and testing. Recognizing the complexities of research decisions and that such decisions are incompatible with shareholder action, the Staff has consistently concurred with the exclusion of shareholder proposals relating to a company's product research, development and testing.

For example, the Staff concurred in the exclusion of a similar shareholder proposal as relating to ordinary business matters in *Pfizer Inc.* (avail. Feb. 14, 2008). That proposal requested the formation of a committee "to more fully explore the ethical and business implications of further research involving cells or cell lines that are the result of the destruction of human embryos." The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(7), noting that the proposal implicated Pfizer's "ordinary business operations (i.e., product research, development and testing)." Similarly, in *Merck & Co* (avail Jan. 23, 1997), the Staff concurred in the exclusion of a proposal seeking the formation of a committee "to study ways to eliminate the use of human fetal tissue obtained from elective abortions in the research, development, and testing of the company's products," noting that it related to "product research, development and testing." *See also Pfizer Inc.* (avail Jan. 23, 2006) (concurring in the exclusion of a shareholder proposal seeking information on the effect of psychotropic medications on specific persons because it related to the company's "ordinary business operations (i.e., product research, development and testing)"); *Pfizer Inc.* (avail Jan. 25, 2004) (concurring in the exclusion of a proposal seeking to change research protocols because the proposal related to "product research, development and testing"); *E. I. du Pont de Nemours & Co.* (avail. Mar. 8, 1991) (concurring in the exclusion of a shareholder proposal seeking to accelerate the elimination of the company's use of ozone-damaging Chlorofluorocarbons and the research of alternatives, explaining that "the thrust of the proposal appears directed at those questions concerning the timing, research and marketing decisions that involve matters relating to the conduct of the [c]ompany's ordinary business operations"); *Chrysler Corp.* (avail Jan. 22, 1986) (concurring in the exclusion of a proposal requesting that the company design, mass produce and market an electric vehicle because it related to "the allocation of funds for corporate research"); *Arizona Public Service Co.* (avail. Feb. 27, 1984) (concurring in the exclusion of a proposal seeking a moratorium on certain research because the proposal related to "the amount and location of research and development activities").

The Proposal relates to the ordinary business operations of the Company in that it requests the adoption of a policy that would govern many aspects of the Company's business, including the Company's research and development efforts. The Company continuously

performs research and development and enters into numerous research and development agreements. As disclosed in the Company's Form 10-K filed on February 18, 2011, "[t]hese activities principally involve the development of new products, improvement in the quality of existing products, improvement and modernization of production processes, and the development and implementation of new technologies to enhance the quality and value of both current and proposed product lines." For example, the Form 10-K states that during 2010, the Company "expanded [its] portfolio of products made with all-natural ingredients, increased the amount of whole grains, fruits, vegetables, nuts, seeds and low-fat dairy in certain of [its] products and took steps to reduce the average amount of sodium, saturated fat and added sugar per serving in certain of [its] products." The purpose of the Company's agreement referenced in the Proposal is to develop sweet enhancers and natural high-potency sweeteners.

Similar to the *Pfizer* and *Merck* proposals discussed above, the Proposal seeks to dictate details of the Company's "private and collaborative research and development agreements" and thus seeks to involve shareholders in decisions regarding the research, development and testing methods the Company may use in formulating its products. Such decisions are critical to management's ability to run the Company and as such, they are not appropriate matters for shareholder oversight. Accordingly, the Proposal may be excluded under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations, specifically, product research, development and testing.

B. The Proposal Involves Ordinary Business Operations Because it Relates to the Company's Decisions Regarding Choice of Technology.

In addition, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because it seeks to involve shareholders in decisions regarding technologies in which the Company may invest. Decisions as to which technologies are economically viable for the Company to pursue in its research and development activities that are described above properly rest with the Company's management and should not be the subject of a shareholder vote. These decisions involve operational and business considerations that require the judgment of experienced management and experts. Such matters are properly within the purview of management, which has the necessary skills, knowledge and resources to make informed decisions, and are not the type of issue that shareholders are in a position to appropriately evaluate.

On numerous occasions, the Staff has permitted the exclusion of a shareholder proposal under Rule 14a-8(i)(7) because the proposal relates to a company's choice of technologies. In *CSX Corp.* (avail. Jan. 24, 2011), the Staff concurred in the exclusion of a proposal that the company develop a kit that would allow CSX to convert the majority of its locomotive fleet to a more efficient system as relating to the company's ordinary business, noting that "proposals that concern a company's choice of technologies for use in its operations are

generally excludable under rule 14a-8(i)(7). Similarly, in *WPS Resources Corp.* (avail. Feb. 16, 2001), the Staff permitted the exclusion of a shareholder proposal requesting, *inter alia*, that the company develop some or all of eight specified plans (including "deploying small-scale cogeneration technologies" to "improve the overall energy efficiency of private and public sector building customers") because the proposal dealt with "ordinary business operations," and specifically, related to "the choice of technologies." Additionally, in *Union Pacific Corp.* (avail. Dec. 16, 1996), the Staff agreed that a shareholder proposal requesting a report on the status of research and development of a new safety system for railroads was excludable because it related to "the development . . . of new technology." *See also Applied Digital Solutions* (avail. Apr. 25, 2006) (proposal requesting a report on the sale and use of RFID technology and its impact on the public's privacy, personal safety and financial security was excludable as relating to ordinary business operations (i.e., product development)); *International Business Machines Corp.* (avail. Jan. 6, 2005) (permitting exclusion of a proposal requesting that the company employ specific technological requirements in its software as it related to IBM's ordinary business operations (i.e., the design and development of IBM's software products)); *Burlington Northern Santa Fe Corp.* (avail. Jan. 22, 1997) (proposal requesting a report on the status of the research and development of a new safety system for railroads was excludable because it concerned the development and adaptation of new technology).

Just as the Staff concurred with the exclusion of the shareholder proposals discussed above we believe that the Proposal is excludable under Rule 14a-8(i)(7) because it seeks to regulate the Company's choice of technologies. Specifically, the Proposal seeks to dictate the types of technologies used in the Company's "private and collaborative research and development agreements." Accordingly, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

C. *The Proposal is Excludable Because it Relates to the Terms of the Company's Code of Ethics.*

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because it seeks to involve shareholders in the determination of the terms to include in the Company's Worldwide Code of Conduct and other ethical policies. The Staff has consistently concurred with the exclusion of shareholder proposals relating to a company's ethics policy or code of ethics. For example, the company in *Willis Group Holdings Public Limited Co.* (avail. Jan. 18, 2011) had imposed a policy of not accepting "contingent commissions" from insurance companies in its retail brokerage business. Pointing out that contingent commissions "are a large and legal potential source of revenue," the proposal directed the company's management to prepare a report summarizing the financial impact of the company's policy. The Staff concurred in the exclusion of the proposal, noting that "the proposal relates to the terms of Willis Group Holdings' ethics policy." *See also PepsiCo, Inc.* (avail. Feb. 11, 2004) (concurring in the exclusion of a

proposal directing the company, in part, to develop a code of conduct to address "unequal bottler treatment" because the proposal related, in part, to "developing a code of ethics"); *Costco Wholesale Corp.* (avail. Dec. 11, 2003) (concurring in the exclusion of a proposal requesting the development of a "Code of Ethics that would also address issues of bribery and corruption" because the proposal related to the "terms of [the company's] code of ethics").

The Proposal seeks the adoption of a corporate policy that "employs ethical standards." It goes on to specify that the "ethical standards" in the policy should "not involve using the remains of aborted human beings in both private and collaborative research and development agreements." Thus, the Proposal appears to contemplate that at least one term in the corporate policy will be a prohibition of the use of "the remains of aborted human beings" in the Company's research and development agreements. In addition, because the Proposal's language only says what the "ethical standards" should *not* involve, it leaves a large, almost unlimited universe of other ethical standards that could also permissibly be included in the policy. These other ethical standards could be entirely unrelated to the Company's research and development agreements. Thus, like the no-action precedent cited above, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) because it relates to the terms of the Company's Worldwide Code of Conduct and other ethical policies.

D. The Proposal Does Not Focus On a Significant Policy Issue for Purposes of Rule 14a-8.

In the 1998 Release, the Commission clarified that "proposals relating to [ordinary business] matters but focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." This approach allows shareholders to have "the opportunity to express their views . . . [on] proposals that raise sufficiently significant social policy issues." *See* 1998 Release.

The Proposal does not focus on a significant policy issue. The Staff has for decades consistently concurred in the exclusion of proposals involving the use of cells or materials taken from human embryos as relating to ordinary business operations, including during periods where public debate regarding the use of human embryonic cells was much more significant and widespread than it is today. *See General Electric Co.* (avail. Feb. 7, 2011) (concurring in the exclusion of a proposal requesting the board to "take steps to assure that all products in which General Electric is involved and that have used in research, development, manufacture, or testing, cells or materials taken from human embryos or fetuses, carry on their label the information that embryonic/fetal cells/materials were used in research, development, manufacture, or testing, as appropriate"); *Pfizer Inc.* (avail. Feb. 14, 2008) (concurring in the exclusion of a proposal requesting the formation of a

committee "to more fully explore the ethical and business implications of further research involving cells or cell lines that are the result of the destruction of human embryos"); *Merck Co.* (avail. Jan. 23, 1997) (concurring in the exclusion of a proposal requesting the formation of a committee "to study ways to eliminate the use of human fetal tissue obtained from elective abortions in the research, development and testing of the [c]ompany's products"); *Hospital Corp. of America* (avail. Feb. 12, 1986) (concurring in the exclusion of a proposal seeking to prohibit the performance of abortions at the company's facilities). As with the letters described above, the Proposal does not relate to a significant policy issue that the Staff has recognized for the purposes of Rule 14a-8(i)(7). In addition, even if the Staff were inclined to recognize as a significant policy issue the use of embryonic stem cells in research, we believe the Proposal would still be excludable. The Proposal does not refer to embryonic stem cells. Rather, it refers to "embryonic kidney cells."

We acknowledge that the Staff has found human rights to be a significant policy issue. PepsiCo already has a Human Rights in the Workplace Policy, as well as a statement on Responsible Research on its public website. *See* http://www.pepsico.com/Company/Corporate-Governance/Policies.html. However, the Proposal does not involve the specific human rights issues that the Staff has previously recognized as significant policy issues, such as the persecution of persons based upon their political beliefs, free speech or forced labor. *See, e.g.*, *Yahoo! Inc.* (avail. Apr. 5, 2011) (denying the exclusion of a proposal directing the company to formally adopt specified human rights principles to guide the company's business in "China and other repressive countries" because the proposal related to the "significant policy issue of human rights"). In *Yahoo! Inc.*, the proposal related to human rights abuses that could be facilitated by the sale of information technology and technology products to countries known to use such products as a tool to commit human rights violations. In contrast, the Proposal focuses on the manner in which the Company may conduct product research, development and testing, the Company's choice of technologies and the Company's code of ethics. These are distinct issues from the human rights matters that have been recognized as significant policy issues for purposes of Rule 14a-8(i)(7).

Even if the Staff were inclined to view the Proposal as touching upon significant policy issues, the Proposal would still be excludable because it also involves matters of ordinary business that are not related to the potential significant policy issues. Consistent with the 1998 Release, the Staff has repeatedly concurred that a proposal may be excluded in its entirety when it addresses topics that broadly include both significant policy issues and ordinary business matters. For example, in *PetSmart, Inc.* (avail. Mar. 24, 2011) the proposal requested that the board require its suppliers to certify they had not violated certain acts or laws relating to animal cruelty. The Staff granted no-action relief and stated, "Although the humane treatment of animals is a significant policy issue, we note your view that the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record

keeping.'" *See also Bank of America (Trillium Asset Management)* (avail. Feb. 24, 2010) (concurring with the exclusion of the proposal because one aspect of the proposal implicated the bank's ordinary business). Similar to the *PetSmart* and *Bank of America* proposals, the Proposal broadly covers issues that are not related to any potential significant policy issue. It requests the adoption of a corporate policy that employs ethical standards, the only restriction on the standards being that they cannot involve "using the remains of aborted human beings in both private and collaborative research and development agreements." That sole restriction leaves a large universe of ethical standards that could permissibly be included in the corporate policy.

As discussed above, the Proposal focuses on the Company's product research, development and testing, the Company's decisions regarding the choice of technology and the terms of the Company's code of ethics, and it does not focus on a significant policy issue. Thus, under the precedents discussed above, the Proposal is excludable under Rule 14a-8(i)(7).

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 2012 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 (212) 351-4050 or Cynthia Nastanski, the Company's Senior Vice President, Corporate Law, at (914) 253-3271.

Sincerely,

George A. Schieren

George A. Schieren

Enclosures

cc: Cynthia Nastanski, PepsiCo, Inc.
SHAREHOLDER NAME REMOVED