Takeovers Executive of the SFC criticises Fidelity Worldwide Investment in relation to breaches of the dealing disclosure requirements in Rule 22 of the Takeovers Code

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Criticism on Fidelity Worldwide Investment

1. The Executive publicly criticises FIL Investment Management (Hong Kong) Limited under section 12.3 of the Introduction to the Code on Takeovers and Mergers ("Takeovers Code") for breaching Rule 22 of the Takeovers Code as a result of its late disclosure of dealings in the shares of Little Sheep Group Limited ("Little Sheep") between 23 May 2011 and 1 June 2011. FIL Investment Management (Hong Kong) Limited trades under the brand name Fidelity Worldwide Investment in Hong Kong and is referred to herein as Fidelity Worldwide Investment.

2. Fidelity Worldwide Investment, on behalf of various funds and investors, held over 8% of the issued share capital of Little Sheep and fell within the definition of "associate" under the Takeovers Code during the relevant period.

Background and relevant provisions of the Takeovers Code

Background

3. Fidelity Worldwide Investment provides asset management services to investors all over the world with managed assets in the group valued at approximately US$255.9 billion (as of 30 June 2011).

4. Rule 22.3 of the Takeovers Code provides that *"[i]f a person manages investment accounts on a discretionary basis, relevant securities so managed will be treated, for the purpose of Rule 22, as controlled by that person and not by the person on whose behalf the relevant securities are managed*." This means that Fidelity Worldwide Investment, and not its clients, will be treated as interested in any shares and other interests in shares managed by it on a discretionary basis.

5. On 26 April 2011 an offer period commenced for Little Sheep when Little Sheep announced, amongst other things, that it had received an approach from a substantial shareholder, Yum! Brands, Inc. (''Yum''), regarding a possible pre-conditional cash offer to acquire the outstanding share capital of Little Sheep ("Rule 3.7 Announcement").

6. On 13 May 2011 Little Sheep and Yum announced, amongst other things, a pre-conditional proposal for the privatisation of Little Sheep by way of a scheme of arrangement ("Rule 3.5 Announcement").

7. Each of the Rule 3.7 Announcement and the Rule 3.5 Announcement contained a clear reminder to associates of Little Sheep (as defined in the Takeovers Code) that they should disclose their dealings in Little Sheep in accordance with Rule 22 of the Takeovers Code.

Offer Period Tables

8. The Offer Period Tables are published on the Takeovers page of the SFC website to assist relevant parties to discharge their obligations under the Codes, including the dealing disclosure obligations under Rule 22 of the Takeovers Code and dealing restrictions under Rule 21 of the Takeovers Code. The Tables provide details of (i) new offer periods that have commenced in the past 14 days; (ii) offer periods that have closed in the past 14 days; and (iii) all current offer periods under the Takeovers Codes. The takeover of Little Sheep was added to the Offer Period Table during the morning of 27 April 2011.

9. The SFC announced the publication of the Offer Period Tables on the SFC website in the March 2011 Takeovers Bulletin issue no. 16. Associates of offeree companies (including persons who own or control 5% or more of any class of the relevant securities of the offeror or the offeree company) were also reminded of their reporting obligations under Rule 22 of the Takeovers Code in the Takeovers Bulletin.

Relevant provisions under the Takeovers Code

Rule 22

10. Rule 22.1(b)(i) of the Takeovers Code provides that "*[d]ealings in relevant securities by an offeror or the offeree company, and by any associates, for the account of discretionary investment clients during an offer period must be publicly disclosed in accordance with Notes 5, 6 and 7 to this Rule 22.*"

11. The Takeovers Code defines an "Associate" to include "*a person who owns or controls 5% or more of any class of relevant securities … issued by an offeror or the offeree company, including a person who as a result of any transaction owns or controls 5% or more*."

12. Immediately prior to the commencement of the offer period for Little Sheep on 26 April 2011, Fidelity Worldwide Investment held 8.20% of the issued share capital of Little Sheep. Given that at all relevant times Fidelity Worldwide Investment held over 5% of the issued share capital of Little Sheep, it was an associate of Little Sheep and was required under Rule 22 of the Takeovers Code to disclose publicly its dealings in Little Sheep during the offer period.

Rule 3.8

13. Rule 3.8 of the Takeovers Code provides that "*When an offer period begins, the offeree company must announce, as soon as possible…. In the announcement, the offeree company, the offeror or potential named offeror should remind their respective associates to disclose their dealings in any securities of the offeree company, or in the case of securities exchange offer, any securities in the same class as the securities that are offered as consideration under an offer*…".

14. As already mentioned in paragraph 7 above each of the Rule 3.7 Announcement and the Rule 3.5 Announcement included the requisite reminder to associates of Little Sheep of their disclosure obligations under Rule 22 of the Takeovers Code. It was specifically mentioned in the reminder that associates of Little Sheep included persons holding 5% or more of a class of relevant securities of Little Sheep.

Breaches of Rule 22 of the Takeovers Code

15. Between 23 May 2011 and 1 June 2011 Fidelity Worldwide Investment executed 29 trades in the shares of Little Sheep (the "Dealings") increasing its shareholding in Little Sheep by an aggregate acquisition of 127,000 shares, representing a 0.01% increase in Fidelity Worldwide Investment's shareholding from 8.20% to 8.21%. Despite the provisions of Rule 22 of the Takeovers Code and the reminders set out in the Rule 3.7 Announcement and the Rule 3.5 Announcement, Fidelity Worldwide Investment failed to file disclosures with the Executive in respect of the Dealings in accordance with Rule 22.

16. Fidelity Worldwide Investment self-reported to the Executive on 10 June 2011 that it had not made the required disclosures in respect of the Dealings in accordance with Rule 22 of the Takeovers Code. Fidelity Worldwide Investment subsequently explained that it had missed the announcements of the proposed privatisation of Little Sheep that were published on the Hong Kong Stock Exchange Limited's ("Stock Exchange") website due to an inadvertent oversight. Fidelity Worldwide Investment also confirmed that, at that time, its daily monitoring procedures did not include a review of the Offer Period Tables.

Apology by Fidelity Worldwide Investment and Remedial Action Taken

17. Fidelity Worldwide Investment has apologised for the breaches and submitted that it takes its obligations to make proper and timely disclosure under the Takeovers Code seriously. It self-reported the late disclosures to the Executive immediately after the late disclosures were discovered.

18. Fidelity Worldwide Investment has explained that its dealings in shares of Little Sheep were not proprietary positions held by it and were conducted on behalf of funds managed by the group. Fidelity Worldwide Investment has also confirmed that the reported transactions were conducted in accordance with the investment policies and objectives of the relevant funds and not with a view toward obtaining control of Little Sheep.

19. Fidelity Worldwide Investment has implemented a number of enhanced measures to ensure future compliance with the Takeovers Code. These measures include, inter alia;

    (i) the provision of training to staff members of the Asia regulatory reporting team to reinforce the daily checking and reporting process;

    (ii) the addition of the following webpages/searches to its daily monitoring procedures:

        (a) the "Offer Period Tables" webpage on the SFC's website;

        (b) the announcements page on the Stock Exchange's website; and

        (c) the query function of Bloomberg to assist in identifying takeover offers;

    (iii) the hiring of an additional staff member to assist in the daily monitoring process;

(iv) the subscription to relevant alerts from the SFC, the Stock Exchange and the Takeovers Bulletin to assist in monitoring takeovers in Hong Kong; and

(v) the enhancement of the compliance assurance process which has been independently reviewed by external counsel.

20. In this regard the Executive notes that Fidelity Worldwide Investment has since duly complied with the disclosure obligations under Rule 22 of the Takeovers Code following dealings in Little Sheep shares.

Implications of Fidelity Worldwide Investment's failure to comply with Rule 22 of the Takeovers Code

21. The disclosure obligations under Rule 22 of the Takeovers Code are intentionally more onerous than those under Part XV of the Securities and Futures Ordinance ("SDI") in that (i) Rule 22 requires filing to be made by 10:00 a.m. on the business day following the dealing; (ii) there are no *de minimis* thresholds; and (iii) Rule 22 requires the disclosure of prices paid or received for each underlying trade whilst SDI only requires the disclosure of the highest and the average price paid or received.

22. The high degree of transparency required under the Takeovers Code is essential to the efficient functioning of the market in an offeree company's shares during the critical period of an offer. Timely and accurate disclosure of information in relation to dealings by associates and any party who may have the ability to exercise a material influence over the outcome of an offer plays a fundamental part in ensuring that takeovers are conducted within an orderly framework and that the integrity of the markets is maintained. This is in line with General Principle 6 which provides that:

"All persons concerned with offers should make full and prompt disclosure of all relevant information and take every precaution to avoid the creation or continuance of a false market. Parties involved in offers must take care that statements are not made which may mislead shareholders or the market."

23. Fidelity Worldwide Investment, as an associate of Little Sheep, failed to make timely disclosure of details of its dealings in the shares of Little Sheep between 23 May 2011 and 1 June 2011 during the offer period. The Executive considers Fidelity Worldwide Investment's failure to report its dealings as required by Rule 22 to be a material breach of General Principle 6 as well as Rule 22 of the Takeovers Code and to merit the present disciplinary action. In reaching the decision to issue this criticism the Executive has taken into consideration all relevant factors, including amongst other things, the fact that Fidelity Worldwide Investment self-reported the breaches, its co-operation with the Executive's review of this matter and the additional controls it has implemented to ensure future compliance with the Takeovers Code.

24. Fidelity Worldwide Investment accepts that it has breached the Takeovers Code as described and has agreed to the disciplinary action being taken against it under section 12.3 of the Introduction to the Takeovers Code.

25. Finally the Executive wishes to take this opportunity to remind practitioners and parties who wish to take advantage of the securities markets in Hong Kong that they should conduct themselves in matters relating to takeovers and mergers in

accordance with the Takeovers Code and particularly, associates with a 5% or more interest in the offeree company or offeror company must report their dealings in the offeree company (or offeror company in the case of a securities exchange offer) during an offer period in accordance with Rule 22 of the Takeovers Code.

7 November 2011