Google Gemini on Draft Request for Legal Decision from GAO Re Possible EPA WIFIA and OMB ADA Violation

InRecap February 8, 2026

Part of InRecap 'discussion' with Gemini on 2/8/26 Gemini offered draft unprompted in course of 'discussion', response unedited

[DRAFT] REQUEST FOR LEGAL DECISION

TO: Comptroller General of the United States, U.S. Government Accountability Office (GAO)

FROM: [Committee Chair / Member of Congress]

SUBJECT: Potential Anti-deficiency Act Violation and Misuse of Mandatory Authority for Predictable Funding Losses in the WIFIA Program

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I. STATEMENT OF ISSUE

This request seeks a legal opinion on whether the **Environmental Protection Agency (EPA)** and the **Office of Management and Budget (OMB)** have violated the **Anti-deficiency Act (ADA)** (31 U.S.C. §§ 1341, 1517) by intentionally excluding predictable funding losses from initial loan commitment apportionments. Specifically, we ask if the systematic use of **Permanent Indefinite Authority (PIA)** under the **Federal Credit Reform Act (FCRA)** (2 U.S.C. § 661c) to fund "near-certain" losses resulting from WIFIA interest rate resets and flexible borrower drawdowns constitutes a "coercive deficiency" unauthorized by the FCRA's "re-estimate" provisions.

II. BACKGROUND

The WIFIA program has realized over **$2.1 billion** in mandatory funding losses—over ten times its discretionary appropriations. These losses largely stem from an asymmetric interest rate mismatch: borrowers lock in low rates at commitment but delay drawdowns until Treasury borrowing costs rise. While OMB Circular A-11, Section 185 requires agencies to model "expected deviations" and "other factors," it appears the EPA and OMB treat these predictable behaviors not as upfront costs, but as "unexpected" re-estimate events.

III. LEGAL ARGUMENTS

1. **Violation of the "All Costs" Requirement:** FCRA (2 U.S.C. § 661(a)(5)) defines cost as the "estimated long-term cost... on a net present value basis." If a loss is mathematically predictable at the point of commitment, it is an **inherent cost**, not a re-estimate event.
2. **Exceeding the "Authorized by Law" Exception:** The ADA prohibits obligations in excess of an appropriation "unless authorized by law." We argue that the FCRA's Permanent Indefinite Authority was intended solely for *unforeseen* technical or economic changes. Using it to subsidize "free" interest rate options—where loss is a "near-certainty"—exceeds the statutory authority of Section 504(f).
3. **Creation of a Coercive Deficiency:** By executing loan commitments with known structural deficits, the agencies create a **fait accompli** for the Treasury, forcing mandatory spending that avoids the discretionary caps established by Congress in annual appropriations.

IV. QUESTIONS FOR THE COMPTROLLER GENERAL

- Does the exclusion of predictable borrower behavior (e.g., "in-the-money" drawdowns) from the initial subsidy calculation violate the FCRA mandate to record "all costs"?
- If an agency obligates the government to a loan knowing the discretionary apportionment is insufficient to cover the *expected* cash flow deficit, does this constitute a violation of **31 U.S.C. § 1341**?
- Does OMB's role in approving underfunded subsidy models constitute an improper exercise of apportionment authority under **31 U.S.C. § 1517**?
