WIFIA FCRA Criteria

The Current Criteria’s Background Section, Line-by-Line

Version 1.1

October 2023

The 2020 WIFIA FCRA Criteria

A WIFIA loan is not intended to finance Federal activities. When a WIFIA Section 3908(b)(8) non-Federal cost share in a federally involved project is being financed, the non-Federal nature of the cost share may be relatively complex. A loan's non-Federal nature is also a requirement of WIFIA's FCRA loan budgeting.

A 2020 Congressional Directive instructed OMB to develop FCRA criteria for WIFIA loans to non-Federal cost share. These Criteria were published in the Federal Register and include a short Background section followed by a series of questions.

This presentation reviews the Background section line-by-line to answer:

- Is the exact FCRA issue with non-Federal cost shares **clarified**?
- Are relevant principles from the 1967 Budget Report being **utilized**, as required by the Directive?
- Do the Criteria's questions follow from **clear premises and conclusions** set forth in the Background section?

Background Line 1: The Recording Statute

The Federal budget is presented on a cash basis. This is driven by many considerations, among which is a need to reflect the statutory requirement that the Federal Government records full cost at the time an obligation is entered into, as required by 31 U.S.C. 1501, known as the recording statute.

- 31 USC 1501 (1)(a)(2) specifies: "*a loan agreement showing the amount and terms of repayment".* All WIFIA loans are recorded in accordance with this requirement.
- By definition, a non-Federal cost share is a contribution to a federally involved project that is provided by non-Federal sources. Although this resource is sometimes noted in the Federal budget, it is explicitly labelled as a "non-budget item". USC 31 1501 does not apply.
- The cost share will reduce the Federal participant's obligation to fund the project, which is its primary policy objective. The reduction will be reflected in the Federal participant's budget.

Background Line 2: Federal Activities in the Budget

***If an activity is determined to be Federal in nature, then, consistent with 31 U.S.C. 1501, Federal obligations are recorded in the budget at the full value of the activity*.**

- A WIFIA loan is obviously a Federal activity. The commitment for, and subsidy cost of, the loan will be recorded in the budget. The correct "value" of the activity is determined in accordance with detailed FCRA budgeting rules.
- A non-Federal cost share paid for with cash or non-WIFIA financing simply reduces Federal cost in the project. It is not a Federal activity.
- When the *same* non-Federal cost share is financed by a WIFIA loan, the incremental Federal activity (the loan obligation and its cost) is fully recorded by the program, as noted above.
- The Criteria appear to be suggesting that there is an issue here, but it is not clear what that is.

Background Line 3: Federal vs. Non-Federal

The question of whether or not to include a project or asset in the budget hinges on whether the project or asset in question is Federal or non-Federal in nature.

- The WIFIA loan is obviously a Federal *credit* asset.
- A non-Federal cost share paid for with cash or non-WIFIA financing is clearly a non-Federal asset, and its cost is excluded from the budget.
- When the *same* non-Federal cost share is financed by a WIFIA loan, a Federal credit asset is created, and its cost is recorded in the budget.
- The non-Federal nature of the cost share asset should be validated for both fundamental WIFIA statutory eligibility and FCRA loan treatment.

Background Line 4: Comprehensive Budget

When faced with a project or asset where this Federal designation is unclear, the 1967 Report recommends "a comprehensive budget, with very few exclusions" and states that "borderline agencies and transactions should be included in the budget unless there are exceptionally persuasive reasons for exclusion."

- In 1967 Report's *Coverage of the Budget*, the primary principle involves whether the resource allocation is Federal or non-Federal.
- The WIFIA loan program allocates credit subsidy resources. The *full-term* cost is recorded in the Federal cash budget when the loan is made.
- The program also allocates non-subsidized financing resources. This *temporary* allocation is recorded on an accrual basis to avoid distorting the Federal cash budget.
- The non-Federal borrower allocates non-Federal resources for loan repayment. This is a *permanent* allocation.

Background Line 5: Criteria vs. Questions

The 1967 Report notes the inherent difficulty in making a Federal or non-Federal determination in many cases and suggests a series of questions, which guide the criteria below, yet notes that "the answer to no one of these questions is conclusive" and decisions involve "a net weighing of as many relevant considerations as possible."

- A "Federal or non-Federal determination" does not appear to be an "inherent difficulty" is in this case. The WIFIA loan is Federal, the non-Federal cost share asset is not.
- The Congressional Directive explicitly required the development of *criteria*. The current Criteria's Background section does not provide criteria or clarify the issue.
- Questions can guide the development or application of criteria, but the current Criteria's sixteen questions are not criteria.

Background Line 6: FCRA Budgeting

The most significant statutory exception to the cash basis of the Federal budget is section 504 of FCRA, 2 U.S.C. 661c, which requires the budgetary treatment of direct loans and loan guarantees provided by the Government to a non-Federal borrower to be recorded using net present value.

- A full chapter in the 1967 Report, *Federal Credit Programs*, describes very clearly that separate accrual treatment is necessary for loans due to their "unique characteristic", *repayment.*

- Treating loan cash principal outflows and repayment inflows as expenditures and revenues would seriously distort the Federal cash budget. That is why FCRA was enacted in 1990.

- A WIFIA loan to a non-Federal cost share borrower will have a dedicated, highly creditworthy source of non-Federal repayment. This is exactly the situation described by the 1967 Report and for which FCRA requires accrual treatment.

Background Line 7: FCRA vs. Cash Basis

Regardless of the identity of the borrower, however, requiring that a Federal project or asset be recorded in the budget on a net present value basis would be inconsistent with 31 U.S.C. 1501, existing Government-wide guidance, and a cash budget.

- The non-Federal identity of the non-Federal cost share borrower *cannot* be disregarded. It is central to FCRA treatment for a WIFIA loan.
- It is *also* central to the non-Federal cost share's correct characterization. Non-Federal loan repayment *permanently funds* the cost share asset. The non-Federal borrower is paying for its non-Federal asset.
- The WIFIA loan only *temporarily finances* the cost share asset.
- The non-Federal cost share asset is not Federal, and its cost should not be recorded in the Federal budget. The WIFIA loan is a Federal credit asset that is properly recorded in accordance with both 31 USC 1501 and FCRA law. There is no inconsistency.

Background Line 8: Premise of Criteria Questions

Therefore, to "limit Federal participation in a project consistent with the requirements for the budgetary treatment provided for in section 504 of [FCRA] and based on the recommendations contained in the [1967 Report]," as required by Proviso 4 under the WIFIA Program heading in Public Law 116-94, only non-Federal projects are eligible for WIFIA loans and loan guarantees.

- Elsewhere in the Background, the phrase '*project or asset*" is used, suggesting that the Criteria were to be applied to *either* overall projects *or* cost shares in federally involved projects, depending on the specific WIFIA loan application.
- This conclusive sentence, however, refers only to "*projects*", directing eligibility to be determined solely for the overall project, not the non-Federal cost share asset.
- There is no valid or logical reason to exclude the words "*or assets*" in this sentence.

Conclusions

The Criteria's Background section fails to provide an adequate basis for the sixteen questions WIFIA loan applicants are required to answer:

- The exact FCRA budgeting issue for non-Federal cost shares in federally involved projects **is not clarified**.

- The most important and fundamental principles of the 1967 Report's chapter, *Coverage of the Budget*, **are ignored**. The Report's chapter, *Federal Credit Programs*, is inexplicably ignored completely.

- The Background's concluding sentence, the primary premise for the questions that follow, **inconsistently and illogically excludes "assets" from the determination of WIFIA eligibility**. Apparently, the exclusion was intended to force the eligibility of the "project" to be solely considered, with the unstated implication that that alone would determine the eligibility of non-Federal cost share asset. Neither the exclusion nor the implication is justified.

A Better Alternative

The FCRA issue for WIFIA loans to non-Federal cost shares in federally involved projects is not intrinsically complex or difficult to resolve:

- **Clarify the Directive**: The criteria are to "limit Federal [credit] participation in a [federally involved] project consistent with [FCRA law and *all of* the relevant principles in the 1967 Report]"
- **Focus on 1967 Report principles**: Loan repayment is the primary factor in FCRA treatment. Such repayment should be a non-Federal resource allocation decision.
- **Primary criteria**: The WIFIA loan must be to a non-Federal borrower with a non-Federal source of repayment.
- **Secondary criteria**: A non-Federal cost share in a federally involved project may be subject to federal sovereign power in ways that invalidate FCRA treatment. The WIFIA borrower must demonstrate that the loan is commensurate with its expected benefit from the cost share, and that its repayment allocation decisions were made independently from any Federal participant in the project.

Contact

John Ryan

InRecap

www.inrecap.com

jryan@inrecap.com

(917) 270-3784