



**Department of Commerce**  
Innovation is in our nature.

# Foreclosure Fairness Program Guidelines

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**These guidelines are frequently updated or revised. Please visit [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) for the most current version.**

## Foreclosure Fairness Program Guidelines

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## INTRODUCTION

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The Foreclosure Fairness Act (FFA) ([RCW 61.24.163](#)), initially passed by the Legislature in April 2011, reshapes the non-judicial foreclosure process in Washington State to help protect homeowners from unnecessary foreclosures. It assigns the primary responsibility for developing and administering the Foreclosure Fairness Program (FFP) to the Department of Commerce (Commerce). A large part of the FFP is administering a foreclosure mediation program and approving and training foreclosure mediators.

Commerce recognizes that the FFA allows the foreclosure mediators to use their discretion on how to conduct and certify the mediation cases assigned to them. Commerce's role is not to instruct these mediators on how to conduct and certify their mediations, but to assist them to conduct mediations that comply with the statute and to facilitate the sharing of best practices between mediators.

The below list of guidelines and best practices were compiled by Commerce in an effort to provide the foreclosure mediators, referrers, and any other interested stakeholders, with useful tools in navigating the referral and mediation process contemplated by the FFA.

**It is important to note that this is NOT an exhaustive list and that these guidelines may change without notice.**

**Commerce continues to improve its FFP guidelines as the program evolves and matures and as we analyze new situations and circumstances encountered in the administration of the program. Updated guidelines, as well as other FFP information and forms, are posted regularly on our FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).**

*Pub. 5/6/13.*

## GUIDANCE REGARDING ELIGIBILITY AND REFERRALS

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### Borrower Ineligibility Claims

#### Before a Mediator Is Assigned to a Case:

When Commerce receives a **new** referral, prior to sending the notice required by [RCW 61.24.163\(3\)](#), Commerce typically provides information by email about the new mediation request to the identified trustee (property address, borrower(s), and beneficiary identified in the referral). If the eligibility of the borrower is questioned by the trustee, Commerce forwards the trustee's inquiry (by e-mail) to the referrer. Unless the referrer withdraws the referral, Commerce moves forward with the mediator assignment process and notifies the parties per [RCW 61.24.163\(3\)](#) (with a few exceptions, e.g., if Commerce received proof that the beneficiary is exempt from mediation – see “Exempt Beneficiary” section).

It is the responsibility of the referrer (attorney or counselor) to determine if the borrower qualifies for foreclosure mediation ([RCW 61.24.160\(3\)](#)). When Commerce forwards the trustee's claim of ineligibility to the referrer, the referrer will be asked to consult with their client (the borrower) regarding the issues raised and inform Commerce of their determination, as follows:

1. If the referrer's determination is that the borrower is eligible for mediation and all the information in the original referral was correct, confirm with Commerce that they intend to keep the referral as originally submitted. Commerce will assign a mediator, notify the parties per [RCW 61.24.163\(3\)](#), and the mediation process will move forward.
2. If the referrer's determination is that the borrower is eligible for mediation but corrections to the original referral are needed, re-submit the referral form with the corrected information to Commerce. Commerce will assign a mediator, notify the parties per [RCW 61.24.163\(3\)](#), and the mediation process will move forward.
3. If the referrer's determination is that the borrower is indeed not eligible for mediation, notify Commerce with a request to withdraw the referral as ineligible. Commerce will notify the trustee (by email) that the referral was withdrawn as ineligible by the referrer. Commerce will not assign a mediator. If the case had already been assigned to a mediator and Commerce's Notice has been mailed out to the borrower and beneficiary, see below.

#### After a Mediator Is Assigned to a Case:

Mediators should NOT concern themselves with borrower eligibility matters. It is NOT the mediator's role to determine a borrower's eligibility or to address ineligibility claims. **Once a case is assigned by Commerce to a mediator, the mediator must assume that the borrower is eligible and proceed with the mediation process as usual, including certifying the case.**

If during the mediation process the beneficiary maintains that the borrower is ineligible and informs the mediator that it **will NOT** participate in mediation, the mediator may have no other choice but to close the case and certify it accordingly. Under the assumption that the borrower was eligible (since borrower was referred, and Commerce assigned the case to the mediator), the mediator will need to use his/her

discretion, as contemplated under the statute, to make a determination whether or not the beneficiary acted in good faith by not participating in mediation.

Furthermore, there is no provision in the FFA providing for mediation to be cancelled or a borrower to become ineligible for mediation due to the beneficiary's statement that it "terminated foreclosure" or "terminated non-judicial foreclosure." The FFA does not contemplate a process for "terminating foreclosure". Once a borrower receives a Notice of Default, they are eligible for mediation if the referral submitted to Commerce meets all the other FFA eligibility criteria. Commerce's guidance to mediators in these cases is that they proceed with the mediation process as usual and assume that the borrower is eligible for mediation. As stated above, should the beneficiary inform the mediator that it will not participate in mediation, the mediator may have no other choice but to close the case and certify it accordingly.

Claims of borrower ineligibility should be forwarded to Commerce. If Commerce receives claims that a borrower is ineligible, Commerce may need to contact the referring attorney/counselor to review the ineligibility claim and the borrower's circumstances. **If it is determined that the borrower was indeed ineligible for mediation, Commerce, not the mediator, will cancel the mediation** and formally notify the parties and the mediator (by letter) that the referral was ineligible for mediation under the FFA. Mediators need **not** certify cases that are deemed to be ineligible for mediation.

*Pub. 1/20/15.*

## Mediators & Borrower Eligibility

See "Borrower Ineligibility Claims" section above.

*Pub. 6/17/13. Rev. 1/20/15.*

## Referral Timeline

FFA recognizes a borrower's eligibility based on the following:

1. Borrowers who received a Notice of Default prior to July 22, 2011, are eligible to be referred up to one day prior to the date of the Trustee Sale.
2. Borrowers who received a Notice of Default after July 22, 2011, are eligible to be referred until 20 days after the date a Notice of Trustee Sale (NOTS) has been recorded.

The count starts the day after the NOTS was recorded. For example, if the referral was recorded on January 1, the 20 days count would start on January 2. The referral must be received by Commerce on January 21 to be eligible for mediation.

Commerce follows the rule set by [RCW 1.12.040](#) to determine the eligibility of requests for foreclosure mediation. When the **last** day (of any timeline set in statute) falls on a Saturday, Sunday, or holiday, we follow [RCW 1.12.040](#) for computing time and go to the next business day. ([RCW 1.12.040](#) is considered to be a "statute of general applicability.")

*Pub. 5/6/13.*

## Voluntary Mediation (as of June 12, 2014, HB 2723)

HB 2723 amended the FFA (effective June 12, 2014) to introduce “voluntary mediation” (see [RCW 61.24.163\(1\)](#)). Accordingly, if a borrower is not referred to Commerce within the applicable time frames, the borrower and the beneficiary (as defined in [RCW 61.24.005\(2\)](#)) may agree in writing to enter the FFA mediation program.

This amendment to the FFA allows a borrower who would otherwise be time-barred to enter the mediation program, if the beneficiary so agrees. Commerce will process a voluntary mediation referral and assign a mediator just as with any other referrals, provided that both the beneficiary and the borrower(s) agree in writing to enter the FFA mediation and to follow the FFA requirements.

A voluntary mediation **agreement** template is attached at the end of the “Referral to Foreclosure Mediation” form posted on the FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures). It is the responsibility of the referring attorney or counselor to provide a copy of this **signed** agreement as part of the referral to mediation submitted to Commerce.

*Pub. 6/12/14.*

## “Borrower” Definition Expanded (as of June 12, 2014, HB 2723)

The FFA allows a person to be referred to mediation if the borrower is deceased and this person is a successor in interest of the deceased borrower who occupies the property as his or her primary residence ([RCW 61.24.165\(5\)](#)). For purposes of mediation under [RCW 61.24.163](#), this person must be treated as a “borrower” (see definition in [RCW 61.24.005\(3\)](#)).

The FFA also allows a person to be referred to mediation if this person has been awarded title to the property in a proceeding for dissolution or legal separation ([RCW 61.24.165\(6\)](#)). For purposes of mediation under [RCW 61.24.163](#), this person must be treated as a “borrower” (see definition in [RCW 61.24.005\(3\)](#)).

It is the responsibility of the referring attorney/counselor to determine and indicate the grounds for eligibility on the referral form submitted to Commerce. Please note that Commerce does not have the authority to give legal advice.

*Pub. 6/12/14.*

## Eligibility of Borrowers with Special Circumstances

Incarcerated borrowers are eligible for mediation. However, since there is no provision in the FFA that treats them differently from other borrowers, they must meet the same FFA deadlines and requirements as other borrowers.

Similarly, the FFA does not address foreclosures where the borrower is military personnel in active duty, deployed, or recently discharged. However, under a Federal law (the [Servicemembers Civil Relief Act](#)) a beneficiary may be required to obtain a court order before it can foreclose. **Borrowers who are military personnel in active duty, deployed, or recently discharged should seek independent legal advice to ascertain their rights.**

*Pub. 5/6/13.*



## Owner Occupancy and Residential Real Property Requirement

The FFA applies ONLY to deeds of trust recorded against owner-occupied residential real property. “Owner-occupied” means property that is the principal residence of the borrower. “Residential real property” means property consisting solely of a single-family residence, a residential condominium unit, a residential cooperative unit, or as of June 12, 2014, a residential real property of up to four units ([RCW 61.24.005\(13\)](#)). The property must have been owner-occupied as of the date of the initial contact under [RCW 61.24.031](#) was made (see [RCW 61.24.165](#)).

Borrowers remain eligible for mediation even if they **subsequently** move, as long as the property was their principal residence at the time the initial contact under [RCW 61.24.031](#) was made. The referring attorney or housing counselor is responsible for pre-screening borrowers for eligibility.

A borrower who owns a mobile home and rents the land would be ineligible for mediation.

*Pub. 5/6/13. Rev. 6/12/14.*

## Exempt Loans ([RCW 61.24.165](#))

The FFA does NOT apply to deeds of trust:

- (a) Securing a commercial loan;
- (b) Securing obligations of a grantor who is not the borrower or a guarantor; or
- (c) Securing a purchaser's obligations under a seller-financed sale.

*Pub. 5/6/13. Rev. 8/26/13.*

## Reverse Mortgage

The FFA statute is silent regarding the eligibility of reverse mortgages for mediation. The referring attorney or housing counselor should make a fact-specific determination regarding each particular reverse mortgage situation. Commerce will rely on the referrer’s determination that mediation is appropriate (per [RCW 61.24.163\(2\)](#)).

*Pub. 5/6/13. Rev. 5/9/13.*

## Equity Line of Credit

If an equity line of credit is on the principal residence of the borrower, the loan is from a non-exempt lender, the borrower is eligible, the referral meets the FFA timelines, and all other statutory requirements are met – the equity line of credit is eligible for mediation. A line of credit secured by a deed of trust is just like any other deed of trust.

*Pub. 5/6/13.*

## Referrals Regarding Second Mortgages

Commerce will accept referrals for second mortgages that are in default and assign a foreclosure mediator as usual **IF** all the FFA eligibility requirements are satisfied. The referral must include a trustee,

as required for all other referrals. If the first mortgage is also in foreclosure, they will be mediated as separate cases. Commerce will need to receive one referral per mortgage loan.

*Pub. 5/6/13.*

## Referrals During Bankruptcy

If a borrower meets all the FFA eligibility criteria and is currently in bankruptcy, Commerce will accept and process their referral if one of the following items accompanies the referral:

1. Evidence of a relief from the stay; OR
2. A consent letter from the debtor to the beneficiary pursuant to RULE 4001-2 (Federal Rules of Bankruptcy Procedure) meeting the following criteria:
  - Letter is in writing;
  - Letter is signed by either the debtor or their attorney;
  - Letter identifies beneficiary on the deed of trust;
  - Letter contains words to the effect that the debtor consents to the beneficiary participating in mediation under the FFA; and
  - Letter contains words to the effect that mediation is for purposes of negotiation of a modification of the debt secured by the deed of trust.

*Pub. 5/6/13.*

## Quit Claim Deeds

As a general rule, mediation referrals for properties with quit claim deeds should be in the original borrower's name, as they are still the "borrower" defined in [RCW 61.24.005](#).

A quit claim deed does not necessarily change who the borrower is on the note secured by the deed of trust. And, in fact, many deeds of trust say if the borrower conveys his/her ownership interest in the property without the lender's consent, the lender may declare an immediate default. This is generally referred to as the "due on sale" clause. Generally speaking, the original borrower is still responsible, and the note is still secured by a deed of trust on the property, regardless of the quit claim deed.

However, in some circumstances the due on sale clause may not be triggered by a quit claim deed or other transfer of interest. Examples are transfers by quit claim pursuant to a dissolution (divorce) or legal separation proceeding, or transfer from a deceased borrower's estate. **A borrower who claims rights under such a transfer should seek independent legal advice in order to determine what, if any, rights he/she has relative to the deed of trust that is being foreclosed.**

Amendments to RCW 61.24.165, effective June 12, 2014 (HB 2723), provide that a person who takes title to property through the estate of a deceased borrower or dissolution or separation, may in some circumstances be referred to mediation. See RCW 61.24.165(5) and (6), which read as follows:

- (5) For purposes of referral and mediation under RCW 61.24.163, a person may be referred to mediation if the borrower is deceased and the person is a successor in interest of the deceased borrower who occupies the property as his or her primary residence. The referring counselor or attorney must determine a person's eligibility under this section and indicate the grounds for

eligibility on the referral to mediation submitted to the department. For the purposes of mediation under RCW 61.24.163, the person must be treated as a "borrower." This subsection does not impose an affirmative duty on the beneficiary to accept an assumption of the loan.

(6) For purposes of referral and mediation under RCW 61.24.163, a person may be referred to mediation if the person has been awarded title to the property in a proceeding for dissolution or legal separation. The referring counselor or attorney must determine the person's eligibility under this section and indicate the grounds for eligibility on the referral to mediation submitted to the department. For the purposes of mediation under RCW 61.24.163, the person must be treated as a "borrower." This subsection does not impose an affirmative duty on the beneficiary to accept an assumption of the loan.

*Pub. 5/6/13. Rev. 6/12/14.*

## Exempt Beneficiary

Commerce posts an annual list of financial institutions exempt from mediation on its FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures). Referrers must verify the eligibility of the beneficiary against this list **prior** to submitting the referral form to Commerce.

If a financial institution submits a valid exemption certification for the current year, but was not exempt from mediation the previous year, all mediation referrals received by Commerce during the previous year will be honored. All requests for mediation during the current year (January 1 – December 31) will be ineligible upon receipt of the valid exemption by January 31<sup>st</sup>.

After the receipt of a referral, if Commerce is notified by a trustee that the referral should be considered ineligible based on the latest "Assignment of Deed of Trust" naming an exempt beneficiary as the holder of the note and beneficiary for the purposes of the Deed of Trust Act ([RCW 61.24](#)), Commerce will request a copy of the "Declaration of Note Holder" or "Beneficiary Declaration" as described in [RCW 61.24.030\(7\)\(a\)](#). If further clarification is needed, Commerce may also ask for a copy of the specific promissory note endorsement assigning that beneficiary to the deed of trust. Once Commerce receives the document(s), a decision on the eligibility of the referral will be determined and all parties will be notified.

*Pub. 5/6/13. Rev. 8/26/13; 9/16/13.*

## Trustee Sale & Postponement

Once Commerce receives a complete referral to mediation, we notify the trustee that mediation has been requested for that property. In order to notify a trustee prior to a Friday sale, we must receive the eligible, complete referral **by noon on the Thursday before the scheduled date of the trustee sale.**

**Note:** this applies only to borrowers who received a Notice of Default prior to July 22, 2011, and who are eligible to be referred up to one day prior to the date of the Trustee Sale.

*Pub. 5/6/13.*

## Eligibility Questioned by Trustee or Beneficiary

See “Borrower Ineligibility Claims” section above.

*Pub. 5/6/13. Rev. 1/20/15.*

## Referral Signature Requirements

To ensure the validity of a referral for mediation, the signature of the referring attorney or housing counselor is required on the referral form. An electronic/scanned copy of the original-signed form transmitted by fax or PDF attachment to an email is acceptable.

The original signature is intended to signify that the individual attorney or housing counselor whose name appears has reviewed the referral for eligibility and appropriateness with all due diligence in keeping with the standards of their respective professions.

*Pub. 5/6/13.*

## Referrals with More than One Referrer

Commerce expects that each referral will have one referrer—the person who signs the referral. If there is more than one referrer indicated on the form, Commerce will only record the referrer who signed the referral in the FFP database.

*Pub. 5/6/13; 9/16/13.*

## Repeat or Subsequent Mediations

Commerce will process one mediation referral per **foreclosure proceeding** (issuance of a Notice of Default). The only possible exceptions are referrals made under the “Voluntary Mediation” section (see above) or if a borrower withdraws from a previously scheduled mediation, prior to session, under circumstances not considered a “lack of good faith” or “borrower unresponsiveness” by the mediator.

Once a mediation case has been closed and a Certification/Report issued by the mediator, Commerce does not have the authority to reopen it or start a new mediation process. The FFA does not contemplate repeat mediations/referrals on the same foreclosure proceeding. Since repeat or subsequent mediations are not required under the law, Commerce cannot compel the parties to re-engage and agree to mediate under the FFA for a second time. However, the parties (beneficiary and borrowers) are free to continue negotiations.

Commerce will process referrals where the parties voluntarily agree in writing to enter the mediation program (see the “Voluntary Mediation” section above) after the time frame for referral has passed. In “Voluntary Mediation” both parties agree to enter the foreclosure mediation program and follow the FFA procedures.

*Pub. 5/6/13. Rev. 8/26/13; 6/12/14; 1/20/15.*

## Mediations Outside of FFA

Commerce will not process and assign mediators for “outside of FFA” mediations. Examples include when the borrower is not eligible, or the beneficiary is exempt, or when mediation already occurred on that foreclosure proceeding. Commerce will inform the parties that they are free to mutually agree to mediate, but they are not compelled by the FFA to do so. The only exception is referrals made under the “Voluntary Mediation” section (see above). A borrower that would otherwise be time-barred from mediation may, if the beneficiary agrees, be referred to “Voluntary Mediation.” In “Voluntary Mediation” both parties agree to enter the foreclosure mediation program and follow the FFA procedures.

*Pub. 5/6/13. Rev. 8/26/13; 6/12/14.*

## Request for a Second Mediation to Enforce Prior Agreements

Borrowers cannot request a second mediation to enforce agreements reached in prior mediations. Borrowers would have to ask a court to enforce the agreement and any provisions of [RCW 61.24](#) that were not honored by the other party(s) to the agreement. Commerce or the mediators do not have enforcing authority over any agreements made in mediation. Commerce does not have the authority to reassign a case to a mediator once the case has been certified and closed.

*Pub. 5/6/13. Rev. 8/26/13; 6/12/14.*

## GUIDANCE REGARDING FINANCIAL INSTITUTIONS

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### Beneficiary's Definition

The beneficiary is defined in [RCW 61.24.005](#) as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” Under Washington State law, the **current** holder of the Note is the beneficiary. Commerce relies on the referrer to identify the beneficiary on the referral form.

*Pub. 5/6/13.*

### Exemption from Mediation

Requests from financial institutions for mediation exemptions must be submitted to Commerce annually **no later than January 31<sup>st</sup>**. Exempt status submissions must be certified by the financial institution under penalty of perjury that they were not the beneficiary of deeds of trust in more than 250 trustee sales of owner-occupied residential real property in the previous year ([RCW 61.24.166](#)).

**Exemption certification templates & detailed instructions** are posted on Commerce's FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures). The exemptions must be renewed annually.

If a financial institution submits a valid exemption certification for the current year, but was not exempt from mediation the previous year, all mediation referrals received by Commerce during the previous year will be honored. All requests for mediation during the current year (January 1 – December 31) will be ineligible upon Commerce's receipt no later than January 31<sup>st</sup> of a valid exemption certification.

Commerce posts the annual list of financial institutions exempt from mediation on its FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

*Pub. 5/6/13. Rev. 6/12/14.*

### Exemption from Foreclosure Fairness Account Fee

According to [RCW 61.24.174](#), non-exempt beneficiaries must report to Commerce and pay \$250 for each notice of default they issued, or directed a trustee to issue, in the previous quarter on a deed of trust made on owner-occupied residential real property.

Federally insured depository institutions that certify under penalty of perjury that they issued, or directed a trustee or authorized agent to issue, fewer than 250 notices of default in the preceding year, are exempt from these fees. The exemption certifications must be submitted to Commerce annually.

**Exemption certification templates & detailed instructions** are posted on Commerce's FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

*Pub. 5/6/13. Rev. 6/12/14.*

## Notification of New Beneficiary

A change in beneficiary should not be confused with a change in “servicer.” The beneficiary is defined in [RCW 61.24.005](#) as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” If a servicer that is not the beneficiary—as defined—changes during the mediation process, the FFA process should not be affected. According to the FFA ([RCW 61.24.163\(8\)\(a\)](#)), it is the responsibility of the **beneficiary—as defined**—to have a **person** who is authorized to agree to a resolution attend the mediation (in person, by phone, or by video conference), regardless of who the loan servicer is. In some cases this person could be a servicer employee authorized by the **beneficiary** to agree to a resolution in mediation.

The FFA does not address the situation where a **beneficiary—as defined in [RCW 61.24.005](#)**—changes **AFTER** the mediation process had started. Once a proper referral has been made to Commerce and Commerce has assigned a mediator, Commerce has no control over the situation. However, we offer the following comments.

If the beneficiary changed **AFTER** the referral was processed by Commerce and the Notice was issued and sent to all parties involved, and the mediation process was started, Commerce’s view is that the successor beneficiary “steps into the shoes” of the original beneficiary for purposes of foreclosure mediation, unless it is an exempt beneficiary. If a beneficiary changes **AFTER** mediation had been requested and the mediation process had started, it is incumbent on the original beneficiary to inform the successor beneficiary of the status of the foreclosure and mediation on the loan that is being sold. The mediator should continue the mediation process as usual with the successor beneficiary. The mediator may rely on a qualifying beneficiary declaration (under [RCW 61.24.163\(5\)\(c\)](#)) as proof of the successor beneficiary’s identity.

If the successor beneficiary is exempt from FFA mediation (per [RCW 61.24.166](#)), it may voluntarily proceed and continue the mediation process that started with the original beneficiary. In that case, the mediator should continue the mediation process as usual.

*Pub. 5/6/13. Rev. 9/16/13; 6/12/14.*

## Trustee Sale & Postponement

[RCW 61.24.163\(16\)\(b\)](#) states, “If a borrower has been referred to mediation after the notice of sale was recorded, the sale may not occur until the trustee receives the mediator’s certification stating that the mediation has been completed.” Once Commerce receives a **complete** referral to mediation, we notify the trustee that mediation had been requested for that property. However, Commerce has no control over a trustee’s decision to postpone a sale.

*Pub. 5/6/13.*

## GUIDANCE REGARDING MEDIATION SESSIONS

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### Mediation Timeline

#### 70 Days to Session:

The 70-day to session timeline starts once the mediator receives the Notice from Commerce ([RCW 61.24.163\(6\)](#)). The mediator, or an administrator acting on their behalf, will begin contacting the two parties (borrower(s) and beneficiary) to schedule the mediation, exchange documents, and pay the fees. Mediation ends once the mediator completes and submits the Foreclosure Mediation Certification/Report to Commerce and to all the parties.

#### Postponing the Mediation:

Per [RCW 61.24.163\(6\)](#), the mediation session must take place within 70 days (from the mediator's receipt of Commerce's Notice) in the county where the property is located, unless the parties agree to extend this timeline. This means that **unless BOTH parties agree to extend the timeline** the mediation cannot be extended beyond the 70 days. In instances when one party does **not** agree to a time extension, the mediator should ensure that both borrower(s) and beneficiary understand that the case will be closed and certified without a session taking place and that the borrower may lose their opportunity to mediate. The mediator will then have to make a determination of good faith participation (per [RCW 61.24.163\(10\)](#)) and certify the case accordingly.

#### Documents Exchange:

The documents must be exchanged according to the statute: borrower submits documents to both mediator and beneficiary in 23 days from receipt of Commerce's Notice; the beneficiary submits documents to both mediator and borrower in 20 days from receipt of borrower's documents.

#### Scheduling Notice:

The mediator must send written notice (the "scheduling notice") of the mediation's date, time, and location to the borrower(s), the beneficiary, and copy Commerce, at least 30 days prior to the mediation session. The scheduling notice must include the statements described in [RCW 61.24.163\(7\)\(b\)](#). Commerce strongly recommends that mediators disclose in the scheduling notice their scheduling, re-scheduling, and fee policies. A sample/template scheduling notice may be found on Commerce's website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) (see menu on the right-hand side).

In order to ensure the borrower receives the required scheduling notice information, Commerce interprets [RCW 61.24.163\(7\)\(b\)](#) to mean the mediator **must** send the scheduling notice(s) to the borrower **regardless** of a "notice of appearance" or other similar documents from the borrower's representative indicating correspondence with the borrower should be directed to the borrower's representative. Mediators should also send a copy to a borrower's representative.

#### Contacting the Parties to Ensure Readiness:

The mediator, or an administrator acting on their behalf, should contact both the borrower(s) and beneficiary prior to the scheduled mediation session **"to ensure that the parties have all the necessary information and documents to engage in a productive mediation."** (See [RCW 61.24.163\(7\)\(a\)](#).) If either party is not ready, the mediator must determine if the session needs to be rescheduled. However, both



parties need to agree to reschedule a session beyond the 70-day timeline contemplated in [RCW 61.24.163\(6\)](#).

*Pub. 5/6/13. Rev. 6/6/13; 6/17/13; 8/26/13; 6/12/14; 1/20/15.*

## Borrower Eligibility in Question

See “Borrower Ineligibility Claims” section above.

*Pub. 6/17/13. Rev. 1/20/15.*

## Borrower’s Attendance to Mediation, Power of Attorney

The borrower(s) identified on the loan must attend the mediation **in person**. When a borrower cannot or does not want to attend the mediation in person, they can authorize a personal representative to act on their behalf at the mediation. However, the borrower should produce a **power of attorney** that clearly authorizes that representative to undertake binding negotiations on the borrower’s behalf.

In cases with multiple borrowers, all borrowers identified on the loan must attend the mediation, unless one borrower gives written power of attorney to the other(s).

*Pub. 5/6/13.*

## Beneficiary’s Attendance to Mediation

[RCW 61.24.163\(8\)\(a\)](#) states: “[...] a person with authority to agree to a resolution on behalf of the beneficiary may be present over the telephone or videoconference during the mediation session.” During session, the **mediator must ask** the beneficiary’s representative to indicate if they have authority to agree to a resolution on behalf of the beneficiary, and later document this in their Mediation Report/Certification.

*Pub. 5/6/13.*

## Attendance at Additional Mediation Sessions

A person with authority to agree to a resolution on behalf of the beneficiary must be present by phone, video, or in person during **any and all sessions**.

It is Commerce’s view that the parties may agree that the borrower(s) and the beneficiary's legal representative (attorney) can appear at a **continued** session (or subsequent sessions) by phone, given that the two conditions listed below are met:

- The mediator allows it; and
- The mediator has written agreements from **both** parties (e-mail is acceptable).

*Pub. 5/6/13.*

## Attendance of Guests, Observers, and Other Advocates

The beneficiary, borrower, and mediator must agree in writing in order for guests and/or observers to attend a mediation session.

The borrowers need to attend the mediation in person but they are free to choose their representation, such as a housing counselor, an attorney, or any “other advocate.” [RCW 61.24.163\(7\)\(i\)](#) does not specifically limit borrower’s “other advocates” to housing counselors or attorneys and does not specifically limit the attendance of such supporters and/or advocates during foreclosure mediation. The foreclosure mediator can use his/her discretion to determine the extent of participation by advocate(s) for the borrower during a mediation session.

*Pub. 5/6/13.*

## Language Translation

When communicating with borrowers, the FFA does not require communication in a language other than English. However, best practice and fair dealing would favor providing letters in another language (if possible) if there is an indication that the borrower may have limited English proficiency.

Borrowers may bring any person they wish to interpret/translate the mediation proceedings with the consent of the mediator. The participation of a language interpreter during a mediation session will be determined by the foreclosure mediator. All costs associated with the interpreter will be the responsibility of the borrower.

*Pub. 5/6/13.*

## Americans with Disabilities Act (ADA) Accommodations

Mediators should conduct mediations in facilities that are ADA compliant. Generally, the Federal ADA regulations regarding nondiscrimination and accommodations are found at [28 CFR 36](#). These regulations cover public accommodations. They apply to a number of facilities open to the public that provide various services. Federal law may require certain accommodations whether or not an individual requests specific accommodations. Federal ADA regulations should be consulted to ensure that any required accommodations are provided in accordance with ADA requirements.

If an individual participating in mediation requests accommodations to assist in accessing the mediation facility and/or the mediation materials, accommodations must be provided. The mediator has the responsibility to make sure that the facility where the mediation is conducted is ADA compliant (check the above referenced CFR).

*Pub. 1/20/15.*

## Net Present Value Requirements (Inputs and Test)

### **Before Mediation ([RCW 61.24.163\(5\)\(g\)](#)):**

The beneficiary must include in its document transmittal to the mediator and the borrower all the data used in any net present values (NPV) analysis. NPV input data that is required by any applicable federal

mortgage relief program **must be provided**. If no federal mortgage relief program applies, the beneficiary **must provide** the NPV data inputs required by FDIC.

**During Mediation ([RCW 61.24.163\(9\)\(b\) and \(c\)](#)):**

The FFA states the mediator **may require** the parties to run an NPV **test**. Commerce presumes that the mediator **will** require the NPV test to be completed. If a test is not completed, we expect the mediator to explain the reason for this (for example, “the borrower was not interested in keeping the house, all he wanted to discuss was a short-sale”). Also, the FFA states that the mediator **must** require the parties to run an NPV test during mediation if an NPV test is required for the applicable loan (e.g., federal mortgage). If the applicable loan does not require an NPV or if an NPV calculation is not provided, the beneficiary **must still provide, before mediation, the NPV data inputs** established by FDIC and published in the FDIC loan modification program guide (see above).

**After Mediation ([RCW 61.24.163\(12\)\(e\)](#)):**

NPV inputs and/or test results must be reported on the certification **when an agreement was not reached**. If an NPV test was used during a mediation resulting in non-agreement, the statute requires that the mediator’s certification include: a copy of the NPV test used (or its description), copies of the inputs, and the result of the NPV test expressed in a dollar amount.

The certification form includes three NPV questions that the mediator must answer:

1. Were NPV inputs provided by the beneficiary?  
Beneficiaries are required by statute to provide a list of NPV *inputs* to the mediator and borrower before the mediation session. Not providing the NPV inputs is a violation of the duty to mediate in good faith under FFA. See [RCW 61.24.163\(5\)\(g\)](#) and the “Before mediation” paragraph above.
2. Was an NPV test/analysis completed?  
If an agreement was not reached by the parties, the mediator must either attach a copy of the NPV test to the certification or a description of the NPV test on the certification form. The mediator must also indicate who prepared the NPV test and provide its results expressed in a dollar amount. Some NPV tools do not provide the test results expressed in a dollar amount (for example the CheckMyNPV model), in which case attaching the NPV worksheet to the certification should suffice. If an agreement was not reached by the parties and an NPV test was *not* completed, the mediator must provide an explanation on the certification as to why there was no NPV test completed. If agreement *was* reached or a session did not occur, the mediator is not required to attach the NPV test or its description to the certification, but is encouraged to if a NPV test was completed.
3. If YES on question 2, did the NPV of the modified loan exceed the anticipated net recovery at foreclosure?  
Mediators must review the NPV test and answer this question accordingly, particularly if an agreement was *not* reached (see [RCW 61.24.163\(14\)\(c\)](#)). Some NPV models give a dollar amount while others only give a pass/fail result. For example, a positive dollar amount or a “pass” result would translate into “yes” to this question.

**Must the Beneficiary Offer a Loan Modification If the NPV Result Is Positive?**

When the NPV test shows a “pass,” the beneficiary is **not** required to offer a loan modification. If it is a

pass and there is no modification offered, that may constitute the basis to enjoin the foreclosure (see [RCW 61.24.163\(14\)\(c\)](#)). Commerce’s guidance is that a mediator does not find the beneficiary “in lack of good faith” **solely** because the NPV showed a pass and a modification was not offered. However, the mediator would need to include/attach the NPV inputs and results on the certification and indicate a loan modification was not offered along with the beneficiary’s cited basis for not offering a modification.

*Pub. 5/6/1. Rev. 1/20/15.*

## Requirement to Produce the Pooling & Servicing Agreement

If a beneficiary cites a Pooling & Servicing Agreement (PSA) or, as of June 12, 2014 (HB 2723), “other investor restrictions” as the basis for its inability to enter **any** proposed modification – including any that the borrower may propose – the beneficiary must produce the applicable sections of their PSA or “other investor restrictions,” and documentation or a statement detailing the beneficiary’s efforts to obtain a waiver, as per [RCW 61.24.163\(5\)\(j\)](#).

*Pub. 5/6/13. Rev. 8/26/13; 6/12/14.*

## Videotaping, Transcription, or Other Recording

The FFA does not address recording mediations. The FFA appears to anticipate that mediations will not be like a “hearing” with a court recorder but more like a “private conversation.”

[RCW 9.73.030](#) makes it unlawful to record a “private conversation” without permission (see [RCW 9.73.030\(1\)\(b\)](#)). The statute also says that consent is considered to be obtained if the person recording announces to everyone else that the conversation is being recorded and the announcement is on the recording (see [RCW 9.73.030\(3\)](#)). If the mediation is recorded, copies should be provided to all the parties who attended the session. If there is an objection to recording the mediation, Commerce has no authority to make a determination or provide legal advice on the issue.

*Pub. 5/6/13.*

## Relocation of a Scheduled Mediation

Commerce will not reassign a mediator in another location for the convenience of the parties if the mediator has already made substantial efforts to prepare for the mediation session, scheduled the mediation date and/or the fee payments have been received. Commerce does not view [RCW 61.24.163\(4\)\(a\)](#) as meaning that the parties can change the location at any point in the process. In order to relocate a scheduled mediation, the parties may make compensation arrangements for the current mediator to travel to and conduct the mediation at the new location other than the location where the mediation had been scheduled, **or** compensate the mediator on an agreed upon amount for time and effort already invested to prepare for the scheduled mediation, and **then** request that Commerce reassign the referral to another mediator. Both of these options are at the discretion of the assigned mediator.

*Pub. 5/6/13.*

## Mediation Continuances

The stated purpose of the foreclosure mediation process is to create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible. The mediator has the discretion to continue the mediation session **once**. Under [RCW 61.24.163\(8\)\(b\)](#), only **after a mediation session commences** the mediator may continue the mediation session **once**, and any further continuances must be with the consent of the parties. The mediator may use their discretion to postpone/reschedule a continuance due to extraordinary circumstances (e.g., illness, death in the family) encountered by either party or the mediator.

The mediator cannot “continue” **before** the mediation commenced (i.e., parties came to the table and met). Rescheduling a mediation session is not the same as continuing the session.

Mediators can use a continuance to wait for a final decision before issuing a Mediation Certification/Report. However, because the statute ([RCW 61.24.163\(12\)](#)) requires the mediator to submit a certification within seven business days after the conclusion of the mediation **session**, Commerce recommends that when continuances are needed, the mediator **schedules** the continuance session, rather than keeping the mediation “open” with no scheduled session on the books. If it is determined later that the additional session is not needed, the mediator can cancel it and certify the case accordingly. The mediator should include a brief explanation regarding the certification’s delay in the Comments box of the certification form, i.e., to explain the gap between the date of the last session and the date of the certification.

If the parties reach a temporary loan modification agreement (such as a Temporary Payment Plan), Commerce recommends that the mediator use their continuance to continue the session until the temporary loan modification period is completed. At that point, the mediator can determine if it has become a permanent loan modification and certify it accordingly. If the permanent loan modification fails, the mediator may conduct the session to complete the mediation by addressing other available alternatives to foreclosure, as required by the FFA.

*Pub. 5/6/13. Rev. 6/6/13; 6/12/14; 1/20/15.*

## Substituting Mediators

**Commerce will not assign or re-assign mediators to cases upon request or preference from either party.**

The mediator assigned by Commerce must conduct the mediation and complete and sign the Mediation Certification/Report. The statute places the responsibility on the assigned mediator to conduct the mediation process. This includes communicating with the parties, ensuring that documents are exchanged pursuant to the statutory timelines, convening one or more mediation sessions, and certifying the mediation. These duties are specific to the mediator, not to Commerce. This means that once a mediator accepts a case assigned to them by Commerce, the mediator is solely responsible to conduct, convene, and certify the case, and bring closure to the mediation process contemplated in the FFA.

Commerce expects that mediators inform Commerce **right away** if they can no longer accept new cases or need their capacity adjusted (e.g., reduce the number of cases that they can accept). Mediators should timely review new mediation assignments to identify without delay whether they are unable or unwilling to mediate the case. Requests for substitutions while the mediation process is well underway or after session(s) have occurred should **not** be the norm.

**Early in the Mediation Process:**

If an assigned mediator is unavailable or unwilling to conduct a newly assigned mediation, he/she must notify Commerce immediately after the assignment. Commerce will reassign that case to another approved mediator who is available within the same county and formally notify all parties.

**Late in the Mediation Process:**

If an assigned mediator becomes unavailable or unwilling to conduct the mediation late in the mediation process (e.g., after the documents have been exchanged, or after an initial session was held), *it is incumbent upon that mediator* to timely communicate with the parties and make acceptable alternative arrangements for the case to be brought to completion, including conferring with another approved foreclosure mediator regarding assumption of the mediation case. Once these arrangements have been made, Commerce must be notified and we will re-assign the case to the new mediator and formally notify the parties.

**In Emergency Situations:**

In an unforeseen, emergency situation (e.g., the mediation is scheduled for the next day and the mediator has a medical emergency), a DRC/organization may re-assign the case to another mediator. The DRC/organization should, however, offer two options to the borrower and beneficiary: (1) reschedule the session with the originally assigned mediator, or (2) agree to the mediator substitution in writing. If a substitution is agreed on, the DRC/organization must notify Commerce by email and attach a copy of the written substitution agreement. Commerce will adjust its records accordingly. Since the parties had already agreed to the substitution in writing, Commerce will not notify the parties of the mediator substitution.

Commerce may remove a mediator from the approved list of FFA mediators if it is determined that a mediator has too frequent requests for substitutions or re-assignments, such that they interfere with the effective administration of the program.

*Pub. 5/6/13; 1/20/15.*

## **Document Requirements When Other Foreclosure Alternatives Are Considered**

The statute provides guidance regarding documents required for a loan modification, but is silent regarding documents required for a short sale and other possible mediation outcomes. However, the FFA does say:

[RCW 61.24.163\(7\)\(a\)](#) *The mediator may schedule phone conferences, consultations with the parties individually, and other communications to ensure that the parties have all the necessary information and documents to engage in a productive mediation.*

AND

[RCW 61.24.163\(9\)](#) *The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan.*

When the parties indicate that they wish to discuss a short sale or something else other than a loan modification, the mediator may confer with both parties to determine what documents will be most useful to facilitate an effective discussion during mediation. The statute clearly allows the mediators to have preparatory discussions with each party and to require any and all documents necessary to complete the mediation with discussions of all available foreclosure alternatives.

Also, according to [RCW 61.24.163\(10\)\(b\)](#), the mediator has reasonable discretion to determine what documents are to be submitted and when, as well as how to conduct the scheduling of the mediation session generally.

*Pub. 5/6/13.*

## Mediations That Do Not Occur

The mediator assigned to a case will need to complete a Certification/Report even if the mediation is cancelled for any reason, including for the reasons listed in [RCW 61.24.163\(11\)](#) (see below). The Certification/Report must identify the reason for cancellation and be sent to the borrower(s), beneficiary, trustee, referrer, and Commerce. Commerce will NOT send cancellation letters to the parties (with some exceptions, e.g., if Commerce receives proof that the beneficiary is exempt from mediation – see “Exempt Beneficiary” section). Also see “Mediation Cancelled by Mediator, per RCW 61.24.163(11)” section below.

*Pub. 5/6/13. Rev. 9/16/13.*

## Mediation Cancelled by Mediator, per RCW 61.24.163(11)

[RCW 61.24.163\(11\)](#) reads as follows:

*“If the mediator reasonably believes a borrower will not attend a mediation session based on the borrower's conduct, such as the lack of response to the mediator's communications, the mediator may cancel a scheduled mediation session and send a written cancellation to the department and the trustee and send copies to the parties. The beneficiary may proceed with the foreclosure after receipt of the mediator's written confirmation of cancellation.”*

While the statute does not require documentation of the borrower’s conduct which leads to the cancellation, Commerce strongly recommends that mediators **document in writing** the basis for their “reasonable belief” that a borrower will not attend mediation. Prior to certifying the cancelled mediation due to borrower’s conduct, Commerce recommends that the mediator consider sending the

borrower a **warning letter/email** specifying that their mediation may be cancelled and the possible consequences, such as the borrower's losing their right to mediate under the FFA.

Commerce encourages mediators to **contact the borrower directly** if their repeated attempts to communicate with the borrower's representative (attorney or counselor) failed. Commerce recommends that mediators document all of their communication attempts in writing.

Note that the mediation session **must have been scheduled** before the cancellation by mediator contemplated in [RCW 61.24.163\(11\)](#) becomes a possibility.

The beneficiary may proceed with the foreclosure after receipt of the mediator's written confirmation of cancellation, according to [RCW 61.24.163\(11\)](#).

Also note that the FFA **does not specify** the mediation will be cancelled if borrower fails to submit all documents within the 23-day period. Instead, [RCW 61.24.163\(10\)](#) states:

*"A violation of the duty to mediate in good faith as required under this section **may** include: [...] (b) failure of the borrower or the beneficiary to provide the documentation required for mediation or pursuant to the mediators instructions."*

The mediator has reasonable discretion to determine what documents are to be submitted and when, as well as how to conduct the scheduling of the mediation session generally.

*Pub. 5/6/13. Rev. 9/16/13.*

## Mediations Cancelled When Ineligible, Ineligibility Claims

See "Borrower Ineligibility Claims" section above.

*Pub. 5/6/13. Rev. 6/12/14; 1/20/15.*

## Borrower Withdrawal Prior to Mediation

If the referrer or borrower withdraws the referral **before** a mediator has been assigned, Commerce will stop the process (not assign a mediator) and inform the trustee that the mediation request has been withdrawn. In these cases, cancellation letters will **not** be sent by Commerce to the parties.

If a case was already assigned to a mediator, the referrer or borrower must send their written withdrawal request, including their explanation for withdrawal, to the mediator. If the borrower's eligibility for mediation is the reason for withdrawal or in question, see "Borrower Ineligibility Claims" section above.

When a borrower wishes to withdraw from mediation, the mediator **must attempt** to determine the cause for withdrawal before certifying the case and inform Commerce of the reason. Commerce recognizes that there are situations when a postponement rather than a withdrawal could be in both parties' interest. The mediator should encourage both parties—**borrower and beneficiary**—to discuss and reach a **mutual agreement** to postpone the mediation, to jointly request the mediator postpone and re-schedule, and to agree as to payment of any additional costs the postponement may cause.



**Unilateral Withdrawals:**

If postponement is not agreed on and the borrower withdraws from mediation for what seems to be a good reason, the mediator could certify the case as “Mediation Did Not Occur” and describe the reason or circumstances. If a borrower **unilaterally withdraws** from mediation **without good cause or explanation**, it is reasonable for the mediator to submit the report certifying that the borrower did not participate in good faith due to “lack of timely participation.”

**Agreements Reached Prior to Mediation Session:**

The FFA provides for a mediation session conducted by a neutral third party whose role is to facilitate a full and fair evaluation of ALL documentation from both parties and ALL reasonable foreclosure alternatives, as required by the FFA. **An agreement reached outside of mediation is NOT a substitute for a complete mediation session.** The mediators must NOT certify such outside agreements as an outcome of the mediation session, i.e., “mediation occurred – agreement reached.”

If a prior agreement takes place and no mediation occurs, **the mediator shall report the case as “Mediation Did Not Occur”** and provide an explanation of the circumstances. For example: “A *Permanent Loan Modification agreement was accepted prior to mediation*” or “*The parties reached a short-sale agreement prior to mediation.*”

In cases where a **temporary** agreement is reached prior to session (such as a Temporary Payment Plan (TPP)) and the borrower contemplates withdrawing from mediation, Commerce recommends that mediators offer to keep the mediation case “open” until the TPP becomes permanent. This will require, however, that a mediation session **is scheduled**. If the TPP becomes a permanent modification, the mediator can cancel the session and certify the case accordingly (“agreement reached prior to mediation session”). The mediator should include a brief explanation in the Comments box of the certification form. If the TPP fails, the mediator may then conduct the session to address other available alternatives to foreclosure, as required by the FFA.

*Pub. 5/6/13. Rev. 6/6/13; 6/12/14; 1/20/15.*

## GUIDANCE REGARDING CERTIFICATIONS/REPORTS

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### Completing the Mediation Report/Certification

Once a case has been assigned to a mediator, it is that mediator's responsibility to complete a Mediation Certification/Report at the conclusion of the mediation process, **even if a session did not occur**.

**Commerce will NOT cancel mediations after a case had been assigned to a mediator.** Some exceptions may apply such as the assignment or referral was made in error, or the beneficiary is exempt, or the borrower was later determined to be ineligible for mediation (see "Borrower Ineligibility Claims" section above). Once a case had been assigned to a mediator, Commerce expects the assigned mediator to complete and submit a certification at the conclusion of the case. If a session did not occur or the mediation is cancelled for any reason, the mediator must select the "No Mediation Occurred" outcome and choose from the listed options.

Commerce recognizes that all cases are different and the Certification/Report form provided cannot cover any and all possible scenarios. Mediators are encouraged to use the **Comments box** (at the bottom of the form) and include any information that cannot be captured otherwise or that may be necessary or relevant to the case.

**Commerce would like to remind mediators that these forms, once received by Commerce, become public record, so mediators should be mindful of including private and/or sensitive information.**

Commerce must have complete and accurate information to meet our reporting obligations to Legislature and stakeholders. Below are a few steps to ensure that certifications are correctly submitted:

1. The most current Mediator Report/Certification form posted on our website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) (see menu on the right-hand side) must be used for all cases.
2. **Mediators must follow the instructions included at the top of the form for completing, printing, and submitting their Certification/Report.**
3. The certification form needs to be typed. Commerce will not accept handwritten certifications.
4. ALL fields must be completed, so there will be no room left for guessing. N/A should be entered where not applicable.
5. The date, time, and location of the mediation session(s) are required by statute. They should not be left blanks unless the mediation did not occur.
6. The names of ALL of the persons participating in all of the mediation session(s) must be included, and a participation type for each person must be selected. The Comments box can be used to provide clarifications if necessary.
  - a. The borrower(s) must participate in person (unless they have someone with a power of attorney representing them).

- b. The certification needs to show that a person with authority to settle for the beneficiary participated in the mediation. The person’s name, title, and complete contact information must be entered. A selection in the “Authority” dropdown menu must be made.
7. The three mediation outcomes are mutually exclusive—only one outcome should be selected. Sub-outcomes pertaining to that outcome can then be selected.
8. All options that require comments (such as “specify reason” or “Other”) must include a brief explanation of the circumstances. Commerce will not accept certifications that are missing explanations in the options that require comments.
9. All three Net Present Value questions must be answered. Attachments may be required, per the instructions in the Net Present Value section. Also read the “Net Present Value Requirements (Inputs and Test)” section earlier in this document.
10. The Comments box should be used for additional, relevant information, or to clarify information entered in other parts of the form. For example, the comments box should include a brief explanation regarding the certification’s delay, i.e., to explain the gap between the date of the last session and the date of the certification.
11. When all of the information is entered, the mediators must follow the instructions at the top of the form for proper submittal. Mediators must use the “**Click to Print Report**” button found on the actual form, and not the “Submit Form” button in the Adobe software. The "Click to Print Report" and "Click to Edit Report" buttons may be used to switch between edit and print modes, as needed. Once the form is ready for submittal, it must be signed and submitted using one of these options:

Option 1: Print ("Click to Print Report" button), sign, scan, and email the certification to [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov) with “BORROWER-LAST-NAME – Certification” in the subject line.

Option 2: Click on the "Signature" line (page 2), insert a scanned signature file (jpg, tif, gif), click the "Click to Print Report" button, save the file on your computer, and email it to [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov) with “BORROWER-LAST-NAME – Certification” in the subject line.

Option 3: If you do not have scanning capabilities for the certification or your signature, print ("Click to Print Report" button), sign, and mail the certification to Department of Commerce, ATTN: Foreclosure Fairness Program, PO Box 42525, Olympia WA 98504-2525.

*Pub. 5/6/13. Rev. 8/26/13; 9/16/13; 6/12/14; 1/20/15.*

## Completing the Certification When Continuances Are Necessary

Because the statute ([RCW 61.24.163\(12\)](#)) requires the mediator to submit a certification within seven business days after the conclusion of the mediation **session**, Commerce recommends that when continuances are needed, the mediator **schedules** the continuance session, rather than keeping the mediation “open” with no scheduled session on the books. If it is determined later that the additional

session is not needed, the mediator can cancel it and certify the case accordingly. The mediator should include a brief explanation regarding the certification's delay in the Comments box of the certification form, i.e., to explain the gap between the date of the last session and the date of the certification.

*Pub. 6/6/13. Rev. 9/16/13; 1/20/15.*

## Distribution of Written Certifications

According to [RCW 61.24.163\(12\)](#): "Within seven **business** days after the conclusion of the mediation session, the mediator must send a written certification to the department and the trustee and send copies to **the parties...**" The participants listed below should receive a copy of the **signed** Mediation Report/Certification (via email or mail):

- The borrower(s) – see NOTE below
- The borrower's attorney and/or housing counselor
- The referring party
- The beneficiary
- The beneficiary's attorney and/or other representative
- Department of Commerce
- Other participants, at the mediator's discretion

A signed Mediation Certification/Report form shall be submitted to the Department of Commerce **preferably** via email at [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov). See "Completing the Mediation Report/Certification" section above.

NOTE: Commerce interprets [RCW 61.24.163\(12\)](#) to mean the mediator must send the certification to the borrower **regardless** of a "notice of appearance" or other similar documents from the borrower's representative indicating correspondence with the borrower should be directed to the borrower's representative.

*Pub. 5/6/13. Rev. 1/20/15.*

## Re-certification or Certification Withdrawal

Also read the "Complaints Regarding Mediators" section below.

A mediator may consider withdrawing or revising and redistributing the Mediation Certification/Report form **IF there was a material omission or oversight on the mediator's behalf during the mediation session(s) and process, which would have changed the outcome of the mediation and thus the mediator's certification.**

Commerce's guidance is that if a mediator has reason to believe that there was a material omission or oversight on his/her behalf during the session and the mediation process (BUT before the issuance of the Mediation Report/Certification), he/she can re-issue or withdraw the certification. The mediator should explain what the material omission/oversight was **and document it**. The decision to re-issue or withdraw the certification is solely the mediator's, based on documentation/evidence of his/her material omission/oversight. Commerce views this guidance as consistent with the FFA requirement that a mediator issue a certification reflecting the mediation, and that the participants in mediation

address issues of foreclosure that may enable the borrower and beneficiary to reach resolution ([RCW 61.24.163](#)(9) and (12)).

If the mediator issues a re-certification or withdrawal, it should be distributed to the same parties who received the original Mediation Certification/Report with an explanation of his/her material omission or oversight.

*Pub. 5/6/13. Rev. 1/20/15.*

## **Mediating in Good Faith**

When certifying whether each party has acted in good faith pursuant to [RCW 64.24.163\(10\)](#), the mediator has reasonable discretion to determine whether the actions of each party were in substantial compliance with the requirements and the intent of the statute, as noted by the use of the words “may include.” The items listed in [RCW 64.24.163\(10\)](#) indicate “lack of good faith” but are not the exclusive basis for a determination of “lack of good faith.”

The mediator should consider:

- Whether both parties mediated in good faith.
- Whether both parties were able to effectively reach a mutually acceptable agreement.
- Whether the lack of any item specified in Section [RCW 61.24.163\(7\)\(a\)](#) had a material effect on the outcome or may have compromised the result in any significant manner.

*Pub. 5/6/13.*

## GUIDANCE REGARDING FEES

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### Mediation Fees

Mediators should **disclose ALL fees** and related policies **upfront** in the mediation agreement or the scheduling notice they are sending out to the parties when the mediation is first scheduled.

For purposes of mediation payment, mediation starts once the mediator, or an administrator acting on their behalf, begins contacting the parties to schedule the mediation.

According to the FFA at [RCW 61.24.163\(17\)](#), mediators may charge reasonable fees as authorized by Commerce. Unless the fee is waived, the parties (borrower and beneficiary) agree otherwise, or Commerce otherwise authorizes, a foreclosure mediator's fee may not exceed \$400 for preparing, scheduling, and conducting a mediation session lasting between one and three hours.

Mediators are authorized to charge a fourth hour of mediation at \$130. Commerce has not authorized fees for a mediation session that extends beyond four hours.

If the parties agree, the mediator may charge the same amounts for continuances or additional sessions.

Payment of the mediator's fee(s) must be divided equally between the beneficiary and the borrower.

Mediation fees are non-refundable once the mediation session is scheduled or other substantial preparation has started. This also applies to continuances or additional sessions. However, mediators may opt to refund a portion of the fee at their discretion.

*Pub. 5/6/13. Rev. 6/12/14.*

### Rescheduling Fees

[RCW 61.24.163\(6\)](#) states that the "[...] parties may agree to extend the time in which to schedule the mediation session." Commerce takes the position that once the mediation is scheduled both parties (borrower and beneficiary) may agree to reschedule or postpone the session, but rescheduling or postponing is at the discretion of the mediator. This means that the mediator may ask for a rescheduling fee. If the parties do not agree to this fee, the mediator may refuse to reschedule and the parties must attend the mediation as originally scheduled.

*Pub. 5/6/13.*

## GUIDANCE REGARDING APPROVED FORECLOSURE MEDIATORS

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### Approving Mediators

In Washington State mediators can mediate FAA mediations if they meet certain minimum requirements AND are approved by Commerce ([RCW 61.24.169](#)). Commerce maintains an approved mediators list, which can be found on our FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

**Commerce reserves the right to approve a mediator or remove a mediator from the FFA approved mediators list.**

Any candidate who wishes to become an approved foreclosure mediator will be required to successfully complete the following:

- Meet all of the minimum statutory requirements (see below).
- Submit an application to serve as a FFA mediator, which includes documentation of the mandatory experience, qualifications, and training.
- Attend a Commerce foreclosure mediator training program.
- Co-mediate at least three FFA mediations within the parameters required by Commerce.

The minimum statutory requirements identified in [RCW 61.24.169\(1\)](#) are:

1. Must have completed 10 mediations; **AND**
2. Must have accomplished **ONE** of the following:
  - Completed a 40-hour mediation course **AND** 60 hours of mediating
  - Has 200 hours of mediating experience; **AND**
3. Is **ONE** of the following:
  - Attorney who is active member of the Washington State Bar Association (WSBA)
  - Employee of a U.S. Department of Housing and Urban Development (HUD) approved housing counselor agency or approved by the Washington State Housing Finance Commission (HFC)
  - Employee or volunteer of a Dispute Resolution Center (DRC) under Chapter 7.75 RCW
  - Retired judge of Washington courts
  - Other experienced mediator

*Pub. 5/6/13. Rev. 6/6/13.*

### Assigning Mediators to Cases

Commerce relies on our FFP database to assign mediators to eligible cases based on the mediator's service county, capacity, and availability. Cases are assigned to mediators automatically, without emailing or calling in advance to inquire about the mediator's availability. Mediation case Notices are sent electronically (by email) to the mediator, trustee, and referrer. Hardcopy Notices are mailed (by postal service) to the beneficiary and the borrower(s).

Service counties mean the counties in which the mediator is willing to mediate. Capacity means the maximum number of cases that a mediator can and is willing to have open at any point in time. The availability is based on a mediator's capacity and the actual number of open cases.

Commerce will not assign or re-assign mediators upon request or preference from either party.

*Pub. 5/6/13. Rev. 9/16/13.*

## **Conflicts of Interest, Recusals, Mediators Also Acting as Homeowner or Beneficiary Representatives**

Mediators who are also attorneys and choose to represent either homeowners or beneficiaries in foreclosure mediations or legal proceedings may be subject to limitations on the type and number of mediations assigned to them, due to the potential for a conflict of interest with one or more parties. It is incumbent on the mediator to inform Commerce as soon as possible of his/her conflicts of interests.

Commerce expects that mediators will recuse themselves from cases that pose conflicts of interest. Commerce expects recusals to occur **early in the mediation process**, for example, right after a new mediator assignment has been made. Mediators should timely review their mediation assignments to identify without delay whether the mediator has a conflict of interest. **Recusals made while the mediation process is well underway, or after session(s) have occurred, should not be the norm.** Mediators are also expected to refrain from creating a conflict of interest with either party **while** they are conducting mediation for that party.

The statute places the responsibility on the assigned mediator to conduct the mediation process. This includes communicating with the parties, ensuring that documents are exchanged pursuant to the statutory timelines, convening one or more mediation sessions, and certifying the mediation. These duties are specific to the mediator, not to Commerce. This means that once a mediator accepts a case assigned by Commerce, the mediator is **solely** responsible to conduct, convene, and certify the case, and bring closure to the mediation process contemplated by statute.

If **during a mediation process** a mediator discovers a conflict of interest such that he/she must recuse him/herself from the mediation, Commerce must be notified right away. Commerce may re-assign mediations on a case-by-case basis provided that the mediator demonstrates:

- (1) there is an **actual** conflict of interest, such as a close personal relationship, financial involvement, or other interests that are too closely aligned with either party such that the mediator is not impartial, AND
- (2) the mediator has made appropriate alternative arrangements to transition the case; it is incumbent upon that mediator to timely communicate with the parties and make acceptable alternative arrangements for the case to be brought to completion, including conferring with another approved foreclosure mediator regarding assuming the mediation case.

If there is a newly discovered actual conflict of interest AND once arrangements have been made, as described above, Commerce will re-assign the case to the new mediator and formally notify the parties.



**Commerce will not re-assign mediations due to personality conflicts or personal preferences.**

Commerce may remove a mediator from the approved list of FFA mediators if it is determined that a mediator has too frequent recusals, such that they interfere with the effective administration of the program.

*Pub. 5/6/13. Rev. 6/12/14; 1/20/15.*

## Privacy and Confidentiality

The FFA is silent as to mediator responsibility for confidentiality of parties' information. However, best practice is for mediators to observe confidentiality and refrain from sharing information outside of mediation. Mediators should also be aware that laws other than the FFA may forbid disclosure of certain information that is provided in mediation.

*Pub. 5/6/13.*

## Complaints Regarding Mediators

Commerce receives complaints about mediators at the following times: (1) shortly after the mediation concluded; (2) during the mediation process; and (3) long after the mediation concluded.

The process described below applies to the first category—complaints made *shortly* after the mediation concluded. When we receive a complaint *during* the mediation process, we forward the complaint to the mediator and encourage the complainant and the mediator to openly communicate and solve the issue among themselves. We encourage the mediator to review the statute and the program guidelines, but we avoid inserting Commerce into the mediation process. When we receive complaints *several months after* the mediation concluded, we inquire about the delay and, depending of the length of time passed and the reasons for the delay, we decide whether the complaint needs further review.

Complaints about mediators need to be submitted shortly after the mediation's conclusion. They must be submitted to Commerce in writing using the FFP Complaint Form posted on the FFP website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures) (see menu on the right-hand side). Instructions on how to complete the form and what to expect are included in the form.

Typically, complaints are about a mediation certification or about a mediator's conduct or bias. **Commerce will NOT process complaints about a beneficiary's conduct, attorney's conduct (representing the borrower or the beneficiary), or other parties' conduct (see more below).**

When Commerce receives a complaint regarding the manner in which an approved foreclosure mediator conducted a mediation and/or certified the results of the mediation, Commerce will review the complaint and provide the mediator with the opportunity to respond to the issues raised by the complainant.

If the complaint is about a certification, Commerce's guidance is:

- if there was a material oversight or omission on the mediator’s behalf during session(s) or the mediation process, the mediator can withdraw or correct the certification, and provide an explanation to all parties;
- if there was no material omission/oversight on his/her behalf, the mediator may retain the certification as submitted.

Also read the “Re-certification or Certification Withdrawal” section above.

Regardless of his/her decision about the certification, we ask the mediator to provide Commerce with a response to the issues raised by the complainant.

After we receive the mediator’s response, we review it and evaluate it for completeness and compliance with the statute. If we need clarifications or have questions, we follow-up with the mediator by email or phone call.

Once the mediator’s response is complete to Commerce’s satisfaction, we respond to the complainant with our findings. In some cases we may forward a copy of the mediator’s response to the complainant.

Commerce tracks all of the complaints and watches for patterns of bias, misconduct, or egregious errors. While Commerce does not have any authority to re-certify or withdraw certifications, should such a pattern become apparent for a mediator, Commerce has the authority to remove that mediator from the approved mediators list.

*Pub. 5/6/13. Rev. 6/17/13; 9/16/13; 6/12/14; 1/20/15.*

## Other Types of Complaints

### **Complaints about Beneficiaries:**

Commerce has no enforcing authority over the financial institutions or their alleged actions. Complaints about a beneficiary’s conduct or actions should be submitted to the Washington State Office of the Attorney General [Consumer Protection Division](#). The Consumer Protection Division created the Foreclosure Compliance Program to enforce the [Deed of Trust Act](#), as required by the Act (see [RCW 61.24.172](#)).

### **Complaints about Counselors:**

Complaints about Washington State housing counselors can be emailed to [ForeclosureMediation@commerce.wa.gov](mailto:ForeclosureMediation@commerce.wa.gov). Commerce will forward them to the Washington State Housing Finance Commission, which contracts with the housing counselor agencies and reviews their performance.

### **Complaints about Attorneys:**

Commerce has no authority to interfere in an attorney-client relationship. Complaints about a private attorney can be directed to the Washington State Bar Association.

*Pub. 6/12/14.*