

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****24 CFR Part 236**

[Docket No. FR-4689-F-02]

RIN 2502-AH68

**Retention of Excess Income in the Section 236 Program****AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.**ACTION:** Final rule.

**SUMMARY:** This final rule amends HUD's regulations governing the Section 236 program of the Federal Housing Administration (FHA) to establish the terms and procedures by which owners of multifamily housing projects that receive Section 236 rental assistance may retain some or all of their excess rental income. This final rule follows publication of an August 12, 2002, proposed rule, takes into consideration the public comments received in response to the proposed rule, and makes certain changes in response to the public comments.

**DATES:** *Effective Date:* October 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Room 6134, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-8000, telephone (202) 708-3000 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:****I. Background**

The FHA Section 236 program, authorized by Section 236 of the National Housing Act (NHA) (12 U.S.C. 1715z-1), was established to facilitate the construction and substantial rehabilitation of affordable multifamily rental housing (referred to as projects in the Section 236 program) for lower-income households. Under the Section 236 program, HUD provides a long-term interest subsidy (known as interest reduction payments) and mortgage insurance to project owners to reduce the interest rate on the owner's mortgage to help the owner maintain the rental affordability of the project. Within the last few years, several appropriations acts amended Section 236 of the NHA with respect to excess rental income received by owners of Section 236 projects (mortgagors).

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (Pub. L. 105-276, approved October 21, 1998) (FY1999 Appropriations Act) amended Section 236(g) of the NHA (12 U.S.C. 1715z-1(g)) to permit the Secretary to authorize mortgagors to retain excess rental income (Excess Income) upon terms and conditions established by HUD. (See section 227 of Title II of the FY1999 Appropriations Act.) Permitting mortgagors to retain Excess Income is an exception to the general requirement of section 236(g) of the NHA that project owners must pay to HUD all rental charges collected on a unit-by-unit basis that are in excess of the basic rental charges.

The Departments of Veterans Affairs, Housing and Urban Development, Independent Agencies Appropriations Act, 2000 (Pub. L. 106-74, approved October 20, 1999) (FY2000 Appropriations Act) also amended section 236(g) of the NHA to further address the conditions under which mortgagors are eligible to retain Excess Income. (See section 532 of Title V of the FY2000 Appropriations Act.) Section 236(g) of the NHA, as amended by the FY2000 Appropriations Act, allows mortgagors to retain Excess Income, if so authorized by the Secretary and if the income is used for the project upon terms and conditions established by HUD. The FY2000 Appropriations Act also authorizes the Secretary to permit mortgagors to retain Excess Income for non-project use after a determination by HUD that the project is well-maintained and in good condition and that the mortgagor 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 (42 U.S.C. 1437f note).

Section 532 of the FY2000 Appropriations Act also authorized HUD, for FY2000, to return any Excess Income remitted to HUD by mortgagors since October 21, 1998, the date of enactment of the FY1999 Appropriations Act.

Section 861(b) of the American Homeownership and Economic Opportunity Act of 2000 (Pub. L. 106-569, approved December 27, 2000) also did not amend section 236(g) of the NHA, but nevertheless provided permanent authority for HUD to return Excess Income remitted to HUD by mortgagors since October 20, 1999, the date of enactment of the FY2000 Appropriations Act.

**II. August 12, 2002, Proposed Rule**

On August 12, 2002, HUD published a proposed rule (67 FR 52526) to establish the terms and procedures by which Section 236 mortgagors would be eligible to retain some or all of their Excess Income for project or non-project use, as well as the procedures for requesting a return of Excess Income remitted to HUD. HUD received three public comments in response to the August 12, 2002, proposed rule. The commenters consisted of an individual and two associations. In response to the public comments, this final rule makes certain changes to the August 12, 2002, proposed rule as described in Section III of this preamble.

**III. Changes to the Proposed Rule in This Final Rule**

The following changes to the August 12, 2002, proposed rule are made by this final rule. Section IV of this preamble discusses the public comments that prompted these changes.

1. The inclusion of "New Authorized Rent under the Section 8 mark-to-market program" in § 236.60(a) of the proposed rule has been removed in the final rule. The reference to New Authorized Rent is not necessary because there is no Excess Income generated with units receiving Section 8 assistance.

2. The term "fully" is added to § 236.60(d)(1)(i), which now reads: "The mortgagor's Reserve for Replacement is not fully funded."

3. The term "uncorrected" is added to § 236.60(d)(1)(ii)(C), which now reads: "The existence of uncorrected Exigent Health and Safety (EHS) deficiencies identified by REAC."

4. The term "current" is removed from and the phrase "and those repair or maintenance needs are still outstanding" is added to § 236.60(d)(1)(ii)(D), which now reads: "A Comprehensive Needs Assessment that finds there are significant repair or maintenance needs, and those repair or maintenance needs are still outstanding."

5. Section 236.60(e) is revised to remove the requirement that mortgagors request permission annually to retain Excess Income for a specific ongoing purpose where the purpose extends beyond the current fiscal year.

6. A sentence is added to § 236.60(g)(2) to clarify that the time period covered by the narrative description that must be submitted annually is the prior fiscal year of the project, and not the calendar year or HUD's fiscal year.

#### IV. Discussion of Public Comments Submitted on the Proposed Rule

This section of the preamble presents a discussion of major issues and questions raised by the three commenters. The issues are organized according to the section of the rule for which an issue was raised by a commenter or commenters. HUD's response follows the presentation of the commenter's issue or question.

##### *Section 236.60(c), (e), and (g)—Requests To Retain Excess Income; Monthly Report; and Narrative Description*

*Comment:* A mortgagor should not have to request annual HUD approval under § 236.60(e) of the rule to retain Excess Income for project use if the mortgagor complies with all reporting requirements of § 236.60(g)(1) and (2). The annual request is a waste of resources, and a late request would jeopardize the use of Excess Income for supportive services or capital improvements. Section 236.60(c)(3)(ii), which requires that the mortgagor's request to retain Excess Income identify the period from which Excess Income is being requested, and § 236.60(e), which requires that the mortgagor's request be submitted each fiscal year, should be eliminated. If these sections are not eliminated, HUD should offer an option that allows the mortgagor to request retention of Excess Income one time (as opposed to annually) for continuing project use of Excess Income.

*HUD Response:* A mortgagor that requests to retain Excess Income for project use must describe the proposed use of Excess Income, the period from which the Excess Income is being retained, and the amount or percentage of Excess Income that is requested. HUD agrees that in some circumstances, the submission of a request to retain Excess Income on an annual basis should not be necessary. Accordingly, § 236.60(e) is revised in this final rule to provide that a mortgagor requesting approval to retain Excess Income for a specific ongoing purpose where the purpose extends beyond the current fiscal year may (1) submit a request stating the proposed use of Excess Income, and (2) advise that the intended use will extend beyond the current fiscal year. If HUD approves the mortgagor's request, the mortgagor will not be required to submit a new request each fiscal year provided the use of Excess Income remains the same. The mortgagor will still be required to submit the monthly report of Excess Income and the end of year narrative. In the event that the use of Excess Income changes, the mortgagor must notify HUD of the change and

submit a new request to retain Excess Income at least 90 days prior to the date the mortgagor intends to begin retaining Excess Income for the new purpose.

##### *Section 236.60(d)—Retention for Non-Project Use*

*Comment:* Section 236.60(d) allows retention of Excess Income for non-project use. Funds collected from residents living in the project should be used only for project use, and the rule should not allow these funds to be diverted to the mortgagor for other non-related expenditures.

*HUD Response:* Retention of Excess Income for non-project use is permitted by statute and approved by HUD only for those mortgagors that meet specific requirements as outlined in § 236.60(d).

##### *Section 236.60(d)(1)(i)—Reserve for Replacement*

*Comment:* The proposed rule provides that Excess Income cannot be retained for non-project use, if the mortgagor's Reserve for Replacement is not funded. The rule should be revised to provide that Excess Income cannot be retained for non-project use, if the mortgagor's reserve for replacement is not "fully funded." Since retention of Excess Income is not an entitlement, it is important that there be an affirmative demonstration that the future needs of the project are being fully addressed before additional public funds are disbursed to a mortgagor for non-project purposes.

*HUD Response:* HUD agrees with the comment, and § 236.60(d)(1)(i) is revised in the final rule to read "The mortgagor's Reserve for Replacement is not fully funded." (Reserve for Replacement is a defined term in the Section 236 program regulations.)

##### *Section 236.60(d)(1)(ii)(B)—Real Estate Assessment Center (REAC) Score*

*Comment:* Section 236.60(d)(1)(ii)(B) provides that a REAC physical inspection score of below 60 is a basis for determining that a project is not "well-maintained housing in good condition" and not eligible for retention of Excess Income for non-project use. This regulatory section sets a housing condition standard that is too low. Setting the standard so low presents risks that public funds will be allowed for non-project use when the project may have significant physical needs. HUD should raise this threshold to a higher level, such as 80 points, or set the threshold at a certain portion of the project inventory above the minimally acceptable score of 60, such as the upper two-thirds of projects with scores above 60.

*HUD Response:* The REAC score of 60 is consistent with other HUD programs that require a minimum REAC physical inspection score of 60 in order to participate in a particular HUD program.

##### *Section 236.60(d)(1)(ii)(C)—Exigent Health and Safety Deficiencies*

*Comment:* The requirement that a project must not receive any exigent health and safety (EHS) deficiencies in order for a mortgagor to be eligible for retention of Excess Income is too stringent. Only those EHS deficiencies that cannot be easily remedied should prevent a mortgagor from being permitted to retain Excess Income.

*HUD Response:* HUD agrees that deficiencies that are corrected should not prevent a mortgagor from being eligible to retain Excess Income, and § 236.60(d)(1)(ii)(C) is changed to read: "The existence of uncorrected Exigent Health and Safety (EHS) deficiencies identified by REAC."

##### *Section 236.60(d)(1)(ii)(D)—Comprehensive Needs Assessment*

*Comment:* Not all projects have had a "Comprehensive Needs Assessment" and many assessments are several years old and out of date. HUD could require up-to-date assessments on all projects for which a mortgagor requests to retain Excess Income, or for projects with REAC scores of less than 80. HUD could also provide that funding of these assessments are an eligible use of Excess Income for non-project use.

*HUD Response:* HUD notes that proposed § 236.60(d)(1)(ii)(D) refers to "current repair or maintenance needs" and was intended to cover repair or maintenance needs that are still outstanding regardless of the age of the Comprehensive Needs Assessment." To make this intent clear, § 236.60(d)(1)(ii)(D) is changed in this final rule to read: "A Comprehensive Needs Assessment that finds there are significant repair or maintenance needs, and those repair or maintenance needs are still outstanding."

##### *Section 236.60(g)(1) and (2)—Post-Approval Requirements*

*Comment:* The requirement for both monthly and annual reporting is an unnecessary burden. The rule should provide only for an annual report that describes the uses of Excess Income in the prior fiscal year and quarterly filing of the HUD 93104.

*HUD Response:* The reporting requirements are not new. Section 236 mortgagors have always been required to submit a monthly report of Excess Income to HUD. This form enables HUD to know the amount of Excess Income,

if any, that is generated each month. Additionally, if the mortgagor has been approved to retain Excess Income, it enables HUD to know the amount that the mortgagor is retaining each month. In addition, HUD requires an audited annual financial statement that enables HUD staff to monitor the project's accounts. This is a requirement in the regulatory agreement.

*Section 236.60(g)(2)—Annual Narrative Description*

*Comment:* Section 236.60(g)(2) requires mortgagors that retain Excess Income for project use to 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. Clarification is needed concerning to which fiscal year HUD refers in this section (the calendar year, HUD's fiscal year, or the project's fiscal year).

*HUD Response:* Section 236.60(g)(2) of the proposed rule states that the requirement is for the prior fiscal year of the project. The calendar year or HUD's fiscal year is not relevant to this requirement unless the fiscal year of the project happens to coincide with the calendar year or HUD's fiscal year. For the sake of clarity, the final rule includes this explicit statement.

*Additional Paperwork Burden Issues*

*Comment:* Under existing regulatory requirements, projects that have no ability to generate Excess Income (e.g., projects that have been marked down to market) must still submit a monthly report. This is an unnecessary requirement and paperwork burden.

*HUD Response:* Although a project may not generate Excess Income for a year or two after being marked down to market, Excess Income may be generated in future years. This requirement remains a method by which HUD can monitor projects.

## V. Findings and Certifications

### *Paperwork Reduction Act*

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and have been assigned OMB control number 2502-0086. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

### *Regulatory Planning and Review*

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, Office of General Counsel, 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 government 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. 4332(2)(C)) at the proposed rule stage of this final rule, and continues to apply. The FONSI is available for public inspection in the Regulations Division, Room 10276, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

### *Impact on Small Entities*

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

### *Executive Order 13132, Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state

law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. 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 the Executive Order.

### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance Number for Section 236 program 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, HUD amends 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. In Subpart A, a new § 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 the HUD-approved unassisted Basic Rent. The unit-by-unit requirement necessitates that, if a unit has Excess Income, the Excess Income 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 24 CFR part 248 or in connection with an adjustment of contract rents under section 8 of the United States Housing Act of 1937 Act (1937 Act) (42 U.S.C. 1437f), 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 of necessary and reasonable operating expenses 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 fully 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 24 CFR part 5, subpart G;

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

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

(D) A Comprehensive Needs Assessment that finds there are significant repair or maintenance needs, and those repair or maintenance needs are still outstanding;

(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 1937 Act, 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 1937 Act;

(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.*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, a mortgagor must submit a request to retain Excess Income at least 90 days before the beginning of each fiscal year before any other date during a fiscal year that the mortgagor plans to

begin retaining Excess Income for that fiscal year.

(2) *Specific ongoing purpose.* A mortgagor requesting approval to retain Excess Income for a specific, ongoing purpose where the purpose extends beyond the current fiscal year may submit a request that describes the proposed use of Excess Income and advises that the intended use will extend beyond the current fiscal year. If HUD approves the request, following review of the request in accordance with paragraph (f) of this section, the mortgagor will not be required to submit a new request each fiscal year provided the use of Excess Income remains the same. The mortgagor will still be required to submit the Monthly Report of Excess Income and the end of year narrative under paragraph (g) of this section. If the use of Excess Income changes, the mortgagor must notify HUD of the change and submit a new request to retain Excess Income 90 days prior to the date the mortgagor intends to begin retaining Excess Income for the new purpose.

(f) *HUD review and response procedure.* HUD will review a mortgagor's request to retain Excess 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 except as provided in paragraph (e)(2) of this section;

(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 a 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.* A mortgagor 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.* A mortgagor that retains 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. The calendar year or HUD's fiscal year is not relevant to this requirement unless the fiscal year of the project coincides with the calendar year or HUD's fiscal year. 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 or civil penalties, or both (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, in accordance with the procedures of paragraph (c)(3) of this section. A mortgagor that is eligible to retain Excess Income for project use may not

apply for the return of Excess Income that was:

(i) Repaid in accordance with a Workout or Repayment Agreement with HUD; or

(ii) 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

(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, in accordance with paragraph (d)(3) of this section. A mortgagor that is eligible to retain Excess Income for non-project use under paragraph (d)(1) of this section may not apply to retain Excess Income that was:

(i) Repaid in accordance with a Workout or Repayment Agreement with HUD; or

(ii) 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.

(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 September 1, 2005, 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) If at any time during the fiscal year that such approval is in effect, mortgagor, approved to retain Excess

Income for non-project use, 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 withdrawal.

(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: August 24, 2004.

**Sean Cassidy,**

*General Deputy Assistant Secretary for Housing.*

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