



# City of Austin

P.O. Box 1088, Austin, TX 78767-1088

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## Comments of the City of Austin

### Federal Emergency Management Agency Notice of Proposed Rulemaking

#### Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program

#### Docket ID FEMA-2020-00038

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The City of Austin appreciates the opportunity to submit comments in opposition to this proposed rule. In addition to these comments, the City in general endorses the comments submitted by the International Association of Emergency Managers<sup>1</sup>, the American Public Power Association<sup>2</sup>, and the National Low-Income Housing Coalition<sup>3</sup>.

The City understands and appreciates the overall public policy goals that FEMA hopes to meet via this proposed rule. Reducing the number of disasters to which FEMA must respond in order to better target FEMA's financial and organizational capacity and incentivize state and local governments to increase their ability to mitigate against, respond to, and recover from disasters are worthy public policy goals. However, the City believes that FEMA can better achieve those goals using a more incremental approach that recognizes the on-the-ground budget and capacity realities that state and local governments are currently facing.

The City opposes this rule for several reasons.

- **It proposes a sudden and drastic upward revision of the cost of assistance threshold.** At the most basic level, FEMA is proposing to adjust the cost of assistance threshold to immediately reflect over a decade of inflation (further adjusted to reflect another two decades of inflation.) Such a sudden and drastic upward revision would be bad public policy at any time but is especially ill-advised when the COVID-19 pandemic and its social and economic impact have strained state and local government budgets and capacity.

The City is thankful that Congress has enacted successive emergency relief bills providing assistance to state and local governments. This assistance has been critically important. However, these funds have been targeted and the additional resources provided by the federal government, while welcome and appreciated, fall short of

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<sup>1</sup> <https://www.regulations.gov/comment/FEMA-2020-0038-0024>

<sup>2</sup> <https://www.regulations.gov/comment/FEMA-2020-0038-0038>

<sup>3</sup> <https://www.regulations.gov/comment/FEMA-2020-0038-0044>

mitigating the strain that the pandemic has placed on state and local budgets, especially as we look ahead to potentially drastic declines in property tax revenue.

FEMA makes clear that a major driver of this proposed rule is to shift responsibility for disaster recovery to state and local governments and to encourage greater state and local investment in pre-disaster mitigation and resiliency. The City agrees that those are worthy public policy goals. In fact, the City has worked in partnership with several federal agencies, including FEMA, on such investments<sup>4</sup>.

However, FEMA is proposing a significant change not only at a precarious time for state and local budgets, but also when federal tax policy is specifically designed to encourage state and local governments to decrease taxes, via the \$10,000 cap on the deduction for state and local taxes, and to decrease local flexibility to issue bonds for infrastructure investment, via the elimination of tax exempt advanced refunding for municipal bonds.

As the American Public Power Association points out in their comments:

*“FEMA’s stated purposes for the NOPR is to shift the responsibility of responding to smaller disasters to states and local governments.<sup>4</sup> FEMA justifies this move in part by arguing that states and localities have untapped resources in the form of untaxed taxable resources that could be used to offset the cost of such a response. In a vacuum, such an argument could be compelling. However, in recent years, the federal government has taken several steps to make tapping those resources more difficult. Specifically, in the Tax Cuts and Jobs Act of 2017 (TCJA), Congress capped the deduction for state and local taxes to raise roughly \$80 billion a year in federal revenue. Proponents said that the change was intended to pressure state and local governments to reduce taxes.*

*FEMA now proposes that states –including those hardest hit by this policy change –should do more to shoulder the costs of disaster response based upon an estimation of the taxes that they theoretically could raise. However, FEMA fails to account for the fact that any state and local tax increases will be subject to federal tax. Likewise, the TCJA raised an estimated \$17 billion in federal tax revenues by preventing states and localities from better handling their finances by issuing tax-exempt advance refunding municipal bonds. While we understand that FEMA has no authority over tax policy, the ability to respond to FEMA’s policy is directly and substantively affected by tax policy and so we must raise it here. If FEMA moves forward with its proposal to have states and localities shoulder more of the burden for disasters, it should, at a minimum, amend the proposal to reflect the fact that the value of TTR is reduced by the federal taxes imposed on state and local taxes on that TTR.”*

- **It unfairly impacts just a handful of high population states.**

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<sup>4</sup> The City especially appreciates FEMA’s partnership on the Onion Creek Flood Control and Environmental Restoration Project, a non-structural flood damage reduction project that relocated hundreds of frequent flood event households and restored the riparian areas of the flood plain, and created hundreds of acres of parkland in a low- and moderate-income community.

As outlined in the American Public Power Association's comments<sup>5</sup>, FEMA's regulatory impact analysis found that just three states – California, New York, and Texas – would have accounted for \$965 million or nearly half of the \$2 billion in Public Assistance requests submitted between 2008 and 2017 that would have not have cleared the minimum cost of assistance threshold that the proposed rule would institute.

The City is especially concerned with disparity in light of FEMA's decision in this proposed rule to not give greater consideration to local impacts and the impacts of multiple disasters when calculating emergency and disaster declaration decisions.

- **It gives great weight to the section 1239 congressional directive while disregarding the Section 1232 congressional directive.**

The City is disappointed that FEMA chose not to update its emergency and disaster declaration criteria to better reflect local impacts and the impacts of multiple disasters when making declaration decisions, especially since Congress directed FEMA to do so in Section 1232 of the Disaster Recovery and Reform Act of 2018 (PL 115-254). The City disagrees with FEMA's assessment that existing factors are sufficiently flexible to address the directive of Section 1232. In fact, as FEMA states in the proposed rule, the record indicates that while FEMA may consider these factors, the decision to approve a major disaster declaration request largely rests on the cost of assistance factor:

*“Although FEMA considers every request for a Presidential major disaster declaration in light of each applicable regulatory factor, the probability of an incident having exceeded the state COA indicator in disaster damage between 2005 and 2014 was over 80 percent (494 of 589 declared major disasters). In other words, whether damage assessments find an amount that meets or exceed the state COA indicator is highly correlated to whether that state will ultimately receive supplemental federal assistance for that incident.”*

Given that strong correlation, the City believes that FEMA should refrain from any upward adjustment of the cost of assistance factor, never mind the drastic and sudden change outlined in this proposed rule ***without also updating the regulations regarding local impacts and the impacts of multiple disasters.***

The City would add that the directive in Section 1232 is strongly worded, particularly in its repeated use of the word 'shall'. For readers not familiar with the specific wording of section 1232, it reads as follows (emphasis added):

**SEC. 1232. LOCAL IMPACT.**

*(a) In General.--In making recommendations to the President regarding a major disaster declaration, the Administrator of the Federal Emergency Management Agency **shall** give greater consideration to severe local impact or recent multiple disasters. Further, the Administrator **shall** make corresponding adjustments to the Agency's policies and regulations regarding such consideration. Not later than 1 year after the date of enactment of this section, the Administrator **shall** report to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Homeland Security and Governmental*

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<sup>5</sup> <https://www.regulations.gov/comment/FEMA-2020-0038-0038>

*Affairs of the Senate on the changes made to regulations and policies and the number of declarations that have been declared based on the new criteria.*

The City concludes that Congress wanted FEMA to take fairly substantial action in this area, certainly more substantial than simply concluding that its current policies in this area are “sufficiently flexible to address the directive of Section 1232.”

The lack of action on Section 1232 is all the more disappointing as FEMA largely bases this proposed rule on congressional intent outlined in Section 1239 the Disaster Recovery and Reform Act of 2018. The City echoes other commenters in pointing out that congressional directives to FEMA in Section 1239 regarding cost of assistance are very similar to those in Section 1232, raising the question of why FEMA is taking such drastic and sudden action on cost of assistance while maintaining the status quo on local impact and multiple disasters.

In closing, the City believes FEMA can better achieve the goals of this proposed rule using a more incremental approach that recognizes the on-the-ground budget and capacity realities that state and local governments are themselves facing. In addition, we would like to express our appreciation for FEMA’s partnership and assistance. The City values our partnership with FEMA and thanks FEMA for its assistance with the multitude of disasters that have hit central Texas in recent years. FEMA has been critical to the City and its residents as we recovered from these disasters and as we strive to build a more resilient and disaster ready Austin.