**Questions**

1. **Which businesses have a responsibility to respect human rights under the Guiding Principles? Please list the supply chain jurisdictions from low to high risk, from a human trafficking perspective**.

Ans: By Guiding Principles, apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

**List of Jurisdictions:**

According to the Trafficking in Persons Report 2019, issued by the US State Department, The United States is Tier 1, and therefore is the lowest risk, Hong Kong and Madagascar are Tier 2, Malaysia, Sri Lanka, Vietnam and Bangladesh are Tier 2 'Watch List' and the highest risk is Myanmar, which is Tier 3.

1. **As part of a due diligence review, please highlight the types of risks that WeBuy may be exposed to if the Target has been associated with human trafficking.**

Ans: There is a risk that the Target may have breached the law and this could result in financial penalties / fines, public scrutiny, reputational damage and brand value, experiencing difficulties in attracting capital, unforeseen integration costs and contractual risk. The potential damage to WeBuy's reputation for failing to meet its human rights commitment can in turn lead to an investor withdrawing its investment. Further, not complying with a newly passed law related to human rights can lead to litigation as well as the loss of an important consumer base or needing to pay compensation where it is not legally obliged to do so.

1. **The WeBuy lawyers have asked you how you would recommend proceeding and what types of checks should be made at this stage of the transaction**.

Ans: We should firstly determine whether:

1. WeBuy has committed publicly to 'conducting human rights due diligence' or to 'respecting human rights' or where its external stakeholders would reasonably expect it to do so;
2. The transaction is high risk; or
3. There is another reason for considering human rights risks such as laws or financing. We should then ask WeBuy whether it has discussed human rights issues with its sustainability/corporate responsibility/human rights team. Provided there is a commitment or other reason to do so, at the outset of the transaction, we would recommend conducting a human rights due diligence on the Target that is proportionate to the level of risk to human rights. This would identify potential risk areas and the adequacy of the Target's mitigant strategies in relation to minimising these risks. We would also want to identify how the Target manages human rights-related issues and compliance with local laws.
4. **Please elaborate on the potential areas of focus for the due diligence referred to in the answers to Questions 2 and 3.**

Ans: In addition to conducting the usual legal due diligence in a M&A transaction i.e. conducting due diligence where we have offices and engaging local counsel where we do not have offices. We would also present WeBuy with three options in relation to human rights due diligence:

(a) conducted in-house by WeBuy;

(b) by hiring an external provider; or

(c) by instructing Clifford Chance. If Clifford Chance is asked to conduct the human rights due diligence, we are looking to identify salient human rights risks, to check whether there are policies and processes to manage these risks, and to assess their effectiveness. This process would entail:

1. conducting a desktop search;
2. Asking the Target's legal and compliance team to provide us with details of its compliance policies, particularly in so far as they relate to matters relating to human trafficking and compliance with labour laws, such that we can identify the mitigant strategy of the Target;
3. Asking WeBuy to provide any helpful information; and
4. Speaking to contacts in the firm with relevant experience / expertise. After conducting this due diligence, Clifford Chance and local counsel would typically then conduct a Q&A with the Target, where we would ask questions relating to human trafficking matters.
5. **In relation to the Q&A process that we have referred to in the answer to Question 4, please list out a set of questions that you would propose that we ask the Target.**

Ans: Typically, we would use the Q&A process as a way of teasing out information from the Target around compliance with human trafficking legislation. For example, preliminary questions may include:

1. information on its business and activities, including its visibility of its business and business relationships beyond its tier one suppliers;
2. Information on whether the Target has a view on its salient human rights risks and, if so, what the view is, and how it was formed;
3. Information relating to any relevant policies and processes that the Target has in place (including incident reporting, complaint and grievance mechanisms and internal reporting on these);
4. Information that would support an assessment by the firm of the effectiveness of these policies and processes; and
5. Information that would uncover any human rights-related issues raised by employees, community members or other stakeholders connected to the Target's business
6. **The human rights due diligence report has identified a number of allegations from sources that the Target operates certain factories that engage labour that does not necessarily comply with all local employment laws. These allegations have not been substantiated and the Target has confirmed that it has not received any notification from any governmental authority in relation to these allegations. WeBuy has asked you to advise it on how it should deal with these issues.**

Ans: This is really a question about risk allocation / mitigation. A model answer would be the following:

1. incorporate in the share purchase agreement general representations and warranties provided by WeSell around compliance with laws (particularly in relation to human trafficking and other employment laws) and that it has not received any enquiry / notification / summons from any governmental authority and that, so far as it is aware, there are no circumstances that may lead to the same;
2. Incorporate in the share purchase agreement indemnities to the extent required;
3. Incorporate bespoke warranties to correspond to the disclosure that was elicited of the Target in the due diligence enquiries;
4. Conditions precedent to completion such as requesting that the Target addresses past labour complaints;
5. Providing WeBuy with the ability to commission an independent audit;
6. Appropriate closing conditions to mitigate/remedy the human rights impacts and ensure that the Target puts in place adequate policies and procedures in relation to future conduct vis a vis human trafficking compliance;
7. Incorporating a gap covenant, which would protect WeBuy from the Target's actions taken between signing and completion; and
8. A price adjustment mechanism.
9. **In relation to the answer to Question 6, please identify when an indemnity may be required.**

Ans: An indemnity may be required where the due diligence has uncovered a specific human rights issue that WeBuy is concerned will become a financial liability e.g. a governmental investigation or other allegation, and where such known risk cannot therefore be covered by a representation and warranty (it is a general rule that a claimant cannot claim for a breach of a warranty where the subject matter of the breach is known by the claimant prior to the date on which the warranty was given).

An indemnity would also be required to cover WeBuy's liability in such instances set out in Guiding Principle 17, commentary, the Office of the United Nations High Commissioner for Human Rights specifically states that “if an enterprise acquires another enterprise that it identifies as being, or having been, involved in human rights abuses, it acquires the responsibilities of that enterprise to prevent or mitigate their continuation or recurrence. If the enterprise it is acquiring actually caused or contributed to the abuses but has not provided for their remediation, and no other source of effective remedy is accessible, the responsibility to respect human rights requires that the acquiring enterprise should enable effective remediation itself, to the extent of the contribution. Early assessments will be important in bringing such situations to light.”