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CONTENTS

Performance Measurement of Supply Chain Management in Small and Medium Auto Ancillary Units in Coimbatore District -A Sem Approach <i>O. A. Balasubramaniam and A. Somu</i>	2731-2741
The Influence of Social Environment on Customer Experience in Retail Mall <i>Erna Andajani</i>	2743-2749
Understanding Employee Motivation in South India <i>Suvimon Punto and B. Yamuna Krislita</i>	2751-2758
Chinese Zodiac Effect and Precious Metals Returns of 1900 - 2013 <i>Robiyanto, Hersugondo and Siti Puryandani</i>	2759-2773
Impact of Balance Score Card on it & Its Employees' on Different Areas (Financial Non-financial Aspect) <i>Shyam Umasankar K. K. and Shani J.</i>	2775-2779
Determinants Effectiveness of Management Market in West Seram Regency Maluku Province <i>Hendry Selanno, Syanisul Ridjal and Hamsu Abdul Gani</i>	2781-2791
Factors Related to Quality of Work Life of Faculty Members: Indian Perspective <i>K. G. Sentilukumar, S. Chandrakumarangalam and M. Umasankar</i>	2793-2815
The extent of Enterprise Risk Management Implementation in the Nigerian Banking Sector <i>Ishaya Jolm Dabari and Siti Zabedah Saidin</i>	2817-2833
A Study on Primacy of Saving Motive and its Impact Due to the Association with Investment Variables <i>Y. Inthiyas, K. Shyamasundar and S. Sudha Ramar</i>	2835-2851
The Influence of Trading Day on the Values of Companies through Returns, Abnormal Stock Returns in the Indonesian Stock Exchange <i>Yanuar Bachtiar, Abdul Rakhman Laba and Darmono</i>	2853-2863

Groundwater Governance and Institutions in India: Evidence and Policy Implications	3065-3084
<i>Ishita Singh</i>	
Brand Personification and Social Networking Sites: The Missing Link	3085-3094
<i>Rajesh Verma and Rahul Sharma</i>	
Commitment in Organizations: An Affective View	3095-3108
<i>Megha Mehta and Sanjay Modi</i>	
Creating Shared Value of Thai SMEs for Competitive Advantage	3109-3120
<i>Ratthanan Pongwiritthon</i>	
The Study of Chiang Mai Community Product Development Strategies	3121-3130
<i>Ratthanan Pongwiritthon</i>	
Accounting Information System Quality Related to Ethics and Competence of User's	3131-3146
<i>Sri Dewi Anggadini</i>	
Impact of Training Programs on Capacity Building of Rural Communities Leaders (Case of Guli Locality - White Nile State, Sudan)	3147-3157
<i>Elshifa Ali Mirghani Adam Elkhair</i>	
Attitudinal Loyalty & Emotional Aspects (Brand Love, Self-Concept & Emotional Attachment) in Luxury Fashion Purchase: An Empirical Study of Global Brands	3159-3182
<i>Anand Thakur, Rupinderdeep Kaur Simriti Kohli and Bhuvan Lamba</i>	
The Trade-Migration Nexus: A Study of Indian Emigrants in UAE	3183-3194
<i>Heena Goel, Anjali Sharma and Surinder Kumar Singla</i>	
Information Technology Utilization in Employees' Empowerment (Evidence from Iran)	3195-3203
<i>Fatiz Taheri Kia and Tahereh Barzegar</i>	
Surveying the Influence of Market Orientation on Export Performance (Case study: Behnoosh Company)	3205-3212
<i>Ali Mehdizadeh Ashrafi and Sima Moradi</i>	
Legal Professions and Accountants Professions in the Turbulence of Money Laundering	3213-3223
<i>Go Lisanawati</i>	
Effectiveness of Training and Development on project supervisors at Construction Sector	3225-3230
<i>Kokila Parthasarathy</i>	
Entrepreneurial Activity- Economic Growth Nexus: Towards A Better Understanding	3231-3253
<i>Lesego Sekwati</i>	
Foreign Direct Investment and Economic Growth nexus in Liberia: An Application of Markov Switching Model	3255-3276
<i>P. M. Makepe, Ansumana B. Korleh and Narain Sinha</i>	

Relationship between Internal Marketing and Business Performance: A Case Study of Selected Banks in India <i>Parinda V. Doshi & Shradha Hitesh Budhedeo</i>	3277-3285
Mutual Fund Industry in India on a Growth Trail <i>V. Vanaja and R. Karrupasamy</i>	3297-3315
The Causality Between External Debt and Economic Growth in Botswana: A Vector Autoregressive (Var) Approach <i>M. K. Sukumaran Nair, N. Narayana & Goitseone Modisaemang</i>	3313-3330
Scientific Preview of Technical Education in Today's Economic & Global Environment <i>Narinder Mohan and Megha Mohan</i>	3331-3342
Word of Mouth as an Influencer of Organic Food Purchase <i>Orose Leelakulthanit</i>	3343-3357
Optimization Model Supervisor Industry in Workforce Management Based Determination of Model <i>Husain Syam</i>	3359-3377
The Influence of Relationship Quality on Customer Loyalty in the Context of Outsourcing Relationships in the Malaysian Hotel Industry <i>Maria Abdul Rahman and Yusniza Kamarulzaman</i>	3379-3392

LEGAL PROFESSIONS AND ACCOUNTANTS PROFESSIONS IN THE TURBULENCE OF MONEY LAUNDERING

Go Lisanawati*

Abstract: *The rapid changing world affected by sophisticated crime, such as money laundering, nowadays has been attracted law and regulation to involving not only law enforcement agents to prevent, but also other party such as professionals to take an important part and playing a role in prevention of money laundering. Money laundering has been manifest in many ways, without any doubts for sometimes involved 'mens rea' element of other party that is in the form of unknowingly or knowingly, willfully or not.*

This is an interdisciplinary study article with a qualitative method using conceptual approach research study. The result of the analysis study shows that the implementation of client due diligence as same as customer due diligence as the important tools to recognize who are their clients that will be in their 'professional' relationship, the sources of the funds of the client, etc, verify the documents of the clients. Professionals should have to assess their potential exploited positions by the clients, such as putting them as a gatekeeper in the name of professionalism. Through risk based approach, professions should aware the potentiality of their positions in facilitating or supporting money laundering action of their clients.

Keywords: *Legal Professions, Accountants Professions, Turbulence of Money Laundering*

INTRODUCTION

The problem faced by all nations because of money laundering has been developed more and more difficult and sophisticate. The involvement of straw man and/or middle man in the process of disguising or concealing of the assets of criminal forced anti money laundering regime designed an extra effort to prevent and eradicate it. Therefore some international regulation, model of law, or other regulation has been developed risk based model to analyzing all risks based on the risks based assessment approach. The New Financial Action Task Force (New FATF) in its recommendation warns that "countries should require financial institutions and designated non-financial businesses and profession (DNFBPs) to identify, assess and take effective action to mitigate their money laundering and terrorist financing risks" (FATF Recommendation 2012). The profession mention

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in FATF is as legal profession and accountants, and also including any independent professionals which may vulnerable to money laundering.

B. L. Bartlett (2002: 31) reports that "... money laundered through channels other than financial institutions is often placed in what are known as "sterile" investments,... Moreover, criminal organizations can transform productive enterprises into sterile investments by operating them for the purposes of laundering illicit proceeds rather than as a profit-maximizing enterprises responsive to consumer demand and worthy of legitimate investment capital". It means that all the profession who are in charge in the process of "sterile" investment sector, and other activity relate with economic activity should build their professional standards using risk based analyze. It is an approach in order to minimize the potential risks of money laundering cycling in the activity whereby they in charge through assistances from all parties.

Through this approach, the cost of money laundering crime could be reduced when all elements of society and law enforcement, from economic and law perspective together in its prevention and eradication scheme. Under the regime of anti money laundering, countries faced invaluable risks and threat on their economics and law development. But in its reality, it will be not smooth and easy to professions to use Clients Due Diligence in the same meaning as Customer Due Diligence and/or Enhance Due Diligence (EDD) when they meet their clients. Thus, the problem that will be analyzed in this article is "How can professions support anti money laundering regime through their professional standards of professions?"

METHODOLOGY

This article is a qualitative research method. It is fundamentally legal writing, but will be analyzed not only using legal approach, but also other study such as economics approach. The analysis process will use conceptual approach from the best practices in anti money laundering regime, and opinions of experts. Since money laundering is inter-disciplines study, the methodology will use economic perspective approach as well as legal approach.

LITERATURE REVIEW

Money laundering as known as today is actually a process of disguising or concealing the sources of assets derived from criminal activity of offender. The money launderer knows the way to hide the source of illegal assets that derived from illegal crime. G. Stessens (2000: 5) explains that: "Criminals who, through their criminal activities, dispose of huge amounts of money, need to give this money a legitimate appearance: they need to 'launder' it. The phenomenon of money laundering is essentially aimed at two goals: preventing 'dirty money' from serving

the crimes that generate it, and ensuring that the money can be used without any danger of confiscation". Asian Development Bank (2003:2) mention: "by its very nature, money laundering occurs outside the normal range of economic statistic. Nevertheless, as with other aspects of underground economic activity, rough estimates have been put forward to give the problem of some sense of scale".

Money laundering is a global phenomenon that has already become a trend since almost criminals conduct disguising way when their criminal act is deriving money, related with financial and/or economic activity. Therefore money laundering can be categorized as financial crime or economic crime. This money laundering is a transnational crime also, that take action cross border. D.L. Rothe and D.O. Friederichs (2015:29) mention that: "New categories of transnational crime have emerged. The literature of transnational crime and justice has principally focused on such crimes as ... money laundering, and the transnational organized crime networks that are at the center of many of these forms of transnational criminal activity." It means that money laundering is new categories of transnational crime that emerged. Further, H. R. Friman, as quoted by D.L. Rothe and D.O. Friederichs (2015:29) reminds: "the fact in many ways states - which often claims to be combating transnational crime - in fact facilitate and enable the activities of global criminal networks". Hence, risk based approach should be a tool that developed by countries to identify the mechanism of money laundering that may interrupt legitimate economic activity of a country, and distracted the function and responsibility of reporting parties. In this position, reporting parties should understand the risk that may faced caused by their clients or customers and making any placement or layering or integration of their illicit money through the transaction with Reporting parties, including professions. It will always become an opportunity for money launderers to explore methods in order to hide their illicit money. M.L. Benson and S.K. Simpson (2009:79) explain that "Criminal opportunities are now recognized as an important cause of all crime. Without an opportunity, there cannot be a crime... a criminal opportunity comprises two elements: a suitable target and a lack of capable guardianship". Criminal as a client is always expecting that their accountants and lawyers can keep their illicit money through their account, and thus they can be a straw man and/or middle man in this position.

Some International Regulation, Standards, and Recommendation have been developed to response the vulnerable positions of professions as reporting party under AML regime.

The New FATF recommendation 22 (d) explains that:

- (d) Lawyers, notaries, other independent legal professionals and accountants - when they prepare for or carry out transactions for their client concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, saving or securities accounts;
- organization of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

The recommendation above is showing that other activity may arise by client, which is actually categorized as money laundering activity. It will be not easy to practice, but it is a must for professionals such as legal professionals and accountants to recognize who is their client, what is their background of financial, and including the character of their client. Then recommendation 23 (a) of the New FATF mentions that all the professionals should report any suspicious transaction when, on behalf of or for a client, which is involve in a financial transaction. Hence any country should encouraged professionals to concern with the requirement of reporting.

Therefore, all legal professions and accountants should developed their awareness to a minimum risks to clients, and using clients due diligence to recognize the profile of the clients. It is also ensuring the way of money laundering transformed with client's activity that might seems legal, by make transaction with professional to do consultation or representing their "legal" business. Risk based approach will assist in identifying clients they relation with, and identify the risks that may appear from the transaction outlook of the clients. According to the guideline that has been developed by FAFT-GAFI (2008), risk based approach was developed in order to maximizing the effort to against money laundering. The FATF-GAFI (2008) reminds that: "it should be noted that applying a risk-based approach is not mandatory. A properly applied Risk-based approach does not necessarily mean a reduced-burden, although it should result in more cost effective use of resources". Further, regarding with Legal Professional, the FATF-GAFI RBA Guidance for legal professionals shows:

... Many legal professionals are required to comply with specific legislation and regulation and rules regulations enacted or adopted by professionals associations or other self regulatory organizations (SROs). The activities of legal professionals are very diverse, as are the legal and professional obligations with which they are required to comply....

about legal professionals should help inform the approach... Because legal professionals typically refer to those benefiting from their services as "clients" rather than "customers" ...

In this regards, legal professionals as known well in all countries not only will be mention as lawyers, but it is including Solicitors, Notaries, Barristers, etc, should use any kind of customer (=client) due diligence to provide information that needed in the regime of anti money laundering, whether their profile is risky or not to do a professional relationships with. The risk can be includes lower - moderate - and

higher risks. The relationship between professions and the clients is usually become the bearer to implementing due diligence.

Other profession that is also required to develop their standard of professionalism through risk based approach methods in eradicating money laundering is accountants. The FATF-GAFI (2008) targeted: "the accountants themselves when they conduct activities which fall within the ambit of the FATF Recommendation" inter alia with Recommendation 22 of the New FATF (2012). It still need a mechanism to implementing customer (=clients) due diligence requirement as mention by FATF, how to keeping the transaction record between accountants and the clients, giving more attention to unusual bulk transactions. But the FATF-GAFI guidance reminds: "... they are not required to report their suspicious if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege under the laws of that country. Professional secrecy/legal professional privilege is not the same as client confidentiality". The professional secrecy should be built by the country itself under the name of professionalism privilege. The question that arise then: "what is privilege?", "How can the law on money laundering break the limit of privilege itself?", "Have professionals do their best in client due diligence, when they know their clients is involving in money laundering activity or not? Inter alia with this matter, the function of professions now has become a gatekeeper for money launderers to do their "professional and legitimate" business even though the source of money is deriving from illegal crime.

The FATF-GAFI Guideline (2008) has actually give example about the services given by accountants that should be conducted regarding with the possibility of money laundering vulnerability of the clients, such as (but not limited to): audit and assurance services; book-keeping and the preparation of annual and periodic accounts; tax compliance work, and advice on the legitimate minimisation of tax burdens; internal audit, and advice on internal control and risk minimisations; regulatory and compliance services, including outsourced regulatory examinations and remediation services; insolvency/receiver-managers/bankruptcy related services; advice on the structuring of transactions, and succession advice; advice on investments and custody of clients money; forensic accountancy. It means accountants, and also external accountants should develop mechanism and best practices related with their duty, responsibility as a reporting party that required by the law.

The potential launderer for sometimes try to distract the accountant's performance. Therefore, accountants as a service profession should be aware when they are dealing with the clients that actually a criminal. The criminals can be ask an advice to accountant because they want to invest their large sum of money, and want to avoid tax payments responsibility.

Based on the literature review above, it can be said that both legal professional and accountants should be aware with the money laundering scheme and also the possibility to exploit it as a tool to hide their sources of money. The potential misuse of professionalism by clients is commonly triggered by the closed relationship between them.

The critical legal studies will operate in this discourse. A. Altman (1990:68-69) in responding the doctrine of intelligible moral essences by R. Unger, mention that: "Unfortunately, Unger does not grapple directly with the problems raised for his arguments by the liberal right-good distinction." In the context of liberal rule of law, it is important also to know the decision to do what is right and what is good. In the involvement of professions under anti money laundering regime, it can be understood the aim of law achievement should be accompany by the economic approach, where professions not only count something good for them but what is right also. In this matter, from the Theory of Justice, J. Rawls (1971:333) then mention "natural duty and obligation principles that apply to individuals" should be operated will in the context of anti money laundering regime. Through clients due diligence, all the duty and obligation of legal professional, accountants, external accountants, external auditors in responding the needed of their involvement to minimize the risks of money laundering from their clients. Critical Legal Studies and Theory of Justice will operate in the context of fulfillment of the duty and obligation of professions to know and minimize risks of the transaction and emotional bounded between clients and professions.

ANALYSIS

Money laundering has been developed rapidly and manifest into many forms. It is not only dealing with the financial institution as targeting object, but including also other institutions, such as designated non-financial businesses and profession. Money launderer will do their best way to explore and exploit many ways just to disguise and/or conceal the source of their illegal money that is derived from illegal activity or crime. The turbulence has created by illegal profile outlook of clients that may involve professions as a facilitator or supporter for their illegal activity through provide their professionalism as a medium of criminal assets' hiding.

Regarding with profession as a targeting object, it is not easy to implementing anti money laundering scheme to their clients. The pre-cautionary steps that should conduct by professions when they meet their clients, is using the principles of customer due diligence as a principle of client due diligence. In principle, customer (-client) due diligence will assist professions to know who is their clients, what is their profile outlook, verify the identity with the proper document, try to achieve appropriate information from the clients about the purpose of their business activity. Especially if their client is having a politically exposed person (PEPs), they should be implemented the principle of enhance due diligence (EDD) as the

same as depth client due diligence. At least, under the due diligence, legal professions, accountants, auditor, financial planner, and other independent professions that may handle clients that related with money laundering crime.

The application of client due diligence should be balanced with the knowledge from profession to measure their vulnerable positions through risk based assessment approach. In this matter, professions should have knowledge to ensuring the source of funds and wealth of their client's. In 2002, review of the FATF Consultation Paper number 272, has already mention consistently as being linked to money laundering schemes and cases. The consultation paper has mentioned there are several reasons why lawyers appear to be a party who should be aware with vulnerable to money laundering, in some condition such as: Common assumption that criminals use lawyer's client accounts for the placement and layering of the funds under the name of privilege and/or secrecy of their legal professional; The position as "gatekeeper" service from lawyers to their clients, which enable creating corporate vehicles, trusts, and other legal arrangements. It might assist money laundering; the services of lawyers that offering financial advice as a required element of complex money laundering.

It cannot be denied, that money launderer using professionals as a medium to launder their proceeds of crime. Under the professional secrecy, then launderer can have freedom to misuse the trust of the professionals based on the "moral" and "legal" contract to place and layer their assets of crime, without knowing by the lawyers. Under anti money laundering scheme, lawyers and legal professions should reporting suspicious transaction of their clients, except it is secrecy of legal professions. Further, FATF noted in number 277 and 278 that other independent legal professionals are brought to be the party to fight money laundering when they are involved in the lines of business of their clients. FATF warns also that Professional secrecy or legal professional privilege may be upheld when the lawyer is representing a client in court proceedings or is providing legal advice to ascertain the client's legal positions. Thus it can be understand that there is a limitation when legal professional can be applied not in order to avoid the responsibility to report suspicious transaction of the clients.

In the FATF report (2013:16), IBA (International Bar Association) presenting International Principles on conduct for the Legal Profession and outlined some of the competing ethical requirements that legal professionals (other than notaries) must consider when complying with anti money laundering requirements that has been adopted in 2011. That principle on conduct is including:

1. Independence → shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representations, and/or clear and distinct professional judgment when handle a consultation with client;

2. Honesty, integrity and fairness → maintain their high standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into contact.
3. Conflicts of interest
4. Confidentiality/professional → maintain and be affordable protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.
5. Clients' interests → legal professional treat client interests as paramount, subject always to there being no conflict with the legal professional's duties to the court and the interest of justice, to observe the law, and to maintain ethical standards.

The Lawyer's Guide to detecting and preventing money laundering (2014:15) suggested action for lawyers to conduct:

- Identify the client and their beneficial owner
Use reliable, independent sources documents, data or information. If dealing with a corporate, request structure chart and details of beneficial ownership
- Understands the business relationship
Understands, and if appropriate, obtain information about the purpose and intended outcome of the transaction for which your services are being engaged
- Maintain CDD activities
Conduct due diligence about the business relationship and services on an ongoing basis to ensure they accord with your knowledge of the client, its source of funds and risk profile
- If you cannot carry out satisfactory CDD
Do not establish a business relationship or continue acting for the client. In relevant countries consider whether you are required to make an STR.

Lawyer and other legal professionals should really concern with the implementation of CDD as the main tools when considering a construction of anti money laundering tools in their relationship with clients. Other point to consider that is between the duty and obligation of a lawyer as legal professionals, there is a separate position when in lawyer in the stage of recognize the position of the clients for the first time, and/or whether they representing on behalf their clients in the court.

Law Council of Australia in its reports (2009:17) mention that at least there are four stages in implementing AML/CFT from a risk based approach. Those stages are:

- Identification, start with the step of identifying the potential AML/CFT risks specific to the practice – focusing both on client – related and matter-related risks
- Analysis that will analyze the risks whether it is high risks or low risks?
- Management through designing and implementing arrangements (policies, processes, procedures) that limit the impact or likelihood of risks materializing.
- Review on how the arrangement can be effective? Could they be improved? Is everyone following the agreed procedures? Are all the risks addressed?

Compliances of legal professions as reporting parties should be build since the beginning of the transaction process, then try always to maintain the processes of their relationships.

The notaries or notaries public become a reporting party since they have important duty also, as mentioned in the consultation paper number 282: “The notary has an important advisory function, ensuring compliance with the law, legal certainty and the avoidance of litigation. The notary is supposed to perform their services as an objective and neutral advisor, and can act for both parties to a transaction provided there is no conflict of interest. A notary cannot normally refuse to provide services unless the act demanded is clearly contrary to the law”. Notary can provide legal consultancy, such as in contract matters. In some country, notary can be act as a gatekeeper that keep client’s money or even just manage the money. Thus, notary position here in the context of anti money laundering, is vulnerable also to be misused by their clients who conducting money laundering in their business.

Other important professionals that may vulnerable to money laundering, is called as Accounting Professionals, as vulnerable as legal professions. According to FATF Consultation Paper number 289 in the same way the consultation paper number 278 above, especially in the context of accountants which is act as a gatekeeper for the interests of clients.

Therefore in order to prevent money laundering, all the professions shall minimized the risks of their profession through compliance on their due diligence and avoid the possibility of exploitation of their professional relationships as a medium to laundering the assets derived from criminal acts.

FATF is actually concern also with other external accountants, such as accountants in management positions, financial consultants, internal auditors, forensic accountants, tax consultants and practitioner, risk management practitioners, who can have a role to fight against money laundering related with their duty and obligations. Hence, all professionals should apply their knowledge

to evaluate and assess their risks of duty using risk based approach to play a role in preventing money laundering. They should give fully attention and do pre-cautionary principles in considering the implementation of anti money laundering obligations to their professions through reporting any kinds of suspicious transaction and/or illegal activity of the clients, implementing due diligence before representing client's interests. The compliances of reporting party should assess all the time.

As mention in the previous explanations, professionals have secrecy and/or privilege under the contract with their clients. It is a contractual characteristic which is required both parties to fulfill their obligations until the work is over. If one of the parties is failed, that can be a legal problem. In this position, as a reporting party, professions cannot hide their position only under the name of secrecy and/or privilege, not only think about what is good for them. As *Critical Legal Studies* review mention above, in further situation, the problem is not only about what is good, but what is right. What is good for professions does not mean right according to the law, especially as mention recently how money launderer penetrating profession through creating safe channel to hide their illicit proceeds of crime assets. What is right according to the law of money laundering nowadays should bring any kind of good things also. Law should protect the professions from any possibility of lawsuit when they failed to perform as a good party.

It should be separated between secrecy and/or privilege context and obligation as a reporting party to prevent money laundering. Natural duty of professions is belong to the obligation according the law to be a reporting party in combating money laundering. According to John Rawls, this natural duty and obligation can guarantee a justice to all. Implementing CDD and keeping the record of the client's transaction and maintain the transaction with clients should be implemented well under the regime of anti money laundering. Further R. Cooter and T. Ulen (1988:235) mention about the assumption underlying perfect contracts based on the environment of perfect competition. It is that each decision maker has full information about the nature or consequences of his choice. Further explained that: "where contracts are concerned, full information means that one party does not unfairly surprise the other concerning the terms of contract and its consequences". Based on this understanding, there is still responsibility emerged from relationship between clients and professions, does not matter it is under contract or not.

CONCLUSION

Both Legal Profession and accountants (including other independent professionals) as now appointed as important party that has important role in preventing money laundering, should conducting principle of pre-cautionary in their duty, applying client's due diligence to understand their clients' profile outlook, the sources of

the illicit money, and maintaining the professionalism with the standards of professions but not ignoring obligation to support the regime of anti money laundering through assessing their risk of professions that may be exploited by their clients. Their compliances will support the nations' to prevent money laundering and in the frontier to eradicate money laundering.

RECOMMENDATION

Though privilege and/or secrecy should be put forward in the constructions between clients and professionals, as a natural duty of the party, it does not mean ignoring the risk of professions in the turbulence of money laundering. But in the context of anti money laundering regime, where professionals are requested and required to play important role, they should apply the obligation according the law to provide right mechanism to prevent money laundering when they are in relationship with the clients.

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All correspondence should be addressed to: Professor Mokhtar M. Metwally, Editor, *International Journal of Applied Business and Economic Research*, School of Economics and Finance, University of Western Sydney, Locked Bag 1797 Penrith South DC, NSW 1797, Australia, E-mail: m.paul@uws.edu.au, General Instructions to Authors

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