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

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.
- 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 preconditional cash offer to acquire the outstanding share capital of Little Sheep ("Rule 3.7 Announcement").
- On 13 May 2011 Little Sheep and Yum announced, amongst other things, a preconditional 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.

8.

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

- (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