



Department of Commerce

Foreclosure Fairness Program

Annual Report on Program Performance (RCW 61.24.163)

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Report to the Legislature
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Acknowledgements

Washington State Department of Commerce

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Washington State Department of Commerce

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Executive Summary

Overview

The 2011 Foreclosure Fairness Act¹ reshaped the non-judicial foreclosure process in Washington State to help protect homeowners from avoidable foreclosures. The intent of the program is to ensure that, even when foreclosure is unavoidable, the process is fair and transparent, and gives both the borrower and the beneficiary the opportunity to meet and make well-informed decisions.

The act assigns the primary responsibility for developing and managing the Foreclosure Fairness Program to the Department of Commerce. This work is done in partnership with the Washington State Housing Finance Commission the Department of Financial Institutions, the Office of the Attorney General, and the Office of Civil Legal Aid, and in collaboration with Dispute Resolution Centers,² mediators, attorneys (private and civil legal aid), and housing professionals.

The program is funded through fees paid by mortgage lenders (“beneficiaries”). Beneficiaries are required to pay a \$250 fee into the Foreclosure Fairness Fund for each original Notice of Trustee Sale recorded against owner-occupied residential real properties. Beneficiaries who record fewer than 50 Notices of Trustee Sale in the calendar year are exempt from this fee. The fund pays for homeowner counseling, development and operation of the program, enforcement and consumer protection, foreclosure prevention outreach and education, and legal assistance for low- and moderate-income homeowners.

Mediation, an integral component of the program, is paid through a separate fee, shared equally between the beneficiary and homeowner involved in the mediation. Housing professionals agree that keeping people in their homes is not the only possible positive outcome of mediation. Mediation gives borrowers the chance to understand their options and requires beneficiaries to explain why some options may not be available.

Favorable conditions in the real estate market, alternatives to foreclosure, and enhanced residential mortgage lending standards have resulted in a decline in foreclosures since 2013. That decline has created a financial challenge for the program, as revenues are not currently meeting the costs associated with meeting the requirements of the statute. The state partners have worked diligently to reduce costs. However, there is a baseline cost with implementing the program, which revenues are not meeting.

¹ Washington State Legislature, *RCW 61.24.163*, (2011), <http://app.leg.wa.gov/RCW/default.aspx?cite=61.24.163>

² Dispute Resolution Centers are a statewide network of organizations that provide alternatives to legal remedies. The state has provided funding for these organizations for several years to reduce court caseloads by providing affordable mediation to resolve several types of disputes, including parenting plans, divorce, landlord-tenant issues, and most recently, foreclosure. Learn more: <http://resolutionwa.org/>

Although foreclosures have declined, the program remains a critical resource for those individuals, neighborhoods and communities facing foreclosures. Since it started in 2011, the program has received 10,148 referrals, and 8,489 of those cases have been closed and/certified by the mediator. The remaining cases are currently pending or were deemed ineligible for mediation. In 2018, it is anticipated the program will still receive approximately 1,000 referrals for mediation. Of the closed/certified cases 52 percent ended with an agreement between the homeowner and beneficiary, most of which are home-retention agreements.

As the program matures, meaningful and timely data becomes more critical. The ability to identify the precise number of fees that should have been collected, the total volume of foreclosures in the state eligible for the program, and other key information is not readily available, if at all. During the 2015 legislative session beneficiary fees were tied to Notice of Trustee Sales, a recorded document publicly available, where it was previously tied to a Notice of Default, a non-recorded document sent directly to the homeowner and not publicly available.³ This change was expected to provide better visibility into foreclosure activity. However, there are still changes necessary to the Notice of Trustee Sale document and recording procedures established in statute to ensure a consistent statewide collection of data.

Summary of Recommendations

To address the declining revenue and lack of comprehensive and consistent data, Commerce continues to work with key partners and stakeholders to find solutions that work for all the stakeholders who participate in the program. The recommendations summarized below are discussed in more detail on page 25:

- **Address Revenue Shortfall** – adjust the foreclosure fee and/or reach agreement on an alternative fee structure.
- **Inadequate Data Availability** – make changes to the Notice of Trustee Sale and recording process to better track foreclosure activity.
- **References to expired HAMP program in statute** – remove references to the Home Affordable Modification Program (HAMP) in statute. This is a technical legislative fix as the federal HAMP program has sunsetted.

³ For more detail, see “2015 Amendments” on page 4.

Background

Program Creation and Amendments to the Act

Stakeholder Work

The success of the Foreclosure Fairness Program is directly related to the relationships established with all stakeholders involved. The main stakeholders include homeowner advocates, the banking industry, trustees, mediators, housing counselors, and the state program partners identified in this report. Commerce worked with these stakeholders to achieve consensus each time the Foreclosure Fairness Act (Act) was amended.

Through the years, the stakeholders have met to discuss changes necessary to make the program more effective. A summary of those changes is provided below.

Foreclosure Fairness Act: 2011

The Foreclosure Fairness Program was authorized by 2SHB 1326, known as the Foreclosure Fairness Act,⁴ a bipartisan effort from the 2011 legislative session to reduce the impact of foreclosures in Washington state. The program's purpose is to reduce unnecessary foreclosures by providing homeowner counseling and foreclosure mediation.

Early Amendments: 2011-2012

After its original enactment, the Legislature made significant changes to the Act to improve the productivity of foreclosure mediations and to make the overall process more efficient and transparent. These amendments improved the timing and order of the documents exchanged to make it work more effectively for both the borrower and the beneficiary. The modified process allowed the beneficiary to use the information provided by the borrower to complete their review prior to the mediation.

In addition, the 2012 Legislature made changes related to civil immunity for mediators and borrower eligibility. Civil immunity for mediators was added to prevent them from withdrawing from the program due to the potential risk of being sued by one of the parties in civil court. The eligibility requirements for borrowers was also changed so that borrowers are referred to mediation after receiving a Notice of Default. This change has also proven to be beneficial. Prior to this change, many borrowers were missing the opportunity to meet and confer with their beneficiary and going straight to mediation. This is more in line with the design of the Deeds of Trust Act.⁵

⁴ Washington State Legislature, *2SHB 1362 – Foreclosure Fairness Act*, (2011), <http://app.leg.wa.gov/billinfo/summary.aspx?year=2011&bill=1362>

⁵ Washington State Legislature, *Chapter 61.24 RCW – Deeds of Trust*, (2011), <http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24>

Representatives of the beneficiaries (mortgage lenders), housing advocates, trustees, counselors, and mediators supported these changes. These changes were codified in SSB 5988⁶ during the special session of 2011. The Legislature passed SHB 2614⁷ during the 2012 session.

2014 Amendments

During the 2014 legislative session, the House and Senate unanimously passed HB 2723,⁸ which was signed into law by the Governor on March 31, 2014. Commerce convened six stakeholder meetings to discuss these amendments and reach consensus before HB 2723 was written. The amendments in HB 2723 provided many improvements to the Foreclosure Fairness Act, including a broadening of the definitions for “borrower” and “residential real property” that expand program eligibility criteria.

The bill also made changes to beneficiary procedures that:

- Increases transparency and borrower knowledge of the foreclosure process.
- Allows voluntary participation in the foreclosure mediation program if certain criteria are met.
- Allows Commerce to authorize mediation fees.
- Modifies funding allocations to ensure the continuous operations of the program given the decreasing level of program revenue.

2015 Amendments

Passage of ESSB 6052⁹ during the 2015 third special legislative session resulted in Commerce receiving direction via a proviso to convene a workgroup of stakeholders to review the state’s Deed of Trust Act (RCW 61.24). The workgroup included stakeholders from financial institutions, loan servicing and trustee service companies, advocacy groups representing homeowners, and approved foreclosure mediators. Results of the workgroup were discussed in a separate report to the Governor and Legislature, published December 2015.

2016 Amendments

SHB 2876¹⁰ passed in the 2016 session and resulted in three major changes to the statute:

- 1) Revision of the funding allocation to the entities providing services under the Act.
- 2) A change to when beneficiary fees are paid – at the recording of the Notice of Trustee’s Sale rather than the issuance of the Notice of Default.

⁶ Washington State Legislature, *SSB 5988*, (2011), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5988&year=2011>

⁷ Washington State Legislature, *SHB 2614*, (2012), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2614&year=2011>

⁸ Washington State Legislature, *HB 2723*, (2014) <http://apps.leg.wa.gov/billinfo/summary.aspx?year=2014&bill=2723>

⁹ Washington State Legislature, *ESSB 6052*, (2015) <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6052&year=2015>

¹⁰ Washington State Legislature, *SHB 2876*, (2015), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2876&year=2015>

- 3) The exemption from paying the fees applies to beneficiaries with fewer than 50 Notices of Trustee's Sale in the preceding year, rather than 250 issuances of Notices of Default.

Description of the Foreclosure Fairness Program

Roles and Responsibilities

The authorizing legislation for the program spells out some roles and responsibilities for various state agency partners. Other roles were identified through a program development phase, initiated and directed by Commerce, and involving all of the state agency partners. The following are the various state agencies involved with the program along with their responsibilities under the Act.

Washington State Department of Commerce: Commerce is charged with the overall development and management of the Program and the administration of the Foreclosure Fairness Fund. Commerce is also responsible for training, approving, and maintaining a list of approved foreclosure mediators, and assigning them to mediation cases.

Washington State Housing Finance Commission: The Commission administers a homeowner-counseling program, as required by the Act. The Commission oversees a toll-free Homeownership Resource Hotline where homeowners in need of foreclosure prevention assistance can call and receive free foreclosure prevention counseling.

Washington State Department of Financial Institutions: DFI is responsible for conducting homeowner pre-purchase and post-purchase outreach and education programs, and raising public awareness of the services provided under the program. While some of these services will continue, the DFI will no longer receive funding from the Foreclosure Fairness Fund as of July 1, 2016 due to changes to the Act.

Washington State Office of the Attorney General: The Consumer Protection Division of the AGO created the Foreclosure Compliance Program, as required by and to enforce the Deed of Trust Act. The purpose of the Foreclosure Compliance Program is to investigate consumer protection complaints related to foreclosures.

Office of Civil Legal Aid: The OCLA contracts with qualified legal aid programs to provide free legal assistance to low- and moderate-income homeowners in matters related to foreclosure.

Funding

The program is exclusively supported by private funds. Beneficiaries initially paid a \$250 fee into the Foreclosure Fairness Fund for each Notice of Default, a document sent directly to the homeowner and not publicly available. As a private document, it was impossible to determine the total fee income that should have been received, and an amount due by each beneficiary. Effectively, the program operated on the honor system. To address this concern legislation was

introduced, and passed, in the 2016 session,¹¹ beneficiaries now report and pay for each original Notice of Trustee’s Sale, which is a recorded, publicly available document.

Prior to July 1, 2016, federally insured depository institutions that issued fewer than 250 Notices of Default in a year could claim their exemption from these fees during the following calendar year. Beginning July 1, 2016, federally insured depository institutions that record less than 50 Notices of Trustee’s Sale in the previous year are exempt from the fee.

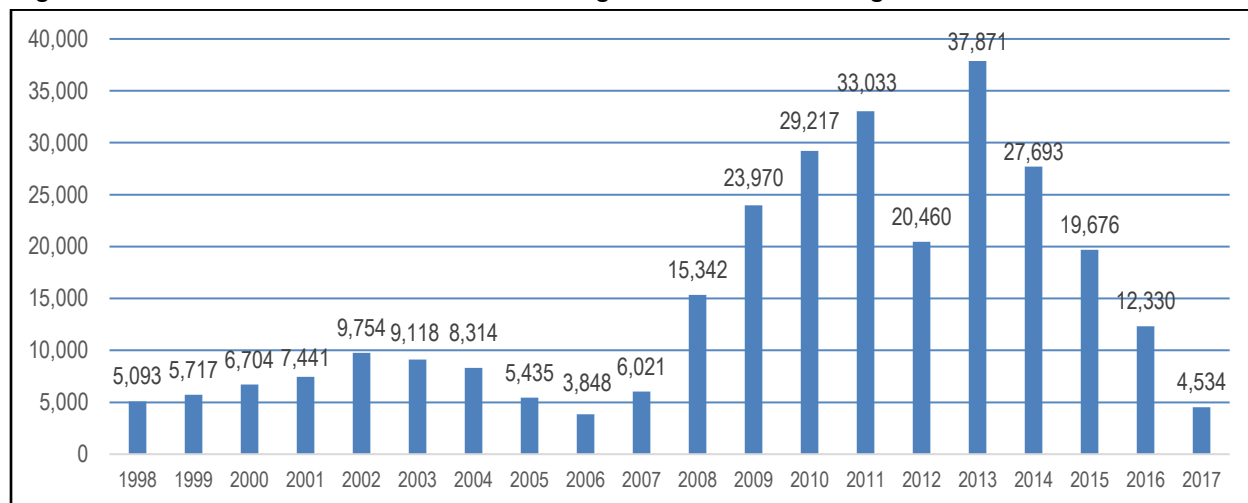
The funds pay for:

- Free homeowner foreclosure counseling.
- Consumer protection and act enforcement.
- Development and oversight of the mediation process (mediators are paid by a separate fee split between the homeowner and the beneficiary).
- Foreclosure prevention outreach and education.
- Free legal assistance for low- and moderate-income borrowers.

The passage of SHB 2876 also modified RCW 61.24.172, which outlines the distribution of funding to the agencies providing services under the Act. Effective July 1, 2016, \$400,000 per biennium will be allocated to fund the Homeownership Resource hotline. The partnering agencies receive a percentage of the remaining funds distributed as follows:

- Housing Finance Commission – 69 percent
- Department of Commerce – 17 percent
- Attorney General’s Office – 8 percent
- Office of Civil Legal Aid – 6 percent

Figure 1: Annual Foreclosure Data, 1998 Through June 2017, Washington State



Source: Unpublished data provided by Zillow.

¹¹ Washington State Legislature, *SHB 2876*, (2016)
<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2876&year=2015>

Figure 1 shows that the program experienced a high point in foreclosure activity in 2013. Foreclosure activity has continued to decrease each year since. We are currently experiencing foreclosure activity at a level similar to the volume seen before the 2008 recession. Unfortunately, there is still uncertainty what will constitute a normalized volume of foreclosure activity, and the decrease in overall volume has not correlated to an equal decrease in the resources necessary to administer the program.

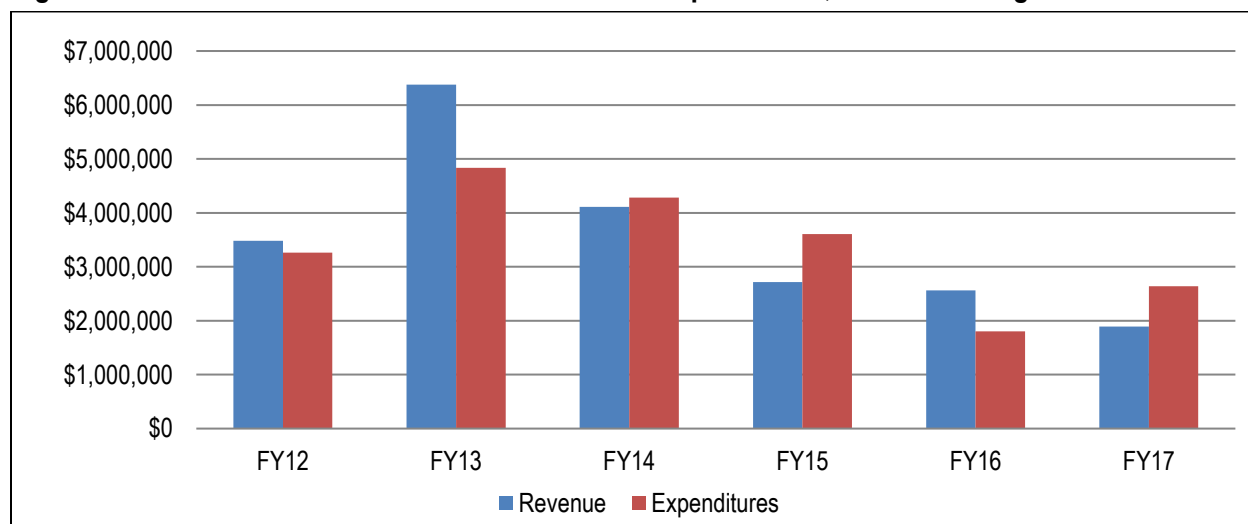
As shown below in Figure 2, the percentage of foreclosures related to reduction or loss of income has decreased while divorce, medical, and death have increased. These foreclosures are far more complex than income-related foreclosures, and often include difficult legal issues and disengaged or hostile parties. As a result, housing counselors and mediators have not seen a reduction in workload to offset the reduction in revenue.

Figure 2: Breakdown of Reason for Default, Calendar Year 2016 and January through November 2017

Year	Reduction/Loss of Income	Divorce/Medical/Death
2016	46%	39.6%
YTD November 2017	36%	49%

Source: Washington State Homeownership Resource Center

Figure 3: Foreclosure Fairness Fund Revenues and Expenditures, FY 2012 through FY 2017



Meet and Confer Period

The “meet and confer” period, prescribed in the Deed of Trust Act, identifies clear steps of notification prior to foreclosure:

- Beneficiaries must issue a Notice of Pre-Foreclosure Options at least 30 days before issuing a Notice of Default. The Notice of Pre-Foreclosure Options explains to the

borrower that they are in danger of losing their home, that free counseling is available to help them understand their options, and the potential for mediation. It also informs the borrower of the opportunity to meet with the beneficiary to try to resolve the issue (known as the “meet and confer” meeting).

- If the borrower responds to the Notice of Pre-Foreclosure Options and requests a “meet and confer,” a Notice of Default may not be issued for an additional 60 days.
- After the Notice of Default is issued, beneficiaries must wait at least 30 days before recording a Notice of Trustee’s Sale.

Referral to Mediation

Following the “meet and confer” period, beneficiaries and borrowers may meet for mediation:

- Borrowers become eligible for mediation once a Notice of Default is issued and remain eligible until 20 days after the recording of the Notice of Trustee’s Sale, and if their beneficiary is not exempt from mediation.¹²
- Borrowers must be referred to Commerce for mediation by an attorney or a housing counselor. The services of the housing counselors are free to borrowers.
- Upon the receipt of a complete referral, Commerce has 10 days to assign a mediator and notify all of the parties that mediation was requested.
- The assigned mediator has 70 days to complete the mediation (it can extend beyond 70 days if both parties agree to an extension). The participants in the mediation must address the issues of foreclosure that may enable the parties to come to an agreed resolution. To do this, the mediator will ask the participants to consider the borrower’s economic position, the Net Present Value¹³ of receiving payments from a modified mortgage compared to the recovered costs following foreclosure, affordable modifications, and any applicable loss mitigation guidelines for loans insured by the Federal Housing Administration, the Veterans Administration, or the Rural Housing Service.

Mediation Certification

Since the inception of the program, Commerce has developed standards, coordinated and conducted training, and approved 229 foreclosure mediators. In addition, Commerce developed guidelines and forms for the mediation and certification process:

- Within seven business days of the completion of the mediation, the mediator must certify the outcome of the mediation to Commerce and send copies to all parties involved.

¹² Federally insured depository institutions that were not a beneficiary in more than 250 trustee sales in a year may certify to Commerce their exemption from mediation status during the following calendar year.

¹³ In the context of foreclosures, Net Present Value is an accounting calculation that the beneficiary performs in order to assist them in comparing the costs of a loan modification to the costs of a foreclosure.

- This certification must indicate whether a resolution was reached, a description of the resolution, and whether the parties participated in good faith.
- If no agreement was reached, they must also include a description of the Net Present Value analysis used and its results.
- A finding that the beneficiary did not act in good faith constitutes a defense to the non-judicial foreclosure action. A borrower may use this finding in court to stop the foreclosure.
- A finding that the borrower failed to mediate in good faith authorizes the beneficiary to proceed with the foreclosure.

Commerce receives all certifications from the mediators and sends copies of the certifications showing “Beneficiary Not in Good Faith,” to the AGO and to the DFI.

The Consumer Protection Division of the AGO enforces the Deed of Trust Act (RCW 61.24), which includes the Act and the program. The AGO reviews the “Beneficiary Not in Good Faith” certifications it receives from Commerce and watches for patterns and repeat violators. It may take action by further investigating or escalating with a beneficiary that repeatedly failed to act in good faith.

DFI licenses some of the beneficiaries that are participating in foreclosure mediation in Washington. DFI reviews the “Beneficiary Not in Good Faith” certifications it receives from Commerce and may open complaints with its licensees. DFI may contact the borrower and/or the mediator to request more information. Once DFI has all the necessary information, it decides on the appropriate course of action, on a case-by-case basis. Data on “Not in Good Faith” decisions are included in Figure 5 on page 20 under “Mediation Results.”

Program Performance

Department of Commerce's Performance

Statewide Counselors

Housing counseling and mediation services are available to borrowers across the state. Borrowers seeking housing counseling contact the Homeownership Resource Hotline where their call is prioritized and referred to a free-of-charge local housing counselor. The Homeownership Resource Hotline provider reported a monthly average of 779 calls during the July 2016 to June 2017 state fiscal year.

Since the passage of the Foreclosure Fairness Act (Act), the number of housing counselors contracted has decreased from 64 to 42 counselors (including legal aid attorneys who provide housing counseling-like services). These counselors, as well as private attorneys, refer mediation-eligible cases to Commerce. Commerce then assigns mediators to these cases based on the borrower's county of residence and the mediators' capacity and availability.

Approved Foreclosure Mediators

In addition, to receiving referrals and assigning mediators, Commerce is responsible for maintaining a list of approved foreclosure mediators. The Act identifies attorneys, retired judges, U.S. Department of Housing and Urban Development-approved housing counselors, and employees and volunteers of Dispute Resolution Centers as eligible to become foreclosure mediators. Commerce requires participating mediators to take foreclosure mediation training and have additional documented mediator training and experience.

Commerce trained more than 300 mediators on the requirements of the Act, federal loan programs, and foreclosure laws during two series of two-day trainings in June 2011 and May 2013. The second day of each training series included a full day of hands-on mediation practice hosted by regional Dispute Resolution Centers around the state. Commerce approved 229 mediators to conduct foreclosure mediations in Washington. There are 86 active mediators conducting foreclosure mediations in Washington State.

Commerce hosted a foreclosure mediator-training event Nov. 2, 2015. Attendance was mandatory for all approved mediators who wish to continue to serve in the program. The purpose of the event was to provide a forum for all mediators to more consistently apply the Act and any applicable federal guidelines, as well as expand their skills through sharing their best/effective practices, creating a more consistent body of practice among all foreclosure mediators in the state.

Referrals to Mediation

From July 2011, when the program began, through June 2017, Commerce received 10,140 referrals to mediation:

- Housing counselors made 4,172 (41 percent) of these referrals, and attorneys (private and legal aid) made 5,968 (59 percent).
- 1,092 (11 percent) of the referrals were deemed to be ineligible.
- 9,048 (89 percent) of the referrals were deemed eligible and assigned to the Commerce-approved mediators.
- 8,284 (92 percent) of the 9,048 assigned or eligible cases were closed or certified by the mediators as of June 30, 2017.

As of Sept. 19, 2017, 512 referrals were pending mediator certification.

More details about the mediation outcomes are presented later in this report, in the “Results of the Mediation Program” section on page 17.

Program Administration Accomplishments

Commerce continues to improve and streamline the administration of the program, in order to more effectively serve the public and all of the program’s stakeholders. The following list includes highlights of the accomplishments made in the last fiscal year (July 1, 2016 to June 30, 2017):

- Received and processed 905 new referrals to mediation.
- Continued streamlining the administrative process, from referral intake to assigning mediators and notifying the parties, and assisting mediators throughout the process.
- Revised and continuously improved the Foreclosure Fairness Program Guidelines,¹⁴ a tool for mediators, referrers, beneficiaries, and other interested stakeholders.
- Improved communication with stakeholders about program updates via GovDelivery.
- Improved the exemption certification process by adding a quality control step for verifying that the institution is federally insured.
- Updated program materials and communications following the sunset of the Home Affordable Modification Program (HAMP).
- Collaborated with legislators and key stakeholders to identify strategies to sustain the program.

Program Partner Performance

The program partners submitted the following reports on their work related to meeting the requirements of the Foreclosure Fairness Act.

¹⁴ Washington State Department of Commerce, “Foreclosure Fairness Program Guidelines,” <https://deptofcommerce.app.box.com/s/xw4a4peivjkg1k861effqlrays4wzwfe>

Housing Finance Commission

Commerce collaborates with the Washington State Housing Finance Commission (Commission) to administer a homeowner-counseling program, as required by the Act. Detailed housing counseling data and outcomes reported by the Commission are included later in this report in the “Outcomes of Housing Counseling” section.

The Commission executed contracts with Commerce to provide resources needed to operate and maintain a statewide foreclosure-counseling program. In this role, the Commission:

- Subcontracts with a statewide network of housing counselors who provide default and foreclosure counseling, and provide payment for their services using Foreclosure Fairness Act funds from Commerce.
- Makes efforts to align practices, policies, and quality of service of the counseling agencies in a consistent manner on a statewide basis.
- Collects and provides data to Commerce regarding the performance of the counseling agencies and the outcomes of services provided to their clients.
- Monitors complaints against housing counselors and takes corrective action when necessary.

Counseling outcomes reported by the Commission include:

- 821 participating borrowers were able to reach agreement (home-retention or non-home-retention).
- 349 borrowers were reported as not reaching agreement and/or having their house foreclosed by the beneficiary.

Department of Financial Institutions

The Washington State Department of Financial Institutions (DFI) is responsible for conducting homeowner pre-purchase and post-purchase outreach and education programs. From the Act’s enactment in 2011, DFI and Commerce worked together closely to raise public awareness about the services provided under the FFP.

From July 1, 2016 through June 30, 2017, DFI:

- Distributed 2,739 English and 305 Spanish translated copies of the Foreclosure Fairness brochure. No copies were requested in Arabic, Cambodian, Chinese, Korean, Russian, Samoan, Somali, Tagalog, and Vietnamese, although they were available.
- Printed 10,500 English copies of the Foreclosure Fairness brochure.
- Provided program brochures and business cards at approximately 200 events statewide.
- Provided program outreach on multiple Hispanic Affairs Commission-coordinated radio shows (in Spanish) with a statewide audience.
- Foreclosure Fairness brochures distributed in the Yakima Valley at 20 outreach events.

With the significant reduction in organizations providing foreclosure prevention counseling, DFI redirected its focus to providing direct funding to those organizations still giving assistance for Washington homeowners facing foreclosure:

- DFI provided Parkview Services with a \$50,000 grant (Oct. 1, 2015-Dec. 31, 2016) to support housing counseling.
- DFI provided the Washington Homeownership Resource Center a \$100,000 grant (Feb. 1, 2016-Feb. 17, 2017) to provide education, information and referrals for Washington homeowners, including those facing foreclosure.
- DFI provided the Urban League of Metropolitan Seattle a \$100,000 grant (Nov. 1, 2015-June 30, 2017) in part to support home ownership and foreclosure counseling.

Office of the Attorney General

The Consumer Protection Division of the AGO created the Foreclosure Compliance Program to enforce the Deed of Trust Act, as required by that Act. During the last fiscal year (July 1, 2016 to June 30, 2017), the FCP received 262 complaints and inquiries.

- 202 direct consumer complaints and inquiries.
- 47 housing counselor complaints and inquiries.
- 13 attorney and other professionals' complaints and inquiries.

The Foreclosure Compliance Program regularly receives case-specific and issue-related input from Commerce, including requests to respond to homeowners and counselors. The Foreclosure Compliance Program and Commerce work collaboratively to solve common issues.

As a part of the 2012 National Mortgage Settlement, the AGO distributed \$43.8 million in grants to governmental agencies and non-profit organizations throughout the state. The agencies and organizations are using the grant funds to provide consumer access to housing counselors and legal services that help provide consumers with protections afforded under the Foreclosure Fairness Act. Overall, the grant recipients reported that more than \$37 million has been expended through their programs throughout the state.

Between July 1, 2016, and June 30, 2017, the AGO took the following actions to enforce the Deed of Trust Act:

- The AGO monitored compliance with servicing standards and distribution of consumer relief for Washington borrowers pursuant to its Feb. 5, 2016, consent decree with HSBC Bank USA, NA and its affiliates.
- The AGO monitored compliance with and distribution of consumer relief for Washington borrowers pursuant to its Dec. 19, 2013, Consent Decree with Ocwen Financial Corporation and its subsidiary Ocwen Loan Servicing and its June 17, 2014, Consent Decree with SunTrust Mortgage, Inc.
- On July 8, 2016, the AGO entered into an Assurance of Discontinuance with Sun West Mortgage Company, Inc., requiring that Sun West not submit to the Department of Commerce any future certifications incorrectly representing that it is exempt from

mediation and fees under the Foreclosure Fairness Act, and requiring that the company make all requisite payments required by RCW 61.24.174 on time.

- On July 12, 2016, the AGO entered into an Assurance of Discontinuance with PHH Mortgage Corporation, requiring that PHH not submit to the Department of Commerce any future certifications incorrectly representing that it is exempt from mediation and fees under the Foreclosure Fairness Act, and requiring that the company make all requisite payments required by RCW 61.24.174 on time.
- On Aug. 4, 2016, the AGO entered into an Assurance of Discontinuance with West Coast Servicing, Inc., requiring that West Coast not submit to the Department of Commerce any future certifications incorrectly representing that it is exempt from mediation and fees under the Foreclosure Fairness Act, and requiring that the company make all requisite payments required by RCW 61.24.174 on time.
- The AGO identified PrimeLending, a PlainsCapital Company, as a company that had failed to make statutorily required payments into the Foreclosure Fairness Account. As a result, PrimeLending made \$2,500 in back-payments into the account.
- The AGO identified First Guaranty Mortgage Corporation (FGMC) as a company that had failed to make statutorily required payments into the Foreclosure Fairness Account. As a result, FGMC made \$6,500 in back-payments into the account.
- In the course of the AGO's work on beneficiary compliance with the requirement to make payments into the Foreclosure Fairness Account, it discovered that miscommunication between beneficiary and servicer, or master servicer and sub-servicer, was a common cause of the failure to pay. The AGO inquired with one such sub-servicer, Roundpoint, to identify beneficiaries and master services for which it (a) services mortgage loans, and (b) does not remit payments to the Foreclosure Fairness Account. Roundpoint identified a number of such entities, and communicated with them to ensure that they understood their payment obligations.
- On Nov. 8, 2016, the AGO entered into a Consent Decree with mortgage loan servicer Planet Home Lending, LLC to resolve the company's execution and recording of documents in county recorder's and auditor's offices that incorrectly identify Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary to deeds of trust, contrary to the Supreme Court's decision in *Bain v. Metropolitan Mortgage Group, Inc. (Bain)*, 175 Wn.2d 83, 285 P.3d 34 (2012). The Consent Decree requires payment of \$47,000, and requires the company to correct all erroneous documents in which MERS purports to take action, such as appointing a successor trustee.
- On Feb. 13, 2017, the AGO entered into a Consent Decree with mortgage loan servicer PHH Mortgage Corporation to resolve the company's execution and recording of documents in county recorder's and auditor's offices that incorrectly identify Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary to deeds of trust, contrary to the Supreme Court's decision in *Bain v. Metropolitan Mortgage Group, Inc. (Bain)*, 175 Wn.2d 83, 285 P.3d 34 (2012). The Consent Decree requires payment of \$23,000, and requires the company to correct all erroneous documents in which MERS purports to take action, such as appointing a successor trustee.

- In *Jordan v. Nationstar Mortgage, LLC*, the Washington Supreme Court held that by changing locks, Nationstar, as servicer for Fannie Mae, was taking possession of the property prior to a foreclosure or sale and thus in violation of RCW 7.28.230. Following that decision, Federal Housing Finance Agency (FHFA) intervened in the federal district court and sought a ruling that the Housing and Economic Recovery Act of 2008 (HERA), the federal law that created FHFA and granted FHFA's conservatorship authority, preempted application of RCW 7.28.230 to Fannie Mae and Freddie Mac. The AGO filed an amicus opposing the FHFA, and on March 9, 2017, the district court denied FHFA request. The Court also denied FHFA's request for an immediate appeal.
- On Nov.1, 2016, the AGO filed a lawsuit against Miriam Lozano d/b/a Primera Services relating to Ms. Lozano's unlicensed and deceptive practices as a mortgage broker who purported to help distressed homeowners obtain a mortgage loan modification and avoid foreclosure. On July 25, 2017, the AGO obtained a preliminary injunction prohibiting Ms. Lozano from engaging in further mortgage brokering activities. The case remains pending.

The AGO also participated in a stakeholders group that examined potential amendments to the Foreclosure Fairness Act and Deed of Trust Act.

Office of Civil Legal Aid

Commerce partners with the Washington State Office of Civil Legal Aid (OCLA), an independent judicial-branch agency, to provide free legal assistance to low- and moderate-income homeowners in matters related to foreclosure. OCLA subcontracts all of the Foreclosure Fairness Act funds it receives to the statewide Northwest Justice Project (NJP). These funds help underwrite the activities of NJP's specialized Foreclosure Prevention Unit (FPU). Attorneys assigned to this unit provide housing counseling services to low- and moderate-income homeowners, represent homeowners in mediations and, where necessary, represent homeowners in litigation to enforce their rights under the Act.

Since FY 2012, Commerce/OCLA Act funding has fluctuated from a high of \$150,000 per year to \$50,000 in FY 2016. Current authorized Act funding for FY 2018 is \$100,000.

For most of the time since FY 2012, core NJP/FPU operations have been underwritten with significant grants originating from the National Mortgage Foreclosure Settlement (through the Office of the Attorney General) and a recent federal settlement with the Bank of America. Facing the expiration of these funding sources in 2018-19, NJP has reduced FPU staffing from 15.6 FTE attorneys located in six locations across the state to 7.5 FTE attorneys in three locations. Consequently, and despite relatively stable demand for Foreclosure Fairness Act-related civil legal aid services (3 percent below FY 2016 levels), NJP experienced a 15 percent reduction in total cases handled between FY 2016 and FY 2017.

In FY 2017 (July 1, 2016 to June 30, 2017), 738 homeowners sought legal assistance to protect their homes. Of these, 143 were determined ineligible for the program. Foreclosure Fairness Act funding helped NJP provide legal assistance to 595 homeowners. During this same period, legal representation for 73 homeowners begun in the prior fiscal year was concluded. At the end of FY 2017, representation was ongoing (not concluded) in 245 cases. In total, legal counseling and representation underwritten by Foreclosure Fairness Act funding resulted in the preservation of more than \$6.8 million in homeowner equity.

The majority of homeowners seeking Foreclosure Fairness Act-related legal help from NJP lived in the most populous Puget Sound counties of King (19 percent), Pierce (13 percent), and Snohomish (9 percent). Cases from these counties accounted for 42 percent of the total cases. Cases from Spokane and Yakima Counties showed a slight decrease, even as their combined overall percentage increased slightly to 11 percent of total cases, 6 percent and 5 percent respectively.

NJP's foreclosure prevention representation during SFY 2017 continued to focus on utilizing Foreclosure Fairness Act protections and provisions, including "meet and confer" and mediation, as well as successfully pursuing "Not-in-Good Faith" certifications to ensure homeowners are provided the benefit of all options and opportunities under the Act to retaining their home.

While the number of foreclosures statewide has dropped significantly from the crisis levels of 2008-13, the home foreclosure landscape is in flux, forcing homeowners and their legal representatives to confront a changing legal and institutional landscape.

Recent trends include the transition of loan servicing from large national banking associations to non-depository institutions with a business plan centered on revenue from default servicing. As before, these new loan servicers do very little to modify national practices to fit Washington law, including the Foreclosure Fairness Act.

Additionally, the end of the U.S. Department of Treasury's HAMP modification program has shifted the focus of foreclosure activity to defending against loan servicers whose policies and practices vary widely and are often undisclosed. In addition to rights afforded under the Act, NJP attorneys leverage federal Consumer Financial Protection Bureau regulations and other consumer protections to retain loan modifications at affordable payments for Washington homeowners.

As noted, NJP capacity declined significantly in SFY 2017, and will continue to decline throughout SFY 2018 as foreclosure prevention funding made available through the Office of the Attorney General from the National Foreclosure Settlement Agreement are exhausted. This will result in a significant loss of foreclosure prevention capacity at NJP in SFY 2018 and beyond, making it ever more critical the Foreclosure Fairness Act funding be directed to these purposes.

Results of the Mediation Program

The data presented in this section is cumulative, covering July 22, 2011, the enactment of the bill, through June 30, 2017. The Mediation Program is administered by Commerce.

Referrals to Mediation

Mediation cases are referred to Commerce by housing counselors (about 40 percent) and attorneys (about 60 percent). Of the 9,166 referrals received through June 30, 2017, Commerce assigned 8,155 to approved mediators, and 1,011 were deemed ineligible. 7,108 of the assigned cases have been mediated, completed, or both. The remaining assigned cases were pending mediation, completion, or both as of June 30, 2017.

Figure 4 below tallies the mediation referrals that Commerce received through the end of this reporting period, and their outcomes. Figure 5 identifies the 10 counties with the highest numbers of referrals received by Commerce through June 30, 2017. Figure 6 illustrates the number of referrals received each quarter from the beginning of the program.

Figure 4: Mediation Referrals from Beginning of Program through June 30, 2017

Mediation Referrals	Cases
Total Mediation Referrals Received	10,148
Referred by housing counselors	4,172 (41%)
Referred by attorneys (private and legal aid)	5,968 (59%)
Cases assigned to mediators*	9,048
Cases completed/closed through June 30, 2017	8,284
Cases ineligible for mediation**	1,092

* Includes cases that have been mediated or closed, as well as cases that are currently pending an outcome.

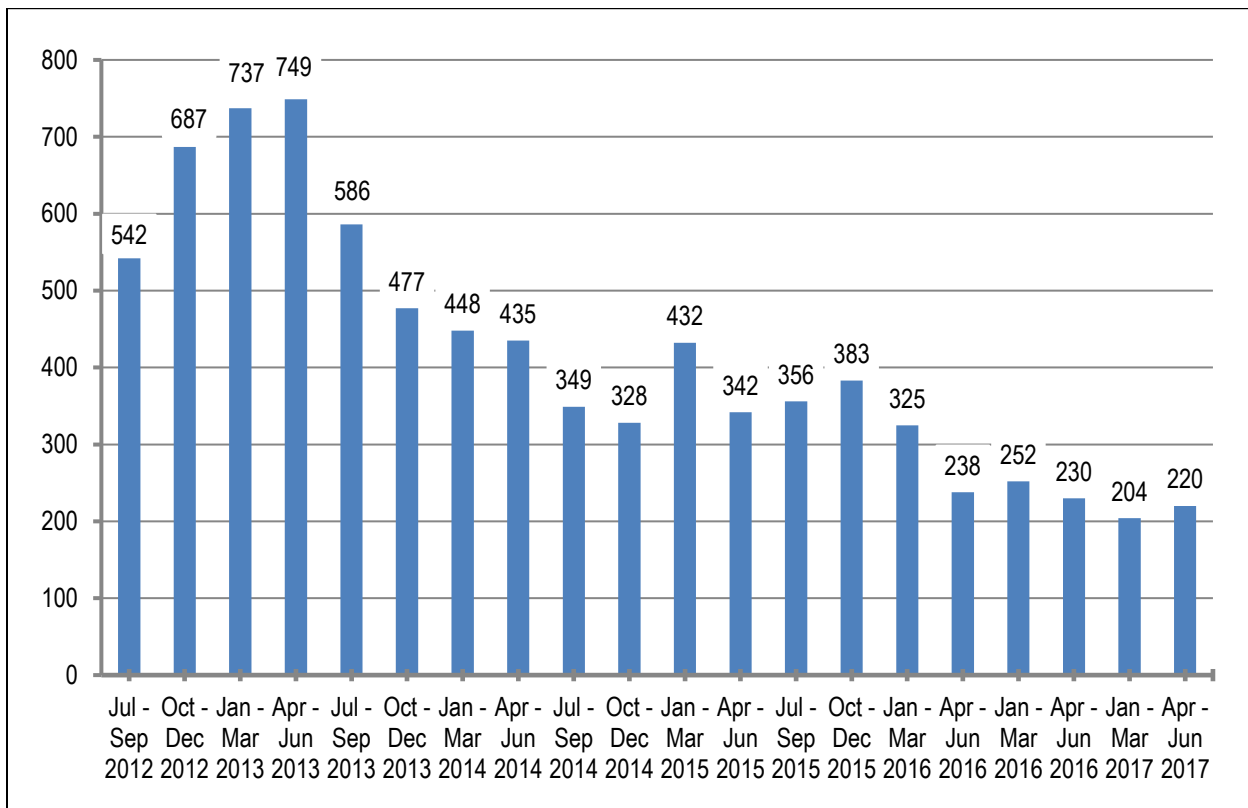
** Cases that have been referred to Commerce but upon further review have been found to be ineligible, typically because the beneficiary was exempt, or the timing of the referral missed the window of eligibility specified in the Foreclosure Fairness Act.

Figure 5: Counties with the Most Referrals Received Through June 30, 2017

Top 10 Counties	Referrals Received
King	3,969
Snohomish	1,746
Pierce	1,684
Spokane	741

Clark	498
Kitsap	285
Thurston	285
Whatcom	172
Yakima	136
Skagit	130

Figure 6: Referrals Received per Quarter, July 2012 through June 30, 2017



Note: Some of the numbers in Figure 4 have been slightly adjusted from the numbers reported in previous legislative reports. Commerce has undertaken a large database maintenance and data integrity project during the past two fiscal years, resulting in some necessary corrections to previously reported data.

Mediation Results

Figure 7 below analyzes the 8,284 cases that have been mediated and completed. The data presented is based on the mediator certifications received by Commerce. Some cases do not reach a mediation session due to a variety of factors, such as agreements between borrower and beneficiary reached prior to session, the borrower’s withdrawal from the mediation process, or one or both parties being unresponsive to the mediator (e.g., lack of good faith on either the borrower’s or the beneficiary’s part).

Figure 7: Outcomes of Mediation Sessions from Beginning of Program through June 30, 2017

Mediation Session Outcomes	Cases
Mediation Session(s) Occurred – Agreement Reached	2,512
Borrower Stayed in Home (subcategories below are not mutually exclusive)	1,970
Reinstatements	152
Repayments	52
Extensions	166
Adjusted rate to fixed rates	208
Amortizations extended	442
Interest rate reductions	877
Principal reductions	108
Monthly principal payments reduced	345
Monthly interest payments reduced	245
Refinances	40
Other loan restructures/modifications	787
Principal forbearances	162
Interest forbearances/write-offs	42
Fees and penalties forbearances/write-offs	34
Other forbearances	56
Borrower Did Not Stay in Home (subcategories below are not mutually exclusive)	542
Deeds in lieu	47
Short sales	216
Voluntary surrenders	43
Cash for keys	28
Other non-retention agreements	252
Mediation Session(s) Occurred – No Agreement Reached	2,323
Parties mediated in good faith but were unable to reach agreement	1,949
Borrower not in good faith	276
Beneficiary not in good faith	252
Both borrower and beneficiary not in good faith	15

For cases with one or more sessions, mediators submitted certifications to Commerce indicating whether an agreement was reached in or after the session. Reaching an agreement does not necessarily mean the borrower is able to stay in the house. In some cases, it is not possible because of the borrower’s financial situation. It is important to note that staying in the home is not the only possible positive outcome. The purpose of the program is fulfilled if both the borrower and the beneficiary are able to communicate openly and in good faith, and make well-informed decisions considering all available options.

Some subcategories listed below are not mutually exclusive. For example, the subcategories listed under “Borrower Stayed in Home” (under “Mediation Session(s) Occurred – Agreement Reached”) are not mutually exclusive because borrowers may receive a loan amortization extension, have the principal reduced, and also have the interest rate reduced. In a case like this, that same favorable result would be counted in all three subcategories.

In instances when an agreement was not reached or when a session did not occur, the mediators are required by statute to make a good-faith determination, which is reported to Commerce on the mediator’s certification. Typically, reported reasons for lack of good faith for either or both the borrower and the beneficiary include:

- Lack of timely or accurate provision of documents to the mediator and the other party.
- Failure to timely appear at, or participate in, mediation.
- Failure to pay their share of the mediation fee.
- Beneficiary’s representative not being authorized to make binding decisions.

Figure 8: Cumulative Mediations/Cases Completed Since Program Inception through SFY 2017

Outcomes	Cases
Cases Certified/Closed	8,489
Referred by housing counselors	3,643
Referred by attorneys (private and legal aid)	4,846
No Mediation Session Occurred	3,320
Home-retention agreement reached prior to session	1,746
Non-retention agreement reached prior to session	222
Borrower withdrew from mediation (not included in other categories)	589
Borrower unresponsive* and/or borrower not in good faith	552
Beneficiary not in good faith	54
Both borrower and beneficiary not in good faith	10
Other than above	166

Source: Mediators’ certifications.

*Mediation cancelled by mediator due to borrower unresponsiveness, per RCW 61.24.163(11).

Borrowers in Default within a Year of Loan Restructuring or Modification

In the statute, establishing the program Commerce is asked to report performance and data about the program, including, “to the extent practical, the number of borrowers who report a default within a year of restructuring or modification.”¹⁵

The program worked with Commerce’s Research Services unit in early 2014 to develop a survey for borrowers who completed the mediation process with their beneficiaries and reached home-retention agreements, allowing them to stay in their homes. The survey¹⁶ consisted of telephone interviews with homeowners who had completed mediation through the Mediation Program and reached home-retention agreements approximately one year prior to the survey being conducted. For more information about the methodologies and results of the survey, follow the link in the footnotes below.

¹⁵ Washington State Legislature, *RCW 61.24.163 (18)(b)*, (2011), <http://app.leg.wa.gov/RCW/default.aspx?cite=61.24.163>

¹⁶ Washington State Department of Commerce, “Foreclosure Fairness Program Home Retention Survey,” (2014), <http://www.commerce.wa.gov/wp-content/uploads/2015/11/ffp-home-retention-survey-2014.pdf>

Outcomes of Housing Counseling

The data presented in this section was provided by the Washington State Housing Finance Commission (Commission) as required by RCW 61.24.160(6).¹⁷ It covers the last state fiscal year of the program, from July 1, 2016 through June 30, 2017.

Commerce collaborates with the Commission to administer a homeowner-counseling program, as required by the Act. Counseling is available at no cost to Washington homeowners in need of assistance. From the beginning of the FFP, the Commission partnered with 16 housing counseling agencies around the state (including two legal aid agencies, Northwest Justice Project and Northwest Consumer Law Center) that had at least two years of experience in providing foreclosure prevention counseling. Due to decreasing demand, the number of foreclosure-prevention counselors decreased over the last year from 52 to 42 at the time this report was prepared.

Figure 9 shows a breakdown by category of the total number of clients assisted by the Commission's counselors and legal aid attorneys and the outcomes of counseling. The Total Outputs and Total Outcomes include all parts of the counseling process and are not exclusive to the Meet and Confer, Mediation, and Appeals/ Escalation.

The Commission reports that between July 1, 2016, and June 30, 2017, its counselors and legal aid attorneys assisted 3,998 borrowers in need of assistance. Counselors and legal aid attorneys attended 1,227 "meet and confer" meetings between borrowers and their beneficiaries, and 397 mediation sessions. The Commission also reports that 927 borrowers were referred to other types of assistance, such as legal and financial assistance.

Before, during, and after mediation outcomes reported by the Commission include:

- 821 participating borrowers were able to reach agreement (home-retention or non-home-retention).
- 349 borrowers were reported as not reaching agreement and/or having their house foreclosed by the beneficiary.

More details are in Figure 9 below.

It is important to note that although some borrowers do not reach an agreement with the beneficiary in mediation, the opportunity to meet and mediate opens the door for further, open communication with their beneficiaries.

¹⁷ Washington State Legislature, *RCW 61.24.160(6)*, (2012), <http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24.160>

Figure 9: Outcomes of Housing Counseling for State Fiscal Year 2017

Category Description	Cases
Totals*	
Outputs	
Clients	2,919
Referrals to Other Services	927
Outcomes	
Pending Outcomes (still in counseling)	1,666
Withdrawals from Counseling	83
Home Retention Agreements	715
Non-Retention Agreements	106
No Agreements	319
Foreclosures	30
Meet and Confer	
Outputs	
Meet and Confer Sessions Attended	1,227
Outcomes	
Pending Outcomes	1,060
Withdrawals from Counseling	14
Home-Retention Agreements	67
Non-Retention Agreements	8
No Agreements	78
Mediation	
Outputs	
Mediation Referrals	558
Clients Assisted in Mediation	473

Mediation Sessions Attended	397
Outcomes	
Referrals Ineligible for Mediation	7
Agreements Prior to Mediation	112
Withdrawals from Mediation	15
Loan Modifications Reached in Mediation	87
Other Home-Retention Agreements Reached in Mediation	40
Non-Retention Agreements Reached in Mediation	12
No Agreements Reached in Mediation	64
Mediation Sessions Continued (Outcome Pending)	197
Appeals or Escalations	
Outputs	
Appeals or Escalations	730
Outcomes	
Pending Outcomes	418
Withdrawals From Counseling	9
Home-Retention Agreements	240
Non-Retention Agreements	36
No Agreements	27

** The Total Outputs and Total Outcomes include all parts of the counseling process and are not exclusive to the Meet and Confer, Mediation, and Appeals/Escalation*

Recommendations

Considering the importance of the partnerships involved in implementing the Foreclosure Fairness Act (the Act), Commerce will continue to work with key partners to address the following issues.

Provide Sustainable Revenue Structure

With a more robust labor market, foreclosures due to job loss and income reduction have decreased from when the Foreclosure Fairness Program began in 2011. However, the percentage of foreclosures resulting from divorce and medical bills/issues has increased, according to the Washington State Homeownership Resource Center (Figure 2, page 7). Reaching a resolution in such cases is more difficult and time intensive. Therefore, while the overall number of foreclosures has declined, there is not a matching reduction in demand for program resources and costs to administer the program.

During times of lower foreclosure activity, the minimum cost associated with administering the program and providing access to services, under the current funding structure, can be higher than the revenue being generated. (Figure 3, page 7). A fee increase would generate revenue sufficient to meet program operating costs at the current level of foreclosure activity.

Improve Data Availability of Foreclosure Activity

The Foreclosure Fairness Program partners continue to look for a reliable data source that captures all foreclosure activity in the state to ensure the requirements of the Act are met, and so the program can verify that required fees have been paid. Unfortunately, practices vary from county to county on how many Notice of Trustee's Sale are indexed, which makes a uniform search, if not any search for this information, difficult. This can be partially addressed through modification to the Notice of Trustee's Sale form described in RCW 61.24.040¹⁸ to require identification of the beneficiary.

Remove References to Making Home Affordable Program in Statute

The Making Home Affordable Program (MHA) expired on Dec. 31, 2016. Programs under MHA, including the Home Affordable Modification Program (HAMP), will no longer be options for homeowners facing foreclosure. References to HAMP are made at RCW 61.24.163(4) and (9)(c).¹⁹

¹⁸ Washington State Legislature, *RCW 61.24.040*, (1965, 1967, 1975, 1981, 1985, 1987, 1989, 1998, 2008, 2009, 2012), <http://app.leg.wa.gov/rcw/default.aspx?cite=61.24.040>

¹⁹ The Washington State Legislature, *RCW 61.24.163*, (2011), <http://app.leg.wa.gov/RCW/default.aspx?cite=61.24.163>