## *II. Title XVI: Financial Crisis Assessment and Fund*

### A. Introduction

In an attempt to make what would become the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act") revenue neutral, the Conference Committee[1] agreed to include Title XVI—Financial Crisis Assessment and Fund.[2] Title XVI called for the creation of a fund, financed by a special assessment on financial companies.[3] Eligible companies would be assessed amounts determined by using a "risk matrix," with final determinations made by the Financial Stability Oversight Council ("Council").[4] Only financial companies with at least $50 billion in assets and hedge funds with at least $10 billion in assets under management would be eligible for assessment.[5] The maximum amount of the Fund would be $19 billion.[6] A special fund would hold the assessments for 25 years, at which point the Fund would be used to reduce the debt of the United States.[7]

Title XVI received immediate and intense disapproval as soon as it was included in the Act.[8] Most notably, Scott Brown,

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[1] Definition of Conference Committee, UNITED STATES SENATE, http://www.senate.gov/reference/glossary_term/conference_committee.htm (last visited Feb. 26, 2011) ("A temporary, ad hoc panel composed of House and Senate conferees" formed to reconcile "differences in legislation that has passed both chambers.").

[2] *See* John Carney, *New Bank Taxes May Derail Financial Reform Bill*, CNBC (June 28, 2010, 5:45 PM), http://www.cnbc.com/id/37979433/New_Bank_Taxes_May_Derail_Financial_Reform_Bill; Daniel Indiviglio, *Congress' Conference Committee Completed for Financial Reform*, THE ATLANTIC (June 25, 2010, 5:39 AM), http://www.theatlantic.com/business/archive/2010/06/congress-conference-committee-completed-for-financial-reform/58718/.

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (as reported by the conference committee, June 25, 2010).

[4] H.R. 4173 § 1601(e), (g).

[5] H.R. 4173 § 1601(f).

[6] H.R. 4173 § 1601(a).

[7] *See generally* H.R. 4173 § 1602.

[8] *See* Carney, *supra* note 2; Daniel Indiviglio, *Why Are Centrist Republicans Mad About the Bank Tax?*, THE ATLANTIC (June 29, 2010, 10:35 AM), http://www.heatlantic.com/business/archive/2010/06/why-are-centrist-republicans-mad-about-the-bank-tax/58900/.

Republican Senator from Massachusetts, withdrew his support for the legislation due to the inclusion of Title XVI.[9] Without the support of Senator Brown (and other Republican senators who withdrew their support) and the death of Senator Robert Byrd, the Conference Committee version of the Act did not appear to have enough support in the Senate to pass.[10] Therefore, the Conference Committee reconvened to withdraw Title XVI.[11]

In order to keep the financial reform legislation revenue neutral, the Conference Committee proposed two alternatives in its place.[12] First Title XIII of the Act prevented the Troubled Asset Relief Program ("TARP") from incurring any new obligations,[13] which would reduce the total authorization under TARP by approximately $225 billion.[14] Second, the minimum reserve ratio for the Deposit Insurance Fund[15] was raised from 1.15% of estimated insured deposits to 1.35%.[16]

### B. Origin of Title XVI

In reconciling the differences between the House and Senate versions of the Act, the Conference Committee sought to avoid the

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[9] Letter from Senator Scott Brown to Chairman Christopher Dodd and Chairman Barney Frank (June 29, 2010) *available at* http://www.boston.com/news/politics/politicalintelligence/2010/06/switching_posit.html.

[10] Carney, *supra* note 2; Indiviglio, *supra* note 8.

[11] Press Release, House of Representatives Comm. On the Budget, The Dodd-Frank Regulation Bill: Complications and Budget Gimmicks (July 2, 2010), *available at* http://budget.house.gov/News/DocumentSingle.aspx?DocumentID=206065.

[12] *See generally id.*

[13] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 1302 (2010) (as enacted on July 21, 2010).

[14] Sidley Austin LLP, *Financial Regulatory Reforms Update: Title XIII—Pay It Back* (June 30, 2010) *available at* http://www.sidley.com/files/News/9daacd6d-9deb-446a-b4da-57b96610f49a/Presentation/NewsAttachment/5833e679-1973-4224-b873-69730409c5ac/FRR_063010_Title13.pdf.

[15] Michael R. Crittenden, *Budget Suggests FDIC Reserve Ratio May Need to Increase*, WALL ST. J. (Feb. 1, 2010, 1:50 PM), http://online.wsj.com/article/SB10001424052748704107204575039242223714402.html (An amount that "represents how much the agency has on hand in its deposit insurance fund compared to federally insured deposits . . . .").

[16] Dodd-Frank Wall Street Reform and Consumer Protection Act § 334.

House and Senate "Pay-As-You-Go" or "PAYGO" rules.[17] According to the PAYGO rules, if a proposed bill lowers taxes or raises spending and does not contain measures to offset those costs, a Senator or Congressman can raise a point of order[18] against the bill.[19] In the Senate, a vote of 60 Senators can waive a PAYGO point of order.[20] However, in the House, if a PAYGO point of order is raised there is no possibility for waiver and the "bill is automatically defeated."[21] The Congressional Budget Office had estimated that the cost of the bill was roughly $20 billion.[22] In order to offset this cost, the Conference Committee added Title XVI—Financial Crisis Assessment and Fund.[23]

### C. Substance of Title XVI

As created by the Conference Committee, Title XVI consisted of three Sections: 1601, 1602 and 1603[24] (only Sections 1601 and 1602 are relevant for present purposes; Section 1603 of the Conference Committee version is Section 1601 in the final version of the Act[25]). Section 1601 of the Conference Committee version of the

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[17] Press Release, U.S. Senate Budget Comm., Budget Perspective—The Financial Crisis Assessment: A Tax by Another Name (June 29, 2010), *available at* http://budget.senate.gov/republican/pressarchive/2010/2010-06-29BudgetPerspective.pdf.

[18] Definition of Point of Order, UNITED STATES SENATE, http://www.senate.gov/reference/glossary_term/point_of_order.htm (last visited Feb. 26, 2011) ("A claim that a rule is being violated. . . . If the Chair sustains the point of order, the action in violation of the rule is not permitted.").

[19] *See Policy Basics: Introduction to the Federal Budget Process*, CTR. ON BUDGET & POLICY PRIORITIES, 6 (Dec. 6, 2010), *available at* http://www.cbpp.org/files/3-7-03bud.pdf.

[20] *Id.*

[21] *Id.*

[22] *House and Senate Agree on Finance Overhaul*, DEALBOOK BLOG (June 25, 2010, 6:31 AM), http://dealbook.nytimes.com/2010/06/25/congress-reaches-final-agreement-on-overhaul/?scp=49&sq=dodd-frank%20senate&st=cse.

[23] Press Release, U.S. Senate Budget Comm., *supra* note 17.

[24] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. §§ 1601-1603 (2010) (as reported by the Conference Committee, June 25, 2010).

[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 1601 (2010) (as enacted on July 21, 2010).

Act described the assessments, while Section 1602 discussed the creation of the Financial Crisis Special Assessment Fund ("Fund").[26]

The total amount of the Fund was the lesser of $19 million or one and one-third the amount necessary to offset the total cost of the Act from enactment through September 20, 2020.[27] The exact amount was to be determined by the Director of the Office of Management and Budget.[28] The assessments were to be collected on an annual basis over three years, with the first payment due no later than September 30, 2012 and the final payment due no later than September 30, 2015.[29] The first $15 million worth of assessments were to be set aside for the Federal Deposit Insurance Corporation to be used for implementation and administrative expenses of Title XVI, while the remainder of assessments was to be deposited into the Fund.[30]

Assessments were to be made on financial companies and hedge funds.[31] The Act defines a financial company broadly, including bank holding companies, savings and loan holding companies, nonbank financial companies, insurance companies, companies "predominantly engaged in financial activities . . . for the purposes of section 4(k) of the Bank Holding Company Act of 1956" and any subsidiary of an otherwise qualifying company.[32] Expressly excluded from the definition of a financial company are farm credit systems, federal home loan banks, Federal National Mortgage Associations, Federal Home Loan Mortgage Corporations, registered investment companies, common trust funds, collective investment funds and insured depository institutions.[33] A hedge fund is not expressly defined in Title XVI; the Financial Stability Oversight Council ("Council") has the authority to define the term, after consultation with the Securities and Exchange Commission.[34]

Furthermore, a financial company must have at least $50 billion in assets, and a hedge fund must have at least $10 billion

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[26] *See generally* H.R. 4173 §§ 1601-1602.
[27] H.R. 4173 § 1601(a).
[28] H.R. 4173 § 1601(a)(2).
[29] H.R. 4173 § 1601(b).
[30] H.R. 4173 § 1601(c).
[31] H.R. 4173 § 1601(f).
[32] H.R. 4173 § 1601(j)(2).
[33] *Id.*
[34] H.R. 4173 § 1601(f)(2).

under management.[35] To determine which organizations would be assessed and the amount of assessments, the Council was to impose risk-based assessments using a "risk matrix" on qualifying financial companies and hedge funds.[36] The risk matrix was to be established by the Council, but thirteen factors to be considered were listed in Title XVI.[37] These factors include: the company's leverage; off balance sheet exposures; relationships with other financial companies; importance as a source of credit, including as a source of credit for low-income, minority, or underserved communities; and liabilities, including reliance on short-term funding.[38] Furthermore, "the nature, scope, and mix of the company's activities" and "such other risk-related factors as the Council may determine to be appropriate" were listed factors to be taken into consideration.[39] In addition, the Council was given the authority to require financial companies and hedge funds make information available to the Council in order to determine assessment amounts.[40] If the Council imposed an assessment on a financial company and that company failed or refused to make a timely payment, penalties would be assessed similar to those for insured depository institutions that do not pay their FDIC insurance.[41]

Only the assessments made would be put into the Fund[42] and Fund assets would not be consolidated with any other government assets.[43] Fund assets could only be invested in United States obligations.[44] In addition, the Fund would not be utilized in any other way for 25 years, at which point it would be used solely for the purpose of reducing the United States debt.[45]

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[35] H.R. 4173 § 1601(f).
[36] H.R. 4173 § 1601(e), (g).
[37] H.R. 4173 § 1601(g).
[38] *Id.*
[39] *Id.*
[40] *See* H.R. 4173 § 1601(i).
[41] H.R. 4173 § 1601(i)(6). The maximum penalty for a depository institution that does not make timely payments on FDIC insurance assessments is 1 percent of the amount of the assessment for each day the depository institution is in arrears. 12 U.S.C. § 1828(h)(1).
[42] H.R. 4173 § 1602(b).
[43] *Id.*
[44] H.R. 4173 § 1602(d).
[45] H.R. 4173 § 1602(g).

### D. Impact of Title XVI

After the Conference Committee released its version of the Act (which included Title XVI), the Congressional Budget Office ("CBO") released a Cost Estimate for the Act.[46] The CBO estimated that the Act would cost $14.9 billion over 2011-2015 and $26.9 billion over 2011-2020.[47] The CBO also estimated that the Act would raise revenue by $17.1 billion and $26.9 billion over the same respective time periods.[48] Furthermore, the CBO estimated that Title XVI would be responsible for $13.5 billion of the $26.9 billion raised by the Act.[49] The CBO did not credit all of the possible $19 billion as revenue because the assessments imposed by Title XVI would be tax-deductable, lowering taxable income and, hence, government revenue elsewhere in the economy.[50]

It was estimated that up to 34 hedge funds,[51] 35 banks and 32 other firms (primarily insurance companies) would be subject to assessments.[52]

### E. Backlash to Title XVI

Immediately after the Conference Committee version of the Act was released, Title XVI became the center of controversy. One major argument against Title XVI was that the risk matrix factors

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46 *See generally* CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: H.R. 4173 DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, CONFERENCE AGREEMENT, AS REPORTED ON JUNE 26, 2010 (June 28, 2010) *available at* http://www.cbo.gov/ftpdocs/115xx/doc11596/hr4173.pdf.
47 *Id.* at 1.
48 *Id.*
49 *Id.* at 9.
50 *Id.* at 9-10.
51 Lawrence Delevigne, *Hedge Funds Fight $19 Billion Financial Reform Tax*, ABSOLUTE RETURN & ALPHA (June 29, 2010), 2010 WLNR 13941157, *available at* http://www.absolutereturn-alpha.com/Article/2620979/Search/Hedge-funds-fight-19-billion-financial-reform-tax.html?Keywords=Hedge+funds+fight+$19+billion+financial+reform+tax (full article only available behind paywall).
52 Bill Swindell et al., *Democrats Consider New Funding For Bill*, NAT'L J. DAILY (June 29, 2010,12:00 AM), 2010 WLNR 13089675, *available at* http://national journal.com/member/daily/democrats-consider-new-funding-for-bill-20100629?mr efid=site_search.

were not only unclear, but many of the factors seemed unrelated to financial stability.[53] This would lead to confusion as to how the risk factors (such as the factor relating to low-income lending) would be used by the Council:

> It could be that banks that do a lot of lending for low-income communities would be assessed a higher fee, since the failure of those banks would be more likely to result in a bailout by government officials concerned that low-income communities would be deprived of important sources of credit.

However, that does not seem likely. Far more likely is that banks that lend in ways approved by the regulators—buying municipal bonds from budget-challenged states or lending to politically favored businesses—will be assessed a lower fee. They will be given credit—rather than penalized—for being an "important source of credit" for these constituencies.[54]

Such unclear terms in the risk factors would grant the Council broad discretionary power.[55] Not only could that lead to a politicization of the assessment process, but this lack of certainty regarding the assessments might paralyze qualifying financial companies and hedge funds.[56]

In addition, critics of Title XVI stated that the assessments would make their way to the public at large through increased fees, higher interest rates, and lower compensation at assessed organizations.[57] It does not appear that any financial company or hedge fund explicitly stated that being subject to Title XVI would lead to any specific changes in pricing or policies. However, in response to a similar bank tax proposal, the CBO stated:

> [T]he ultimate cost of a tax or fee is not necessarily borne by the entity that writes the check to the

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[53] Carney, *supra* note 2.
[54] *Id.*
[55] *See id.*
[56] *Id.*
[57] Robert Romano, *Massive Government Overreach in Dodd-Frank Financial Conference*, NETRIGHT DAILY (June 29, 2010), http://netrightdaily.com/2010/06/massive-government-overreach-in-dodd-frank-financial-conference/.

> government. The cost of the proposed fee would ultimately be borne to varying degrees by an institution's customers, employees, and investors, but the precise incident among those groups is uncertain.[58]

Furthermore, hedge funds were adamantly opposed to Title XVI, arguing that it was the banking system, not hedge funds, that caused the financial crisis and that it would be unfair to penalize hedge funds for another industry's mistakes.[59]

More importantly, however, three Republicans who had supported the previous version of the Act in the Senate withdrew their support.[60] Senator Scott Brown of Massachusetts was most vocal in his disapproval of Title XVI. In a letter sent to Senator Chris Dodd and Congressman Barney Frank, Senator Brown stated that he would withdraw his support of the Act if Title XVI remained.[61] He asked that the Conference Committee reconvene to find a different way to offset the cost of the Act.[62] Senator Brown referred to the assessments as a tax that would "be passed onto the millions of American consumers and small businesses who rely on major U.S. financial institutions for their checking, ATM, loans or other services."[63] He continued, stating that the tax would result in higher fees for consumers and decreased funding available for small businesses.[64]

### F. The End of Title XVI

For guaranteed passage of the Act in the Senate, the democrats supporting the bill needed 60 votes to invoke cloture.[65] The death of Senator Robert Byrd, Democrat from West Virginia, removed one vote in support of the Act, and three Republican

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[58] *Id.* (quoting Letter from Douglas W. Elmendorf, Director of the Congressional Budget Office to Senator Charles E. Grassley (March 4, 2010), *available at* http://cbo.gov/ftpdocs/110xx/doc11046/03-04-Ltr_to_Grassley_on_FCRF.pdf)).
[59] *See* Delevigne, *supra* note 50.
[60] Swindell, *supra* note 51.
[61] Letter from Senator Brown, *supra* note 9.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See* Carney, *supra* note 2.

senators who had previously voted for the Act had withdrawn their support.[66] Due to the lack of support, the Conference Committee reconvened to remove Title XVI.[67]

In order to keep the Act revenue neutral and avoid a PAYGO point of order, two additional measures were added.[68] The first measure prohibited new obligations under the TARP program.[69] No new obligations for TARP funds may be initiated after June 25, 2010.[70] Furthermore, the TARP program was originally authorized to spend $700 billion but that amount was reduced to $475 billion.[71] The second measure increased the minimum reserve ratio for the Deposit Insurance Fund from 1.15% of estimated insured deposits.[72] The reserve ratio measures the insurance fund's balance against insured deposits,[73] and is used in calculating the fees assessed on insured depository institutions.[74] However, small depository institutions with less than $10 billion in consolidated assets are exempt from this increase.[75]

The three Republican senators who withdrew their support from the Conference Committee version of the Act voted for the final version of the Act, which passed the Senate with 60 votes.[76] However, many Senators and commentators still had problems with the new measures used to fund the Act. Senator Judd Gregg of New Hampshire stated that the TARP funds were borrowed to begin with and that reappropriating the funds was "pure deception" of taxpayers,

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[66] *See id.*
[67] David M. Herszenhorn, *Bank Fee Is Eliminated in Financial Bill*, N.Y. TIMES, June 29, 2010, at B1.
[68] *Id.*
[69] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 1302 (2010) (as enacted on July 21, 2010).
[70] *Id.*
[71] *Id.*
[72] Dodd-Frank Wall Street Reform and Consumer Protection Act § 334(d).
[73] *FDIC's Bair Prefers Higher Deposit Reserve Ratio*, CNBC (September 30, 2010, 9:18 AM), http://www.cnbc.com/id/39434882/FDIC_s_Bair_Prefers_Higher_Deposit_Reserve_Ratio.
[74] *See* Crittenden, *supra* note 15.
[75] Dodd-Frank Wall Street Reform and Consumer Protection Act § 334(e).
[76] Meena Hartenstein, *Wall Street Reform Passes Senate: 60-39 Vote Approves Sweeping Bill to Overhaul Financial System*, N.Y. DAILY NEWS (July 15, 2010, 3:15 PM), http://www.nydailynews.com/news/politics/2010/07/15/2010-07-15_wall_street_ reform_passes_senate_6039_vote_approves_sweeping_bill_to_overhaul_fi.html.

who were promised that leftover TARP funds would be paid back to the Treasury.[77] One commentator echoed Senator Gregg's thoughts, stating that using the TARP funds for this purpose adds to the debt and will ultimately lead to raised taxes.[78] Furthermore, the Emergency Economic Stabilization Act (which created the TARP program) states, "rescissions of any amounts provided in this Act shall not be counted for purposes of budget enforcement."[79] As such, it appears that using the TARP funds in such a way violates the terms of the Emergency Economic Stabilization Act.[80]

Concerns have also been raised regarding the increase to the FDIC's minimum reserve ratio. Counting the FDIC's insurance funds towards the cost of the Act appears to double-count the funds.[81] Either the funds are to be used to raise the FDIC's Deposit Insurance Fund or they are to be used for paying down the cost of the Act, but they cannot be used for both.[82] Furthermore, one commentator described the measure as "baffling," stating that "instead of taxing big banks and hedge funds a lot, Congress would prefer to tax all banks a little less? The potential harm would be approximately the same . . . . Again, now it will just fall on the shoulders of all Americans when their bank passes the new fee onto them."[83]

### G. Conclusion

The Dodd-Frank Wall Street Reform and Consumer Protection Act is full of contentious and hotly- debated issues, but few were as difficult to resolve as was the funding the Act. The brief existence of Title XVI[84] is an illustrative reminder of this issue. While the true

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[77] Herszenhorn, *supra* note 66.
[78] Daniel Indiviglio, *A Tax By Any Other Name Would Smell Just as Foul*, THE ATLANTIC (June 29, 2010, 2:24 PM), http://www.theatlantic.com/business/archive/2010/06/a-tax-by-any-other-name-would-smell-just-as-foul/58917/.
[79] Press Release, House of Representatives Comm. On the Budget., *supra* note 11.
[80] *See id.*
[81] *Id.*
[82] *See id.*
[83] Indiviglio, *supra* note 77.
[84] *See* Carney, *supra* note 2 (stating that the conference committee version of the Act which contains Title XVI was released on Friday, June 25); *see also* Herszenhorn, *supra* note 66 (describing how the conference committee

effects of Title XVI are unclear, it is clear that it would have made business more difficult for the largest financial companies and hedge funds, which would, in turn, benefit smaller organizations. As such, it appears that Title XVI would have been an additional tool in furthering the Act's goal of preventing financial companies from becoming "too big to fail."[85]

No matter what your thoughts are on Title XVI, it appears as though its replacements are inadequate. Reappropriating TARP funds is a violation of legislative intent of the Emergency Economic Stabilization Act, as evidenced by both the clear language of the statute and the statements made by the legislators who supported the measure.[86] In addition, while raising the FDIC minimum reserve ratio does technically raise government revenue, that revenue will not be used in a way that pays off the costs of the Act. While Title XVI may not have been the perfect solution to funding the Act, it does appear as though it would actually fund the Act while furthering its goals in a way that the replacement measures do not.

James Britt[87]

reopened the conference proceedings to remove Title XVI on Tuesday, June 29).

[85] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (as enacted on July 21, 2010). (declaring that "end[ing] 'too big to fail'" is one of the stated goals of the Act).

[86] *See* Press Release, House of Representatives Comm. On the Budget, *supra* note 11.

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