

Outline for Legal Challenge to 2020 WIFIA FCRA Criteria Post-*Loper Bright*

1. Introduction: Overview of the Legal Context

- **Brief Background:** Provide a summary of the **WIFIA program** and the **2020 FCRA Criteria** issued by OMB.
 - **Loper Bright Overturning Chevron:** Note the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* (2024), which limited **Chevron deference** and emphasized that agencies must **justify their interpretations of ambiguous statutes** based on the law's **text, history, and purpose**.
 - **Significance of *Loper Bright*:** Explain how this ruling directly impacts **OMB's 2020 WIFIA Criteria**, which were based on an interpretation of the **Federal Credit Reform Act (FCRA)** that is now subject to independent judicial review.
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2. Statutory Interpretation of FCRA

- **Textual Ambiguity of FCRA:**
 - Assert that the **Federal Credit Reform Act (FCRA)** does not explicitly define "**federal asset**" or clarify the meaning of "**federal**" in relation to **WIFIA loans**.
 - Under *Loper Bright*, agencies can no longer **rely on ambiguous language** to justify interpretations that stray from the statute's plain meaning or legislative history.
 - **FCRA's Legislative Intent:**
 - Emphasize that FCRA's primary purpose is to ensure **accurate budgetary cost accounting** for federal credit programs, specifically ensuring **repayment comes from non-federal sources**.
 - Argue that FCRA does not prohibit **loan proceeds from supporting projects with some federal involvement**—as long as **repayment responsibility lies with non-federal entities**.
 - Point out that **Congress amended WIFIA in 2018** to authorize federally involved projects, including those associated with federal agencies like the Army Corps of Engineers, directly contradicting OMB's restrictions.
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3. Overreach of OMB's Interpretation

- **Overreaching Beyond Statutory Authority:**
 - **OMB's 2020 criteria** expand the scope of "federal asset" to include **projects with any federal authorization, ownership interest, or federal user base**.

- Argue that this **goes beyond what FCRA requires** — which only focuses on whether the **repayment comes from non-federal sources**.
 - **Contradiction with Legislative Intent:**
 - The 2018 amendments to WIFIA were intended to include federally authorized projects in **WIFIA's loan program**. OMB's criteria directly **conflict** with this intent, disqualifying eligible projects.
 - **Congress's intent** was clear: **FCRA treatment** should apply to projects that are **non-federally financed**, even if there's federal involvement in ownership or construction.
 - **Lack of Clear Statutory Basis:**
 - Under *Loper Bright*, the criteria's redefinition of "federal" is a **policy decision**, not a **reasonable statutory interpretation** of ambiguous law.
 - The 2020 criteria were issued **without formal rulemaking** and **lack legal basis** to override or reinterpret statutory law.
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4. Procedural Concerns and Lack of Transparency

- **Informal Guidance vs. Formal Rulemaking:**
 - Point out that the **2020 WIFIA FCRA Criteria** were issued as informal guidance, not through the **formal rulemaking process** required by the **Administrative Procedure Act (APA)**.
 - Highlight that this procedural shortcut deprives the public and stakeholders of **meaningful input** and **transparency** on a significant policy change.
 - **Lack of Public Notice and Comment:**
 - The failure to go through **notice and comment rulemaking** limits democratic accountability and **due process**.
 - **OMB's criteria** are subject to challenge for being an **undemocratic re-interpretation** of statutory law.
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5. Legal Precedents and Judicial Review

- **Chevron Is No Longer a Shield:**
 - In light of *Loper Bright*, the **Chevron deference** no longer applies, and **OMB's interpretation of FCRA** must stand on its own merits.
 - Assert that **OMB's interpretation** fails to meet the standards of **reasonableness** and **legality**, as it contradicts both the statutory text and legislative intent.
- **Judicial Review of Agency Interpretations:**
 - Courts must **independently review** whether OMB's 2020 criteria align with **FCRA's purpose** and **Congress's intent**.

- Argue that a reasonable interpretation of **FCRA** would not exclude **non-federal assets** simply based on a **historical or functional federal connection**.
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6. Impact of the Criteria and Remedy Sought

- **Harm to Stakeholders:**
 - Highlight the harm caused by the 2020 criteria to **state, local, and private sector infrastructure projects** that now find themselves ineligible for WIFIA loans despite having **non-federal sources of repayment**.
 - Stress that this not only **impedes project financing** but also contradicts the federal government's **public-private partnership** goals.
 - **Relief Sought:**
 - **Request a declaratory judgment** that the 2020 WIFIA FCRA Criteria are **invalid** under *Loper Bright* and **contrary to FCRA's statutory language and Congressional intent**.
 - **Seek an injunction** to prevent the criteria's further application and demand **OMB revise** its policy through proper **rulemaking**.
 - **Potential Legislative Clarification:**
 - As a contingency, request that the **court** or **Congress** clarify the language of FCRA to ensure that **federally involved projects** with **non-federal repayment sources** remain eligible for WIFIA financing.
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7. Conclusion

- Reaffirm that, under the **post-*Loper Bright* framework**, the **2020 WIFIA FCRA Criteria** do not hold up to **legal scrutiny**. They were an **overreach** of executive power and are **inconsistent** with the statute's text and Congressional intent.
 - Emphasize that the **2020 criteria violate fundamental principles of statutory interpretation and procedural due process**, and therefore should be **struck down**.
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This framework provides a comprehensive legal approach to challenging the **2020 WIFIA FCRA Criteria**. It focuses on the lack of **Chevron deference** post-*Loper Bright*, statutory misinterpretation, procedural flaws, and **harm caused** to key stakeholders.