

The Banker

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*The essential reference guide
for senior bank management
around the globe*



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COMMISSIONING EDITOR
CHARLES PIGGOTT
PRODUCTION
RICHARD GARDHAM
HELEN WILSON
DOMINIC TOMS
HEAD OF DESIGN
LEO COOPER
ART EDITOR
LISA SHEEHAN
HEAD OF PRODUCTION
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DIRECTOR
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GLOBAL OPERATIONS
DIRECTOR - MAGAZINES
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PUBLISHING DIRECTOR
ANGUS CUSHLEY

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Chapter 1 GLOBAL LEADERSHIP: THE WAY BACK TO GROWTH

BANKS' FUTURE, TECHNOLOGY,
 CHINA, CAPITAL MARKETS

8 EUROPE'S TALL ORDER

Facing fallout from European
 sovereign debt woes, stricter
 regulation and decreasing
 profits, Europe's banks are set
 for some tough days ahead

Dr Josef Ackerman,
chairman of the
management board
and the group executive
committee, Deutsche Bank

10 ROLE OF BANKS IN DRIVING ECONOMIC GROWTH

As the world has grown more
 connected, the margin for
 error in the financial system
 has significantly narrowed. But
 with the implementation of a
 universal regulatory framework
 that is stable, transparent and
 consistent, there may
 be grounds for optimism

Stuart Gulliver, group
chief executive, HSBC
Holdings

12 WINNING IN THE HI- TECH REVOLUTION

Rapid advancements in
 technology are changing the
 face of banking and banks
 must adapt to survive

Francisco González,
chairman and CEO, BBVA

14 CHINESE BANKING SECTOR'S DEVELOPMENT CONTINUES APACE

Despite the domestic and
 international challenges
 China faces, its banking
 sector maintains an upward
 trend, and forecasts of further
 development prospects
 remain justified

Wang Hongzhang,
chairman, China
Construction Bank

18 ON THE SLOW ROAD TO RECOVERY

The growth forecast for
 capital markets for the
 coming years appears to be
 bleak. However, some causes
 for optimism are emerging

Robert Parker, senior
advisor, Credit Suisse

Chapter 2 SHIFTING OPPORTUNITIES

ASIA, EASTERN EUROPE, GCC,
 HONG KONG, GREEK BANKS

24 ASIA'S CHANGING ROLE IN THE GLOBAL ECONOMY

While Asia faces its own
 challenges in the short term, its
 growth shows no sign of abating

Gerard Lyons, chief
economist and group
head of global research,
Standard Chartered Bank

26 EASTERN EUROPE WILL BOUNCE BACK

If Europe can regain
 some order, future growth
 opportunities will emerge in
 central and eastern Europe

Manfred Schepers, vice-
president and CFO, EBRD

28 GCC LOOKING BEYOND OIL

Demand for oil looks set to
 dip in 2012, meaning the
 GCC states will have to
 bolster their economic growth
 by other means

Khatija Haque, senior
economist, Emirates NBD



29 THE WORLD'S GATEWAY TO CHINA

Investors are looking towards
 China. For many, this will
 mean utilising services
 in Hong Kong, now firmly
 positioned as one of the
 world's top three international
 financial centres and the
 easiest route into China

Simon Galpin, director-
general of investment
promotion, Invest Hong Kong

30 GREEK BANKS: DOWN BUT NOT OUT

As Greece starts out on the
 long path to recovery, its banks
 may look tempting to investors
 wanting to gain a foothold in
 south-eastern Europe

Dr Nikolaos Georgikopoulos,
research fellow, The Centre
of Planning and Economic
Research, KEPE



Chapter 3 NEW STANDARDS

TRANSACTION BANKING,
 VOLCKER, DERIVATIVES, RISK
 DISCLOSURE, MORTGAGES

36 MAKING REGULATORY CHANGE WORK FOR TRANSACTION BANKING

As regulatory responses to
 the financial crisis transform
 the banking industry,
 transaction banks face the
 challenge of meeting their
 regulatory requirements
 while also supporting their
 clients as they adapt to this
 new environment

Francesco Vanni
d'Archirafi, chief
executive officer,
Citigroup's Global
Transaction Services

40 RESOLUTION PLANNING AND THE VOLCKER RULE

By working with regulators
 banks can create a more
 constructive environment
 in which the two can work
 together. However, the political
 nature of the US's Volcker Rule
 presents a whole new set of
 challenges

Derek Bush, partner,
Cleary Gottlieb Steen
& Hamilton

42 BUILDING A DERIVATIVES MARKET ON FIRM FOUNDATIONS

As a new dawn of financial
 regulation arrives, building
 efficient derivatives markets
 is key. But attempting to fix
 problems that do not exist
 may be detrimental to this
 progress

Stephen O'Connor,
managing director,
Morgan Stanley

44 FINDING THE RIGHT BALANCE IN CAPITAL MARKET STANDARDS

As Europe's politicians and regulators attempt to solve the sovereign debt crisis, the way the markets are regulated is set for a major overhaul. But questions still remain as to what the true impact will be of the proposed changes

Martin Scheck, chief executive, International Capital Market Association

46 COMPREHENSIVE COVER: GLOBAL INITIATIVE TO PROTECT DEPOSITORS

Deposit insurance systems play a crucial role in offsetting contagion and maintaining public confidence, but devising and implementing sufficient international standards for these systems is a difficult task

Carlos Isoard, secretary-general, International Association of Deposit Insurers

49 A CALL FOR BETTER RISK DISCLOSURE

Although banks publish a large volume of disclosures within their annual reports, this information does not necessarily communicate banks' risk management effectiveness to investors

Vincent Papa, director of financial reporting policy, CFA Institute



52 BALANCING RISK, REWARD AND REGULATION IN MORTGAGE LENDING

By evaluating risk from the outset, with the aim to satisfy customers' needs, mortgage lenders' future platforms for growth can be more concrete

Lee O'Connell, global risk and compliance manager, Eversheds Consulting



Chapter 4 PROTECTING BALANCE SHEETS AND LIQUIDITY

LIQUIDITY, CVA NETTING, CONTINGENT CAPITAL

56 PLUGGING THE LIQUIDITY GAP

As volatility within the financial markets spreads far and wide, regulatory initiatives have sprung up across the industry, including Basel III. But will the new liquidity requirements have unintended consequences?

Arno Kratky, head of liquidity analytics, Commerzbank

59 THE BIGGER PICTURE

It is not the size of individual institutions that policy-makers should be worried about but the extent to which they are interconnected

Joseph DiVanna, managing director, Maris Strategies

60 CVA NETTING IN THE BASEL III WORLD

With Basel III's prescriptive methods for calculating credit valuation adjustment not comprehensively addressing portfolio hedges, some hedges that reduce risk may actually increase capital allocation

Peter Sime, head of risk and research, International Swaps and Derivatives Association

62 EMERGING STRUCTURES FOR CONTINGENT CAPITAL

With the old, hybrid capital instruments used by banks unable to absorb losses as intended during the financial crisis, some think that now is the time to introduce new contingent capital instruments

Bert Bruggink, chief finance officer, and **Eugen Buck**, managing director, group finance; senior advisor to group CFO, Rabobank Nederland

Chapter 5 MANAGING THE NEW TRADING LANDSCAPE

COVERED BONDS, REFORM, TRANSPARENCY, OTC DERIVATIVES, RENMINBI

66 COVERED BONDS: A SAFE BET IN AN UNSTABLE WORLD

In their long history, covered bonds, with their seeming resilience to defaults, have proved to be one of the lowest risk investments available

Ted Lord, managing director, Barclays Capital Frankfurt

68 BASEL 2.5 MAKES ITS PRESENCE FELT

As the banking industry braces itself for the final implementation of the Basel III framework, the sweeping reform regarding banks' trading books must also be taken into consideration

Peter Quell, head of portfolio analytics, DZ Bank

69 IMPROVING BOND MARKET TRANSPARENCY

With tough new transparency rules, questions remain about the impact of MiFID II on European bond markets

Rhodri Preece, director of capital markets policy, CFA Institute

70 BRINGING OTC DERIVATIVES IN FROM THE COLD

The post-crash regulatory spotlight has swung its beam onto the over-the-counter derivatives market, with major implications for banks' data management provision

Phil Lynch, president and chief executive officer, Asset Control

71 GET READY FOR THE RENMINBI

Despite uncertain global bond market conditions in 2011, the offshore renminbi not only remained open, it more than doubled in size and is forecast for further growth in 2012

Patrick Tsang, managing director, head of fixed-income capital markets, Asia, Deutsche Bank

Chapter 6 THE BATTLE FOR TRANSACTION BANKING

MOBILE PAYMENTS, AFRICA

74 TIPPING POINT FOR MOBILE PAYMENTS

Contactless technology is transforming payments techniques for consumers

Tom Gregory, head of digital payments, Barclaycard

76 THE ADDED VALUE OF SHARING

Sharing services will bring innovative solutions to the market place and save companies and clients money

Tim Howell, CEO, Euroclear

80 AFRICA'S IMMINENT PAYMENT BOOM

Africa's move to using chip-and-pin cards, along with mobile payments and e-commerce, is accelerating

Mark Richards, partner and head of financial services, Actis

82 MASS ADOPTION IN MOBILE PAYMENTS

Consumers and SMEs have shown a willingness to conduct immediate mobile payments for a small fee

Chris Dunne, strategy director, Vocalink

Chapter 7 HIGH PERFORMANCE ANALYTICS FOR A CHANGING WORLD

CHAPTER SPONSORED BY SAS

86 BIG DATA'S BIG IMPACT

How do businesses control and analyse vast data flow efficiently?

Keith Collins, chief technology officer, SAS

88 BIG DECISIONS MADE FASTER

Banks need to face the reality of accessing financial services through mobile devices and capitalise on its growth potential

Alastair Sim, global senior director, SAS

90 MINING FOR GEMS – ANALYTICS INSIGHTS FROM BIG DATA

Using predictive analytics to control the influx of big data is key to growing business

David Wallace, global financial services, SAS

Chapter 8

KEEPING TRACK OF RISK AND COMPLIANCE

BASEL III, ALGORITHMIC TRADING, THE ARAB SPRING

94 WHERE TO START WITH BASEL III

What parts of a bank's risk management framework need to be re-examined?

Paul Kennedy, general manager of risk frameworks and portfolio analytics, Commonwealth Bank of Australia

96 MANAGING ALGORITHMIC TRADING RISK

Is the right level of accountability being met when using new trading practices?

Fred Ponzo, founder and managing partner, GreySpark Partners

98 KNOW YOUR CLIENT: LESSONS FROM THE ARAB SPRING

Many banks have struggled to keep up with the regulatory impact of the Arab Spring

Dr Tony Wicks, director of AML solutions, NICE Actimize

100 THE RIGHT SIDE OF THE LAW

Failing to comply with new US and UK anti-corruption measures is not an option

Nick Kochan, author of 'Corruption: The New Corporate Challenge'

Chapter 9

TACKLING CORPORATE GOVERNANCE

RISK STRATEGY, OUTSOURCING

104 RISK STRATEGY – WHAT WORKS?

The uphill task of aligning risk appetite with business strategy has begun

Mark Lawrence, managing director, Mark Lawrence Group

107 THE NEW AGENDA

Aligning a bank's strategy with its risk appetite can help to ensure future sustainability

Stilpon Nestor, managing director, Nestor Advisors

109 RISK IN OUTSOURCING

How best can banks protect themselves against failings by third-party service providers?

Phil Davies, chief technology officer, and Nathan Travell, product manager, Milestone Group

Chapter 10

WHAT RETAIL CUSTOMERS WANT

ONLINE BANKING, BRAND BANKING, SOCIAL MEDIA

112 THE REINVENTION OF BANKING

Too many banks are replicating their websites when it comes to apps. They should be rethinking customer relations

Chris Morson, industry expert, digital development

114 THE RISE OF A NEW ONLINE BANKING MODEL

With an influx of new internet banks arriving to challenge the online offerings of traditional banks, what does the future hold for digital banking?

Anders Carlström, head of internet bank, SEB Retail Sweden

116 WILL BANKING'S BRAND CHAMPIONS PLEASE STAND UP

With no one taking responsibility for restoring the banking industry's brand, progress seems a long way off

David Haigh, chief executive, Brand Finance

118 SOCIAL MEDIA PAYS DIVIDENDS

Social media has huge scope for banks to re-engage with their customers and should not be ignored

Bill Penn, chairman, Aspectus PR



120 ADDRESSING THE SEGMENT OF 'ONE'

Are banks getting their marketing and customer service right?

Sriram Srinivasan, senior vice-president, global business head, banking and financial services, and Andy Fincham, head of Europe, banking business advisory services, Wipro Technologies



Chapter 11

THE RISE OF ISLAMIC BANKING

STANDARDISATION, RISK, ASSET MANAGEMENT, DEPOSIT INSURANCE

126 ISLAMIC FINANCE MOVES TOWARDS STANDARDISATION

Islamic finance is facing many challenges as it looks to establish itself as an alternative to conventional banking

Simon Eedle, managing director and head of global Islamic banking, Crédit Agricole Corporate and Investment Bank

129 OFF-BALANCE SHEET RISK IN ISLAMIC FINANCING

Islamic financial institutions face a range of risks when financing real estate projects, not least the fact that assets are uncollateralised during the construction period. Emerging industry standards will help

Joseph DiVanna, managing director, Maris Strategies

130 RECORD YEAR FOR ISLAMIC ASSET MANAGEMENT

With Islamic asset management in its infancy, there are still opportunities for big players to emerge in this new sector

Nigel Denison, head of asset management, Bank of London and the Middle East

132 LAYING THE FOUNDATIONS FOR ISLAMIC DEPOSIT INSURANCE

Is Malaysia's Islamic deposit insurance scheme ready for a global launch?

Khairuddin Hj Arshad, chief operating officer, Malaysia Deposit Insurance Corporation

Chapter 12

SPOTLIGHT ON VALUES

SUSTAINABILITY, INCLUSIVE BANKING, ASIA

136 SUSTAINABILITY: THE NEW BOTTOM LINE

Increasing demographic growth, connectivity, resource-scarcity and other factors have brought the idea of sustainable development to the fore. And as sustainability is a decisive factor for the rise and decline of countries and companies, it also creates risks and opportunities for forward-looking investors

Burkhard Varnholt, head of the asset management, products and sales division and chief investment officer, Bank Sarasin & Cie



138 THE RIGHT TO DECENT FINANCIAL SERVICES

With an estimated 5 million UK households affected by financial exclusion, the need has never been more urgent for financial inclusion to move up the agenda

Mick McAteer, director, Financial Inclusion Centre

140 A COMMITMENT TO SOCIALLY USEFUL BANKING

Bradesco has been a pioneer in sustainable and inclusive banking. The bank's CFO considers the path it has taken and the way ahead

Domingos Figueiredo de Abreu, chief financial officer and investor relations officer, Banco Bradesco

143 ASIA'S RISING STANDARDS

As the world's attention is focused on the success of many Asian economies, the need to ensure responsible investment has never been so important

Mark Robertson, head of communications, EIRIS

Resolution planning and the Volcker Rule



Derek Bush
Partner
Cleary Gottlieb Steen
& Hamilton

BY WORKING WITH REGULATORS, AND NOT AGAINST THEM, BANKS CAN ESTABLISH AN EARLY CREDIBILITY WITH RULE-MAKERS, CREATING A MORE CONSTRUCTIVE ENVIRONMENT IN WHICH THE TWO CAN WORK TOGETHER. HOWEVER, THE POLITICAL NATURE OF THE US'S VOLCKER RULE PRESENTS A WHOLE NEW SET OF CHALLENGES.

Two of the more novel aspects of the Dodd-Frank Act – resolution planning and the Volcker Rule – represent an important lesson for US and international banks adjusting to the new regulatory landscape. The two reforms could not be more different in many respects, but they both point to a common, if basic, strategic conclusion for banks: establishing early credibility with regulatory authorities is of paramount importance. Establishing credibility will not only minimise obvious downside risks but also maximise opportunities.

Bank supervisory authorities across the globe have quickly embraced the concept of resolution planning, even if some may view the potential benefits differently. This international consensus means that it will likely become a permanent fixture of bank supervision, surviving even after institutional memories of the most recent financial crisis fade.

Regulatory engagement

Large, complex banking organisations in

the US faced the prospect of resolution planning with considerable unease, especially after the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC) issued proposed regulations that raised numerous concerns for the industry. The concerns centred around the proposed timetable, confidentiality issues and a lack of clarity regarding specific requirements.

The Federal Reserve and the FDIC took into account and addressed many of the industry's concerns, in a positive sign for the future in this area. The agencies adjusted the timetable, prioritised larger and more complex institutions and affirmed that they would follow an iterative process of reviewing initial plans and providing feedback to institutions.

In public statements and private meetings since finalising the regulations, the agencies have continued to demonstrate a willingness to work with institutions to develop viable resolution plans. Although many larger institutions remain concerned that resolution planning could become a 'trap' that will force them to change their structure, scope or activities, there is reason to hope that resolution planning could evolve into a constructive exercise.

This, in turn, has created incentives for institutions to approach resolution planning as an opportunity, even offering a potential competitive edge for institutions that succeed. They are discovering ways to leverage existing risk management resources to develop resolution plans while, at the same time, looking for opportunities to leverage the

outcomes of resolution planning back into their risk management approaches. Some institutions will struggle with budgetary concerns as substantial internal and external resources will be required, but early experience suggests that the largest institutions are taking resolution planning extremely seriously.

By establishing credibility early in the process, banks will be positioned to reap rewards later and mitigate potentially costly outcomes. Disagreements between institutions and their supervisors over the details of a resolution plan are inevitable as institutions confront what may appear to be unrealistic expectations of their management information systems. But those institutions that are viewed by their supervisors to be dedicated to adhering to the rules will have more leeway to define their plan proactively. In contrast, institutions that communicate – even unintentionally – to their supervisors that they view the exercise as a waste of time risk losing opportunities to control their future.

Volcker dilemma

Owing to the Volcker Rule being largely politically motivated, its implementation is likely to be different to the implementation of resolution planning. Legislative hearings failed to show that proprietary trading or sponsoring and investing in private equity and hedge funds contributed meaningfully to the financial crisis, and the Volcker Rule is an outlier among international approaches to financial stability regulation.

Attempting to prohibit banks and their affiliates from engaging in speculative trading, while permitting them to continue legitimate market-making, hedging and other activities, begs huge numbers of questions about line-drawing and compliance. Trying to restrict banks' ability to sponsor and invest in private equity and hedge funds also creates complex problems, not least the problem of defining a private equity or hedge fund.

These problems are compounded by ambiguities, contradictions and mysteries in the text of the Volcker Rule. As a result, the agencies charged with deciphering and implementing the Volcker Rule in regulations face a fairly hopeless task, especially when there is no coherent policy framework that the agencies can turn to for ultimate guidance on key questions.

Whatever the outcome of the agencies' attempt to write regulations implementing the Volcker Rule, the many US and international banks subject to the Volcker Rule will eventually be left

early experience suggests the largest institutions are taking resolution planning extremely seriously

to confront the most important phase of the process.

Open to interpretation

Banks will need to make judgements as best they can about what the Volcker Rule does and does not prohibit, adopting reasonable positions on issues left unaddressed by the agencies' regulations. In the coming years, banks could experience a highly compressed version of the decades that followed the Glass-Steagall Act and the Bank Holding Company Act, when banks' interpretations of permissible activities ultimately fed into regulatory change and rationalisation of laws that came to be viewed over time as unnecessarily blunt instruments.

In this phase, an institution's credibility with its supervisors will be vital. Banks will need to reach good faith conclusions about how to give the Volcker Rule real-world meaning. Some of these judgements will be second-guessed by examiners, especially in today's environment of more intrusive on-site supervision and ever-increasing expectations of banks' risk management, including management of legal and compliance risk. By establishing a proactive approach and demonstrating a commitment to compliance, banks will avoid perceptions of evasion, and be better placed to convince examiners of the reasonableness of their positions.

The importance of credibility in regulatory relationships may seem obvious. And yet institutions sometimes find themselves in shorter supply than they need. In the evolving landscape of Dodd-Frank reforms, credibility will be critical as institutions grapple with new regulatory requirements. Whether it is to take advantage of opportunities presented by new resolution planning requirements, or to preserve flexibility for legitimate business practices under the Volcker Rule, there is much to be gained from credibility, and much to be lost without it.

biography

Derek Bush is a Washington, DC-based partner at law firm Cleary Gottlieb Steen & Hamilton.

Key ideas

Credible judgement

- **The largest institutions** are taking resolution planning extremely seriously.
- **Prohibiting banks** from engaging in speculative trading while permitting them to continue legitimate market-making, hedging and other activities, begs huge numbers of questions about line-drawing and compliance.
- Banks will need to make **judgements** on what the **Volcker Rule does and does not prohibit**.
- Banks will need to reach **good faith conclusions** about how to give the Volcker Rule real-world meaning. Some judgements will be second-guessed by examiners in today's environment of more intrusive on-site supervision.
- **By establishing a proactive approach** and demonstrating a commitment to compliance, banks will avoid perceptions of evasion.