

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 236

[Docket No. FR-4689-P-01]

RIN 2502-AH68

**Retention of Section 236 Excess
Income**

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish the terms and procedures for owners of projects receiving section 236 rental assistance to participate in retaining some or all of their excess rental charges (Excess Income) for project use; to retain Excess Income charges for non-project use after a determination by HUD that the project is well-maintained housing in good condition and that the owner has not engaged in material adverse financial or managerial actions or omissions; and to request a return of Excess Income remitted to HUD.

DATES: *Comments Due Date:* October 11, 2002.

ADDRESSES: Address all comments concerning this proposed rule to the Rules Docket Clerk, Office of the General Counsel, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Comments should refer to the docket number and title listed above. A copy of each comment submitted will be available for public inspection and copying weekdays between 7:30 a.m. and 5:30 p.m. at the above address. Comments submitted by facsimile (FAX) will not be accepted.

FOR FURTHER INFORMATION CONTACT: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Room 6134, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708-3000 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Section 532(b) of the Departments of Veterans Affairs, Housing and Urban Development, Independent Agencies Appropriations Act, 2000 (Pub. L. 106-74, 113 Stat. 1047, approved October 20,

1999) (FY 2000 Appropriations Act) amended section 236(g) of the National Housing Act (12 U.S.C. 1715z-1(g)) to permit owners (mortgagors) of projects receiving Section 236 rental assistance to participate in retaining some or all of their excess charges, referred to as "Excess Income" in this rule, for project use if authorized by HUD. Permitting project owners to retain Excess Income is an exception to the general requirement of section 236(g) that project owners pay to HUD all rental charges, collected on a unit-by-unit basis, that are in excess of the basic rental charges. Under the new statutory authority, Excess Income that mortgagors are permitted to retain is to be used for the project upon terms and conditions established by HUD. This rule establishes those terms and conditions.

Section 532(b) of the FY 2000 Appropriations Act also permits owners to retain Excess Income for non-project use after a determination by HUD that the project is well-maintained housing in good condition, and that the owner has not engaged in material adverse financial or managerial actions or omissions as described in section 516 of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

This proposed rule would implement the section 236(g) authority to retain Excess Income by adding 24 CFR 236.60, formerly contained in the April 1, 1995 edition of 24 CFR, the provisions of which were saved pursuant to 24 CFR 236.1(c) of the current CFR. As added by this rule, § 236.60 would include the general rule requiring the return to HUD of Excess Income, but would also add new provisions to govern the process for a Section 236 mortgagor to apply for, and HUD to approve, the authority to retain Excess Income. HUD will not withhold approval of a mortgagor's request to retain Excess Income because of the existence of unpaid Excess Income charges, if the unpaid income is being repaid over a period of time in accordance with a Workout or Repayment Agreement with HUD. However, HUD will withhold approval if the mortgagor is in violation of such an Agreement.

Once approved to retain Excess Income, a mortgagor must continue to prepare and submit to HUD a revised Form HUD-93104, Monthly Report of Excess Income. If approved to retain Excess Income for project use, a mortgagor must also submit an annual narrative description of the amount and the uses made of Excess Income during the prior fiscal year of the project. Finally, this rule includes the procedure

for withdrawing the authority to withhold income from a mortgagor.

This rule would also establish the procedures for mortgagors to request a return of Excess Income that has already been remitted to HUD. The Departments of Veterans Affairs, Housing and Urban Development, Independent Agencies Appropriations Act, 1999, (Pub. L. 105-276, 112 Stat. 2461, approved October 21, 1998) (FY 1999 Appropriations Act), at section 227, permitted project owners to retain Excess Income upon terms and conditions established by HUD. Section 532(e) of the FY 2000 Appropriations Act allowed HUD to return any Excess Income remitted to HUD since October 21, 1998, the date of enactment of the FY 1999 Appropriations Act. Finally, section 861(b) of the American Homeownership and Economic Opportunity Act of 2000 (Pub. L. 106-569, 114 Stat. 2944, approved December 27, 2000) authorized HUD to return Excess Income remitted to HUD since the date of enactment of the FY 2000 Appropriations Act.

This rule proposes to permit mortgagors to request a return of Excess Income for project use or non-project use in accordance with the same procedures and conditions that apply to a request to retain Excess Income. For example, a request to return Excess Income for project use must include a description of how the funds will be used, and mortgagors may request a return of remitted Excess Income for non-project use only if the project has been well-maintained housing in good condition during the period from which a return is requested, and if the mortgagor has not engaged in material adverse financial or managerial actions or omissions.

A mortgagor may request a return of Excess Income that has been remitted to HUD since October 21, 1998, except for unpaid income that was repaid in accordance with a Workout or Repayment Agreement with HUD, or Excess Income generated between October 1, 2000, and October 27, 2000, by projects with State agency non-insured Section 236-assisted mortgages or HUD-held Section 236 mortgages. This rule further provides that a mortgagor may not request a return of any income after the date that is one year from the publication date of the final rule. HUD has set this time limit for requesting income returns to give mortgagors a period to plan for the retention and use of Excess Income on a current basis, which is more efficient than a procedure that would require constant reexaminations.

II. Findings and Certifications

Paperwork Reduction Act

The proposed new information collection requirements contained in §§ 236.60(c)(3), (d)(3), and (g), have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44

U.S.C. 3501–3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

The public reporting burden for this new collection of information is

estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in the following table.

Information collection	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total hours
§ 236.60(c)(3)	1,750	1	1,750	.25	438
§ 236.60(d)(3)	750	1	750	.25	188
§ 236.60(g)	1,750	1	1,750	.25	438
Total hours					1,064

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by October 11, 2002. Comments must refer to the proposal by name and docket number (FR-4689-P-01) and must be sent to:

Joseph F. Lackey, Jr., HUD Desk Officer,
Office of Management and Budget,
New Executive Office Building,
Washington, DC 20503.

and
Rules Docket Clerk, Office of the
General Counsel, Room 10276, U.S.
Department of Housing and Urban
Development, 451 Seventh Street,
SW., Washington, DC 20410.

Regulatory Planning and Review

The Office of Management and Budget has reviewed this proposed rule under Executive Order 12866 (captioned “Regulatory Planning and Review”) and determined that this rule is a

“significant regulatory action” as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection during regular business hours (7:30 a.m. to 5:30 p.m.) at the Office of the General Counsel, Rules Docket Clerk, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule will not impose any Federal mandates on any State, local, or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The FONSI is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this proposed rule and in so doing certifies

that the rule would not have a significant economic impact on a substantial number of small entities. The rule only establishes the requirements for mortgagors of section 236 projects to retain and use Excess Income.

Notwithstanding HUD’s determination that this rule would not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD’s objectives as described in this preamble.

Federalism Impact

This rule does not have Federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of Executive Order 13132.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Number for section 236 assistance is 14.103.

List of Subjects in 24 CFR Part 236

Grant programs—housing and community development, Low and moderate income housing, Mortgage insurance, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR part 236 as follows:

PART 236—MORTGAGE INSURANCE AND INTEREST REDUCTION

1. The authority citation for 24 CFR part 236 continues to read as follows:

Authority: 12 U.S.C. 1715b and 1715z–1; 42 U.S.C. 3535(d).

2. Section 236.60 is added to read as follows:

§ 236.60 Excess Income.

(a) *Definition.* Excess Income consists of cash collected as rent from the residents by the mortgagor, on a unit-by-unit basis, that is in excess of either the HUD-approved unassisted Basic Rent or the New Authorized Rent under the Section 8 mark-to-market program under 24 CFR part 401. The unit-by-unit requirement necessitates that, if a unit has Excess Income, it must be returned to HUD. It is not permissible to do an aggregate calculation of the Excess Income for all occupied rent-paying units, and then to offset or subtract from that figure any unpaid rent from occupied or vacant units, before remitting Excess Income to HUD.

(b) *General requirement to return Excess Income.* Except as otherwise provided in this section, or as agreed to by HUD pursuant to a plan of action approved under part 248 of this chapter or in connection with an adjustment of contract rents under section 8 of the 1937 Act, the mortgagor shall agree to pay monthly to HUD the total of all Excess Income in accordance with procedures prescribed by HUD.

(c) *Retention of Excess Income for project use—(1) Eligible mortgagors.* Any mortgagor of a project receiving Section 236 interest reduction payments may apply to retain Excess Income for project use unless the mortgagor owes prior Excess Income and is not current in payments under a HUD-approved Workout or Repayment Agreement.

(2) *Eligible uses.* Excess Income retained by a mortgagor for project use may be used for any necessary and reasonable operating expense of the project. Examples are:

- (i) Project operating shortfalls, including repair costs;
- (ii) Repair costs identified in the Comprehensive Needs Assessment, including increasing deposits to the Reserve Fund for Replacements to a limit necessary to adequately fund the reserve;
- (iii) Service coordinators;
- (iv) Neighborhood networks located at the project for project residents; and
- (v) Enhanced supportive services for the residents.

(3) *Request for approval to retain Excess Income.* A mortgagor must submit a written request to retain Excess Income for project use to the local HUD Field Office. The request must describe:

- (i) The amount or percentage of Excess Income requested;
- (ii) The period from which Excess Income is being requested; and
- (iii) The proposed use of the requested Excess Income.

(d) *Retention of Excess Income for non-project use—(1) Eligible*

mortgagors. Any mortgagor of a project receiving Section 236 interest reduction payments may apply to retain Excess Income for non-project use unless the mortgagor owes prior Excess Income and is not current in payments under a HUD-approved Workout or Repayment Agreement or the mortgagor falls within any of the following categories:

- (i) The mortgagor's Reserve for Replacement is not funded;
- (ii) The mortgagor's project is not well maintained housing in good condition, as evidenced by:

(A) Failure to maintain the project in decent, safe, and sanitary condition and in good repair in accordance with HUD's Uniform Physical Condition Standards and Inspection Requirements in subpart G of 24 CFR part 5;

(B) A score below 60 on the physical inspection conducted by HUD's Real Estate Assessment Center (REAC);

(C) The existence of Exigent Health and Safety (EHS) deficiencies identified by REAC; or

(D) A Comprehensive Needs Assessment that finds there are significant current repair or maintenance needs;

(iii) The mortgagor has engaged in any one of the following material adverse financial or managerial actions or omissions:

(A) Materially violating any Federal, State, or local law or regulation with regard to the project or any other federally assisted project, including any applicable civil rights law or regulation, after receipt of notice and an opportunity to cure;

(B) Materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), after receipt of notice and an opportunity to cure;

(C) Materially violating any applicable regulatory or other agreement with HUD or a participating administrative entity, after receipt of notice and an opportunity to cure;

(D) Repeatedly and materially violating any Federal, State, or local law or regulation, including any applicable civil rights law or regulation, with regard to the project or any other federally assisted project;

(E) Repeatedly and materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937;

(F) Repeatedly and materially violating any applicable regulatory or other agreement with HUD or a participating administrative entity, including failure to submit audited financial statements or required tenant data;

(G) Repeatedly failing to make mortgage payments at times when project income was sufficient to maintain and operate the project;

(H) Materially failing to maintain the project in decent, safe, and sanitary condition and in good repair after receipt of notice and a reasonable opportunity to cure; or

(I) Committing any actions or omissions that would warrant suspension or debarment by HUD.

(2) *Eligible uses.* Excess Income retained by a mortgagor for non-project use may be used for any purpose, except that the non-project use of Excess Income by a nonprofit entity mortgagor is limited to activities that carry out the entity's nonprofit purpose.

(3) *Request for approval to retain Excess Income.* A mortgagor must submit a written request to retain Excess Income for non-project use to the local HUD Field Office. The request must describe:

(i) The amount or percentage of Excess Income requested; and

(ii) The period from which Excess Income is being requested.

(e) *Timing of request to retain Excess Income.* A mortgagor must submit a request to retain Excess Income at least 90 days before the beginning of each fiscal year, or 90 days before any other time during a fiscal year that the mortgagor plans to begin retaining Excess Income for that fiscal year.

(f) *HUD review and response procedure.* HUD will review the mortgagor's request to retain income and issue a letter of approval or denial as follows:

(1) *Approval letter.* The approval letter from HUD permitting the mortgagor to retain Excess Income must, at a minimum, assert:

(i) Retention rights are for the time specified in the approval letter, but cannot extend beyond the current fiscal year;

(ii) Failure of the mortgagor to maintain the Reserve for Replacement account in a fully funded amount at all times is grounds for HUD to rescind the approval;

(iii) Failure of the mortgagor to maintain the project in decent, safe, and sanitary condition and in good repair at all times is grounds for HUD to rescind the approval;

(iv) If the Excess Income requested for project use is not used for the proposed purpose described in the mortgagor's request, the income must be returned to HUD, unless the mortgagor has obtained prior HUD approval for the alternate use; and

(v) The failure of a mortgagor to return retained Excess Income to HUD for not

complying with applicable requirements is a violation of the Regulatory Agreement for which there are enforcement remedies that HUD may take.

(2) *Denial letter.* A letter from HUD denying a mortgagor's request to retain Excess Income must cite the specific reasons for denial and state what requirements the mortgagor must meet to receive HUD's approval to retain Excess Income.

(3) *Environmental review.* Before approving a request to retain Excess Income for project use, HUD will perform an environmental review to the extent required under 24 CFR part 50 for activities that are not excluded under 24 CFR 50.19(b).

(g) *Post-approval requirements—(1) Monthly report.* Mortgagors approved to retain Excess Income must continue to prepare and submit to HUD a revised Form HUD-93104, Monthly Report of Excess Income, or successor form.

(2) *Other reporting requirements.* Mortgagors who retain Excess Income for project use must provide HUD, on an annual basis, two copies of a narrative description of the amount and the uses made of Excess Income during the prior fiscal year of the project. HUD may request additional follow-up information on a case-by-case basis. The report must contain the following certification:

I certify that (1) the amount of Excess Income retained and used was for the purposes approved by HUD; (2) all eligibility requirements for retaining Excess Income were satisfied for the entire reporting period; and (3) all the facts and data on which this report is based are true and accurate. Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties (18 U.S.C. 1001, 1010, 1012; and 31 U.S.C. 3729 and 3802).

(h) *Return of remitted Excess Income—(1) For project use.* A mortgagor that is eligible to retain Excess Income for project use under paragraph (c)(1) of this section may apply for the return of Excess Income remitted to HUD since October 21, 1998 (except for unpaid income that was

repaid in accordance with a Workout or Repayment Agreement with HUD, or Excess Income generated between October 1, 2000, and October 27, 2000, by projects with State agency non-insured Section 236-assisted mortgages or HUD-held Section 236 mortgages) in accordance with procedure in paragraph (c)(3) of this section.

(2) *For non-project use.* A mortgagor that is eligible to retain Excess Income for non-project use under paragraph (d)(1) of this section may apply for the return of Excess Income remitted to HUD since October 21, 1998 (except for unpaid income that was repaid in accordance with a Workout or Repayment Agreement with HUD, or Excess Income generated between October 1, 2000, and October 27, 2000, by projects with State agency non-insured Section 236-assisted mortgages or HUD-held Section 236 mortgages) in accordance with procedure in paragraph (d)(3) of this section.

(3) *Reporting requirement.* A mortgagor that receives returned Excess Income requested for project use is subject to the reporting requirements of paragraph (g)(2) of this section with respect to the returned Excess Income.

(4) *Time limit.* After [Insert date that is one year after the date of publication of the final rule], a mortgagor may no longer apply for the return of any Excess Income remitted to HUD.

(i) *HUD withdrawal of approval to retain Excess Income—(1) Bases for withdrawal of approval.* HUD may withdraw approval for any of the following reasons:

(i) If, at any time after approval, a mortgagor fails to meet the eligibility requirements of paragraph (c)(1) or (d)(1) of this section, as applicable;

(ii) If the mortgagor does not use the Excess Income requested for project use for purposes and activities as approved by HUD; or

(iii) Where the mortgagor has been approved to retain Excess Income for non-project use, if at any time during the fiscal year that such approval is in effect, the mortgagor fails to maintain the project in decent, safe, and sanitary

condition and in good repair, or maintain the Reserve for Replacement account in a fully funded amount.

(2) *Notification of withdrawal of approval.* HUD will notify the mortgagor by certified mail that the authorization to retain Excess Income is withdrawn. The notification will state:

(i) Specific reasons for HUD's withdrawal of approval;

(ii) The effective termination date, which may be the date of the violation resulting in the withdrawal or the date of HUD's determination that the mortgagor was out of compliance;

(iii) The amount of retained Excess Income improperly retained that must be returned to HUD; and

(iv) The actions that the mortgagor must take to restore the authorization to retain Excess Income.

(3) *Mortgagor's request for reconsideration—(i) Letter of reconsideration.* A mortgagor may request that HUD reconsider its decision by submitting, to the Hub/Field Office Director or other party identified by HUD in the notification, within 30 days of receipt of the notification of withdrawal, a letter stating the basis for reconsideration. The letter must include documentation supporting a review of the denial.

(ii) *HUD response.* Within 30 days of HUD's receipt of the mortgagor's request for reconsideration, HUD will make a final determination and respond in writing to the mortgagor. HUD's response may:

(A) Affirm the withdrawal of authority to retain Excess Income;

(B) Reverse the withdrawal of authority to retain Excess Income; or

(C) Request additional information from the mortgagor before affirming or reversing the withdrawal of authority to retain Excess Income.

Dated: July 8, 2002.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

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