



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

## **FORECLOSURE FAIRNESS PROGRAM**

### **All-Foreclosure Mediator Event—November 2, 2015**

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#### **QUESTION & ANSWER DOCUMENT**

*The topics in this document are a compilation of participant questions, comments, and observations captured during the November 2, 2015 All-Foreclosure Mediator Event “Parking Lot” documentation, Case Study outputs, and comments provided in the Mediator Event Evaluation. This document is organized by general topic areas with specific questions/observations within each topic, followed by Commerce responses. Topics are alphabetical with exception to “Miscellaneous” which is placed at the end of the document. In most instances, Commerce maintained wording as provided to maintain integrity of the feedback.*

## **Americans with Disabilities Act (ADA)**

**Add to Commerce's guidelines (ADA section) accommodations for deaf or blind clients during mediation; Interpreting ASL; who bears the financial burden of this?**

*Please see revised [Program Guidelines](#) for the answer to these questions.*

**How does Commerce deal with language in regard to ADA compliance? Sign language?**

*Please see revised [Program Guidelines](#) for the answer to these questions.*

## **Borrower Representation/Housing Counselors**

**We are losing our one housing counselor program locally. Is anything being done statewide to prevent closure and loss of housing counselor programs?**

*Program stakeholders and funding partners are currently working to "right-size" the program to ensure the essential program activities are funded appropriately; this includes amending the statute so housing counseling remains available and provision of this service is financially viable.*

**Only housing counselors or properly trained attorneys should be able to refer to mediation. Housing counselors are the key to the FFA. Attorneys seldom know what questions to ask borrowers.**

*Commerce does not have control over "properly trained" attorneys submitting referrals to the program. The statute does not contain any language to that regard. After assignment and during the mediation process, mediators can send complaints to the [Washington State Bar Association](#) regarding specific attorneys that are representing borrowers (see "Guidance Regarding Foreclosure Mediators" in the Program Guidelines for additional information). Commerce expects mediators to refer un- and poorly-represented borrowers to the borrower preparation resources listed on page 2 of the Referral for Mediation Notice sent to the parties and the mediator at*

*time of assignment or to the program website. Both resources contain valuable borrower representation information, including contact information for the Washington Homeownership Resource Center hotline and Northwest Justice Project's civil legal aid program. The [program website](#) also contains links to "Best Practices for Representing Borrowers in Foreclosure Mediation" (a Northwest Justice Project document) and links to additional Homeowner Resources.*

**Borrower's representative should be a certified housing counselor, not an attorney with no training.**

*Commerce does not have authority to require that a borrower representative be a certified housing counselor. [RCW 61.24.163\(7\)\(b\)\(i\)](#) states a borrower "may be represented by an attorney or other advocate;" [RCW 61.24.160\(3\)](#) states referrals to foreclosure mediation can be made by housing counselors or attorneys. Mediators can send complaints to the [Washington State Bar Association](#) regarding specific attorneys that are representing borrowers. Please see "Guidance Regarding Foreclosure Mediators" in the [Program Guidelines](#) for additional information.*

**How do you hold the borrower's rep accountable without penalizing the borrower? Complaint process to HFC. Unfortunately may not be able to avoid.**

*Unfortunately, this may be unavoidable. Mediators may file a complaint with the [Housing Finance Commission](#) or the [Washington State Bar Association](#). Many mediators have stated they are reluctant to do so due to the likelihood the mediators will need to work with the same borrower representatives in the future. Please see "Guidance Regarding Foreclosure Mediators" in the [Program Guidelines](#) for additional information.*

**Attorneys (mediators) refuse/cannot contact borrower directly (unless borrower's attorney approves) due to Lawyers Code of Ethics.**

*It is not appropriate for Commerce to address this question or any ethics code questions applicable to attorneys. Attorney-mediators should contact the Washington State Bar Association for questions regarding the Rules of Professional Responsibility or other ethics considerations applicable to attorney-mediators.*

**Commerce received the following questions/comments about mediator communication with poorly/under-represented borrowers; our response addresses all issues.**

- **How do we realistically approach borrowers that are under-represented to give them other options?**
- **Steer the buyer towards Commerce: how to do forms - when poorly represented.**

*Mediators should not direct poorly/under-represented borrowers to Commerce for form completion assistance or mediation process guidance. Although mediators must remain neutral in the process, Commerce expects mediators to refer poorly/under-represented borrowers to the borrower preparation resources listed on page 2 of the Referral for Mediation Notice sent to the parties and the mediator at time of assignment or to the program website. Both resources contain valuable borrower representation information, including contact information for the Washington Homeownership Resource Center hotline and Northwest Justice Project's civil legal aid program. The [program website](#) also contains links to "Best Practices for Representing Borrowers in Foreclosure Mediation" (a Northwest Justice Project document) and links to additional Homeowner Resources.*

**How does Commerce urge unrepresented homeowners to hire counsel? Should that be an important function?**

*Commerce sends a "Referral for Mediation Notice" to borrowers at time of assignment ("Notice" also sent to mediator, beneficiary, referrer, and Trustee). The "Notice" contains information for borrowers to help them prepare for mediation ("Preparation for Mediation", page 2). Resources provided include toll-free numbers for the Statewide Foreclosure Hotline (Homeownership Resource Center), Statewide Civil Legal Aide Hotline (Northwest Justice Project), U.S. Department of Housing and Urban Development, and a link to the [program website](#) (which lists additional Homeowner Resources). Commerce also directs borrowers to these resources if directly contacted.*

## Certification Form

Commerce received the following questions/comments about the certification form; our response addresses all issues.

- Please allow a finding of "not in good faith" for both sides (parties) on the certification form.
- Certification request – allow for agreement reached and not in good faith

*Mediators may certify both parties as "Not in Good Faith" within both the "Session(s) Occurred – No Agreement Reached" and "No Mediation Session Occurred" mediation outcomes. After careful consideration and review of the Statute, Commerce will not revise our certification form and data collection system to allow for a determination of "Not in Good Faith" by either or both parties when an agreement is reached. The Statute is sufficiently gray in regards to the benefits or harm the addition of these sub-outcomes may bring to the parties when an agreement is reached. You may however continue to note this information in the Comments section of the certification.*

**Cert. request – allow for agreement reached – other (terms differ from sub-categories provided).**

*After careful consideration, Commerce has decided not to add a sub-outcome under "Session(s) Occurred-Agreement Reached" that allows for other agreements reached that contain terms different than those already provided. Please continue to select "Session(s) Occurred-Agreement Reached/Other Loan Restructure/Modification (new loan terms not provided to mediator)" if new loan terms are not provided.*

**Be able to download the certification form from the Commerce website**

*Commerce staff sent a [Foreclosure Fairness Program Update 12/18/2015](#) with an attached document that contained detailed instructions for downloading, opening, editing, and printing certifications (Downloading, Opening, Saving, Etc). The email attached a copy of the certification tips document ["Tips for Downloading, Opening, Editing, Printing FFA Mediation Report"](#) and a copy of the "FFP Certification How to Guide". The "How to Guide" is posted on the ["November 2015 All-Foreclosure Mediator Event"](#) training page on our program website.*

**Cert request – allow for less typing on contact info – why must we type info you provided to us?**

Commerce revised the certification form on 2/6/2015. The revisions included many enhancements, including a copy/paste feature in the "Borrower(s) and Representative(s)" and "Beneficiary and Representative(s)" sections. Commerce communicated these revisions in a Foreclosure Fairness Program Update sent 2/9/2015 (["Foreclosure Fairness Program Update - February 9, 2015 - Revised Certification Form and Borrower Options after Mediation"](#)). The email attached a copy of the [revised certification](#) as well as a copy of the ["Borrower Options after Mediation"](#) document. Commerce requests mediators include borrower and borrower/beneficiary representative information on the certification form because this information often changes between the time a case is assigned and certification.

**Why does the certification form have a drop-down choice for the borrower that says participation "in person," "by phone," and "by video" if the borrower must be there in person??**

As you know, the borrower(s) identified on the loan must attend the mediation in person ([RCW 61.24.163\(8\)\(a\)](#)). If all borrowers are not able or willing to attend the mediation in person, please select the appropriate method of participation and provide clarification in the Comments section. As a mediator you will need to decide if the borrower(s) inability or unwillingness to attend in person is a factor in determining good faith participation.

**On cert form – sometimes we get P&I figures and principle is not broken out on form.**

Per [RCW 61.24.163\(18\)\(b\)](#), the Foreclosure Fairness Program must report annually the results of the program to the Washington State Legislature; outcomes requested include "...the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions..." Mediators may remind beneficiaries of this statutory requirement when asking for clarification of loan modification figures.

**A TPP is not a "resolution that avoids foreclosure." It is not a final agreement. DO NOT report it as a final agreement reached.**

A Temporary Payment Plan (TPP) in itself is not a resolution that avoids foreclosure. A TPP does not "cure" a default until it becomes a permanent loan modification. For this reason, a TPP is not listed as a sub-outcome on the certification form under "Session(s) Occurred-Agreement Reached". Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for additional information.

**Please give us more guidance on filling out the certification when there is a loan mod. What box do I check when they add on unpaid amounts at the end – call it forbearance? What amount?**

*The following guidance was provided by Northwest Justice Project (NJP). An assumption was made that the question is referring to the arrears (i.e. delinquent past due amounts, which usually include accrued interest, fees, and costs), that amount is usually capitalized and added to the unpaid principal balance, as modified by the modification agreement. Many modifications, however, include what is called, "principal forbearance". This is where a portion of the modified principal balance is separated from the interest-bearing principal balance; the forbearance amount is not interest bearing and is not amortized. This amount is still due upon the loan's maturity, but no payments are made until the loan matures. This amount may include a combination of principal, accrued interest, fees, and costs. This amount is typically determined after the arrears are capitalized and is usually only referred to as principal forbearance - typically it is not possible to determine what amount of the principal forbearance is attributable to forbearance of accrued interest, fees or costs, as distinct categories.*

*The mediator should ask the beneficiary for a specific break down of the forbearance amount, however, if this information is not available the mediator may indicate the total forbearance amount by checking all four of the Forbearance boxes (i.e. "Forbearance of Principal", "Forbearance of Interest", "Forbearance of Fees and Penalties", and "Forbearance – Other"; see example below). In the right hand column, where it says "Write-off \$", across from "Forbearance - Other", the mediator may indicate the total forbearance amount. This would indicate that all of the four sub-categories are included in this one Forbearance amount. It is important to remember that this amount is not actually written off.*

### **Example**

<input checked="" type="checkbox"/> Forbearance of Principal	Write-off \$:
<input checked="" type="checkbox"/> Forbearance of Interest	Write-off \$:
<input checked="" type="checkbox"/> Forbearance of Fees and Penalties	Write-off \$:
<input checked="" type="checkbox"/> Forbearance – Other	Write-off \$: 10,000

*The following guidance was provided by Northwest Justice Project (NJP). An assumption was made that the question is referring to the interest rate reduction included in the modification. Mediators can note there was a percentage change by selecting "Interest Rate Reduction/% Change" and note the percentage change. For example, if the pre-modified interest rate was 8% and the modified interest rate is 5%, the mediator would note a 3% interest rate reduction.*

## **Commerce Data**

**In Commerce's reporting, outcomes are categorized by whether "mediation occurred." That is wrong. What is correct is to say whether a mediation "session occurred." Will you change your wording so it is correct?**

*Commerce revised the certification form language on 6/30/2014. The old version contained "mediation" language. The revised form includes Mediation Outcome language as follows: "Session(s) Occurred - Agreement Reached", "Session(s) Occurred - No Agreement Reached, and "No Mediation Session Occurred". Commerce's data is pulled from our program database. This data is derived from the information provided in mediation certifications. Although we revised the certification form language on 6/30/2014, we did not change the internal data labels in our program database, because of this, generated reports may still reflect the old language. Commerce will do our best to report our outcomes using "Mediation Session" language.*

**Can you put this data on your website?**

*Commerce will begin posting Foreclosure Fairness Program outcomes on our [program website](#) on a quarterly basis.*

## Communication

**Does Commerce want to be on email loops, other than those that have scheduling info (Notice of Scheduling, Cancellations, and Reschedule)?**

*Per [RCW 61.24.163\(7\)\(b\)](#), the mediator must send "written" notice to the borrower, the beneficiary, and Commerce. We do not need to be included in emails that do not pertain to session scheduling notices, cancellations, or rescheduled sessions. Please keep in mind all materials and communication received by Commerce or sent from Commerce are considered public records, and are subject to public review, unless a law specifically exempts certain information from disclosure. Please see ["Public Disclosure Requests"](#) on Commerce website.*

**If borrower (not their rep) does not have email, do we send all notices by snail mail?**

*Per [RCW 61.24.163\(7\)\(b\)](#), the mediator must send "written" notice to the borrower, the beneficiary, and Commerce. Commerce allows "written" notice of the scheduling document via email. 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. If a borrower does not have access to email, the scheduling notice(s) must be sent via United States Postal Service. Mediators should also send a copy to a borrower's representative. Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for additional information.*

**So, we send everyone the mediation scheduling notice – email ok. Is there anyone that you must mail it to as well? I thought borrowers and beneficiary needed one by mail as well. Others at my table say no.**

*Commerce sends a hard copy of the "Referral to Mediation Notice" to the borrower and the beneficiary. Per [RCW 61.24.163\(7\)\(b\)](#), the mediator must send "written" notice to the borrower, the beneficiary, and Commerce. Commerce allows "written" notice of the scheduling document via email. In order to ensure the borrower receives the required scheduling notice information, 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. If a borrower does not have access to email, the scheduling notice(s) must be sent via United States Postal Service. Mediators should also send a copy to a borrower's representative. Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for additional information.*

**When you say document everything, do emails that have been sent suffice or should we keep journals?**

*Commerce does not require a specific form of documentation during the mediation process. Transparent communication is encouraged whenever possible. We recommend mediators use their professional judgement with regards to what and how to document each mediation session/process.*

**Under what circumstances can I as a case manager/coordinator leave off the borrower? I thought in the interest of transparency, the borrower should be included even if the lender leaves them off and borrower rep says they are in contact with borrower.**

*Transparent communication is encouraged whenever possible. Where it makes sense, include the borrower in all communication. Please see the [Program Guidelines](#) regarding borrower receipt of the Scheduling Notice (Guidance Regarding Mediation Sessions), borrower receipt of the certification (Guidance Regarding Certifications/Report), and communication prior to cancelling a mediation per RCW 61.24.163(11) (Guidance Regarding Mediation Sessions) for information regarding required and encourage borrower communication.*

## **Complaints**

**When a complaint is filed during an on-going mediation and it gets resolved so no formal complaint ever materializes, should the mediator send a report to Commerce since Commerce doesn't know what transpired?**

*Commerce does not insert itself into an ongoing mediation process. Mediators may submit a report to Commerce if they would like to share the outcomes of complaints during the mediation process; Commerce staff will attach the report to the case in the program database but will not add the information to our formal complaint tracking sheet. Please see "Guidance Regarding Approved Foreclosure Mediators" in the [Program Guidelines](#) for additional information.*

**Can the mediator or case manager file a complaint against a borrower rep or beneficiary rep? HFC? WSBA?**

*Mediators may file a complaint with the [Housing Finance Commission](#) or the [Washington State Bar Association](#). Please see "Guidance Regarding Approved Foreclosure Mediators" in the [Program Guidelines](#) for additional information.*

**Both parties complained to Commerce. What does Commerce do with the complaint? How is this handled now and in the future?**

*Either or both parties can submit a complaint about a mediator to Commerce. Complaints are handled per our [Program Guidelines](#) (see "Guidance Regarding Approved Foreclosure Mediators").*

**Clarify the types of complaints - percentages from Brigid's presentation (didn't add to 100%).**

*Commerce staff revised the complaint percentages in the Commerce Presentation and posted the Presentation on our website November 9, 2016. This information was communicated in an email November 9 to Mediator Event attendees, as well as all mediators, case managers, and DRC Executive Directors who were unable to attend the Event. Please see "Commerce's PowerPoint Slides" on the ["November 2015 All-Foreclosure Mediator Event"](#) Training page.*

## **Good Faith Determination**

**Commerce received the following questions/comments about Good Faith determination; our response addresses all issues.**

- **What happens after a bad faith cert? What's the point?**
- **In what ways does a beneficiary lack of good faith hurt borrowers? Hurt beneficiaries?**
- **Consequences of bad faith for (1) borrowers and (2) beneficiary?**
- **Will issuing beneficiary in bad faith result in something good for the borrower? Any evidence?**
- **Would be nice to get some hard, accurate data as to how many (and percent) beneficiary bad faiths result in a modification**
- **Please find out what actually happens when "not in good faith" certification is filed; Mods? Etc. Lots of hearsay info being floated around.**

*Commerce does not have statistics regarding what happens to a borrower after a "Not in Good Faith" certification is submitted. We have heard anecdotally that modifications have been offered to borrowers after the receipt of "Beneficiary Not in Good Faith" certifications. Researching these statistics is on our list for future consideration. We revised our Program Guidelines to reflect the statutory language about actions possible due to findings of "Beneficiary Not In Good Faith" and "Borrower Not In Good Faith" as well as our submittal of certifications showing "Beneficiary Not In Good Faith" to both the Washington State Attorney General's Office (Consumer Protection Division) and Washington State Department of Financial Institutions for review and possible investigation. Commerce posted a document on our [program website](#) that provides information about borrower options and resources if there is no agreement after mediation. To access the document, click on "Borrower Options After Mediation" within the "What happens if there is no agreement after mediation?" section.*

**Once you decided to require a mediator to make a determination of “good faith,” it is no longer a “mediation.” Can we look at calling it something else?**

*The original FFA legislation uses the term "mediation". This can only be changed via a legislative amendment. At this time, Commerce does not intend to request a change in terminology via the legislative process.*

**Does a TPP constitute an agreement? If it does, is there a way for a mediator to make a finding regarding good faith? Does it serve anyone to make a finding?**

*A Temporary Payment Plan (TPP) in itself is not a resolution that avoids foreclosure. A TPP does not “cure” a default until it becomes a permanent loan modification. For this reason, a TPP is not listed as a sub-outcome on the certification form under “Session(s) Occurred-Agreement Reached”. Mediators may find either or both "Not in Good Faith" within the "Session(s) Occurred - No Agreement Reached" and "No Mediation Session Occurred" mediation outcomes. Please see “Guidance Regarding Mediation Sessions” and “Guidance Regarding Certifications/Reports” in the [Program Guidelines](#) for additional information.*

**Evaluation of good faith – can you make a distinction between ‘principal’ and ‘representative?’ I.E. between borrower behavior and counselor behavior? And between beneficiary behavior and their rep’s behavior?**

*The Statute refers to "party (parties)", "borrower", and "beneficiary"; it does not make a distinction between the "principal" and the "representative". As such, Commerce will not revise the certification form to allow for a distinction between the "principal" (borrower or beneficiary) and the "representative" (borrower representative or beneficiary representative). Mediators may include this information in the Comments section of certification form.*

**Can we get breakdown statistics on bad faith borrower vs. beneficiary and reasons why?**

*Commerce will begin posting Foreclosure Fairness Program outcomes on our [program website](#) on a quarterly basis.*

**Commerce received the following questions/comments about a finding of “Not in Good Faith” when an agreement is reached; our response addresses all issues.**

- **We want to be able to determine “Not in good faith” even when there is an agreement reached.**
- **Agreement reached, but both parties in BAD FAITH. How to report???**
- **If there is agreement, but also bad faith, how should the bad faith be reported and on what document?**
- **Does Commerce want us to note BAD FAITH if there is clearly bad faith but there is an agreement reached? And if so, for what purpose?**
- **How do I assign a lack of good faith ruling on certification if a modification was given? Does this help with the reporting or tracking?**

*After careful consideration and review of the Statute, Commerce will not revise our certification form and data collection system to allow for a determination of Not in Good Faith by either or both parties when an agreement is reached. The Statute is sufficiently gray in regards to the benefits or harm the addition of these sub-outcomes may bring to the parties. You may however continue to note this information in the Comments section of the certification.*

## Increased Income

**We need guidelines on change of circumstance (increased income) during the process – can the mediator force new application of beneficiary?**

*[RCW 61.24.163\(9\)\(a\)](#) allows the mediator to consider "the borrower's current and future income, debts, and obligations..." when addressing issues of foreclosure. Commerce believes a situation like the one proposed is a great example of mediators using the "art" as well as the "science" of mediation ("art" is the use of mediator skills to "Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible." ([RCW 61.24.005, "Findings -- Intent"](#)); "science" is the use of the [FFA](#) and [Program Guidelines](#)). The borrower/borrower representative play a role in determining if new application documents will move the mediation process towards an agreement reached by the parties. Ultimately, the mediator must ensure the parties address all issues of foreclosure per [RCW 61.24.163\(9\)](#) and if the parties mediated in good faith per [RCW 61.24.163\(10\)](#).*

**How can we help people who were unemployed, got a new great job, so beneficiary denies modification due to income?**

*If the beneficiary denies a modification due to income during the mediation process, the mediator may use authority granted in statute to continue the session once [RCW 61.24.163\(8\)\(b\)](#) or work with the parties to come to agreement on an additional session to discuss options (Is there another type of loan modification for which the borrower may qualify?). The borrower/borrower representative plays a role in advocating for the discussion of additional options. Ultimately, the mediator must ensure the parties address all issues of foreclosure per [RCW 61.24.163\(9\)](#) and determine if the parties mediated in good faith per [RCW 61.24.163\(10\)](#).*

## Languages (Non-English speaking borrowers)

**Commerce received the following questions/comments about non-English speaking borrowers; our response addresses all issues.**

- Need to have non-English speaker bring an interpreter with them.
- Whose responsibility is it to pay for the interpreter?

*Please see revised [Program Guidelines](#) for the answer to these questions.*

Commerce received the following questions/comments about the provision of foreclosure mediation documents in languages other than English; our response addresses all issues.

- When will Commerce have notice documents translated into Spanish, Korean, Chinese, Ukrainian, etc.?
- How about a sheet to give non-English instructions on critical dates?
- Forms from Commerce in languages other than English
- Commerce should have initial referral letter in Spanish as well as English!

*Due to limited resources and capacity, this topic is on the list for future consideration.*

Commerce received the following questions/comments about interpreter services for mediations with non-English speaking borrowers; our response addresses all issues.

- Info on AT&T language line
- Develop list of language resources to put on Commerce's website
- Provide a list of interpreters for language barriers

*Due to limited resources and capacity, this topic is on the list for future consideration.*

**Put a question on the referral form – Is translation needed?**

*This topic is on the list for future consideration. Until then, please communicate directly with the referrer or borrower representative to inquire about language accommodations prior to the scheduling and documents exchange process. The Referral to Mediation Form includes space on page 2 for additional information that may be helpful to the mediation; please refer to that information as it may provide relevant information. Please see [program website](#) for the form (within "Referrers" section).*

## **Mediator's Role**

**A theme that keeps coming up in many different questions/topics – Where is the line between us, as mediators, being neutral and not jumping too far vs. stepping in to move things forward? Example: Asking for NPV, calling poorly represented borrowers, asking questions that borrowers need but rep doesn't ask.**

Commerce recommends mediators apply the authority provided within the statute, the guidance provided in the Program Guidelines, and the information provided in Commerce mediation documents and the program webpage during the mediation process. For example, the FFA provides for mediator authority on issues pertaining to convening a mediation session ([RCW 61.24.163\(6\)](#)), ensuring party readiness for engagement in a production mediation ([RCW 61.24.163\(7\)\(a\)](#)), one-time continuation of the mediation session ([RCW 61.24.163\(8\)\(b\)](#)), and requiring NPV inputs and running an NPV test ([RCW 61.24.163\(5\)\(g\)](#) and [\(9\)\(c\)](#)). Program Guidelines support and clarify authority written in the FFA. For example, the Guidelines provide pertinent information about NPV requirements for both the inputs and test before, during, and after mediation. Both the Commerce "Referral to Mediation Notice" sent to the parties and the Commerce website provide useful resources for un- or poorly-represented borrowers; Commerce expects mediators to direct borrowers to this information as a 3rd party neutral. Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for additional information.

## Net Present Value (NPV)

**Commerce needs to promulgate clear BRIGHT LINE rule for both parties to promptly supply NPV inputs and their NPV calculations before mediation.**

The statute addresses NPV input requirements, analysis, and results in [RCW 61.24.163\(5\)\(g\)](#) (before mediation); [RCW 61.24.163\(9\)\(b\) and \(c\)](#) (during mediation); and [RCW 61.24.163\(12\)\(e\)](#) and [RCW 61.24.163\(14\)\(c\)](#) (after mediation). The statute provides mediator discretion to determine good faith participation based on provision of required documentation (see [RCW 61.24.163\(10\)](#)). Please see "Guidance Regarding Mediation Sessions" and "Guidance Regarding Certifications/Reports" in the [Program Guidelines](#) for additional information.

**Folks at our table wonder what NPV analysis gives Commerce in terms of value. Servicers say it usually doesn't factor in to the decision. It's not in law (only inputs). What does Commerce do with it? Some lawyers refuse to do it, say they don't have to.**

[RCW 61.24.163\(5\)\(g\)](#) requires beneficiaries to provide NPV inputs. [RCW 61.24.163\(9\)\(b\)](#) states the mediator "may require the participants to consider the following...(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recover following foreclosure". [RCW 61.24.163\(9\)\(c\)](#) states "The mediator may run the calculation in order for a productive mediation to occur and to comply with the mediator certification requirement." 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) ([RCW 61.24.163\(9\)\(c\)](#)). 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. Per the "FFP Certification How to Guide", the 3 NPV questions on the certification form are derived from RCW requirements. A mediator must rely on the analysis in order to answer NPV questions 2 and 3 in certain mediation scenarios. The "How to Guide" is posted on our website (click on ["November 2015 All-Foreclosure Mediator Event"](#) Training page).

### **Should Commerce guideline address NPV analysis? Does it currently?**

Commerce provides guidance regarding the NPV test/analysis. Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for additional information. See also the "FFP Certification How to Guide" for information regarding how the NPV analysis is used to answer specific NPV questions on the certification form (click on ["November 2015 All-Foreclosure Mediator Event"](#) Training page).

### **Which boxes in the FDIC Mod in a Box are we required/expected to adjust? Obviously income, BPO, but re-default rates, the interest rates in the upper left? Those seem tricky to figure out.**

Please refer to the "Federal Regulatory Guidelines and NPV Inputs & Test" content on the Foreclosure Fairness Program website (click on the ["November 2015 All-Mediator Event"](#) Training page link). If you cannot find the guidance you are looking for please contact Sheila O'Sullivan via email at Northwest Consumer Law Center (NWCLC) ([Sheila@nwclc.org](mailto:Sheila@nwclc.org)), Ariel Speser via email at Northwest Justice Project (NJP) ([ariels@nwjustice.org](mailto:ariels@nwjustice.org)), Meredith Bruch via email at Northwest Justice Project (NJP) ([meredithb@nwjustice.org](mailto:meredithb@nwjustice.org)), or Randy Lowell via email at Parkview Services ([randy@parkviewservices.org](mailto:randy@parkviewservices.org)).

### **When, if at all, is it appropriate for the mediator to mention or ask about documents like NPV results when neither party brings up the topic during mediation?**

The statute addresses NPV input requirements, analysis, and results in [RCW 61.24.163\(5\)\(g\)](#) (before mediation); [RCW 61.24.163\(9\)\(b\) and \(c\)](#) (during mediation); and [RCW 61.24.163\(12\)\(e\)](#) and [RCW 61.24.163\(14\)\(c\)](#) (after mediation). Commerce provides guidance regarding NPV inputs, test, and results for purposes of certification in our [Program Guidelines](#); please see "Guidance Regarding Mediation Sessions". See also "Mediator's Role" section in this document for further guidance.

## Scheduling and Fees

Commerce received the following questions/comments about mediator authority to assess rescheduling fees; our response addresses all issues.

- Is it appropriate to ask the party who is requesting the reschedule if they are willing to pay the full reschedule fee?
- In amendment process – seek authority for mediator to assess reschedule fee against party responsible for delay

*It is not appropriate for the mediator to ask the party who is requesting the reschedule if they are willing to pay the entire reschedule fee or to assess the reschedule fee against the party responsible for delay. Commerce is revising our guidance to incorporate language regarding the split of rescheduling fees. This new guidance requires the reschedule fee to be split evenly between the parties, unless agreed upon by both parties in writing. Please see “Guidance Regarding Fees and Scheduling” in the [Program Guidelines](#) for additional information.*

**By Commerce standards: What is the difference between continuances, reschedule, and mediator’s discretionary second session?**

*A mediator’s “discretionary continuance” is the one session they have the discretion to schedule per [RCW 61.24.163\(8\)\(b\)](#). A mediator does not have a “mediator’s discretionary second session”; they do have the one session they have the discretion to schedule per (8)(b).*

*“Further continuances” as used (8)(b) are subsequent sessions that must be agreed upon by the parties.*

*A “reschedule” is the cancellation of a scheduled session to another agreed upon date and time.*

*A “rescheduled session” is the session held that was originally cancelled.*

**How much discretion do different mediators have in terms of rescheduling fees and practices – given consistency is desired?**

*RCW 60.24.163(17) allows mediators to charge reasonable fees authorized by Commerce. This change gives Commerce the authority to modify or add mediator fees or mediation-related fees. Commerce expects all mediators (DRC-affiliated and independent) to comply with the fee structure authorized by Commerce as published in the [Program Guidelines](#) ("Guidance Regarding Fees and Scheduling").*

**Are private mediators supposed to go by ResWA guidelines? If not, what do they use? Is that ok to have different fees if consistency is desired?**

*Commerce expects all mediators (DRC-affiliated and independent) to comply with the fee structure authorized by Commerce as published in the [Program Guidelines](#) ("Guidance Regarding Fees and Scheduling").*

**Paid for conference calls.**

*Per [RCW 61.24.163\(17\)](#), the mediator fee includes preparing, scheduling, and conducting a mediation session(s) (including the preparation and submission of the certification). At this time, per stakeholder input, Commerce will not authorize a mediator to charge additional fees for mediation-related conference calls.*

**When are stakeholders going to make a decision about new (higher) fees?**

*Commerce is continuing discussions regarding higher and consistent fees; revised fees and associated guidance will be published in 2016.*

**Could Commerce schedule first session 70 days out when the referral is made?**

*Commerce does not have the authority to schedule the first mediation session. Per statute, the mediator is required to convene the session within seventy days of receiving the referral ([RCW 61.24.163\(6\)](#)) and the mediator is required to send written notice (the scheduling notice) of the session to the parties, with a copy to Commerce ([RCW 61.24.163\(7\)\(b\)](#)). These requirements are addressed in the [Program Guidelines](#) ("Guidance Regarding Mediation Sessions").*

## Settlement Authority

### What does “authority to settle” mean?

*This is an on-going topic of discussion with program stakeholders. Regarding beneficiary participation in the mediation session, [RCW 61.24.163\(8\)\(a\)](#) states the parties must meet in person, “However 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.” Regarding the duty of both parties to mediate in good faith, [RCW 61.24.163\(10\)\(c\)](#) states a “Failure of the borrower or the beneficiary to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation...” may be considered a violation of the duty to mediate in good faith. A representative with “authority to settle” must be present and ready to agree to a resolution on behalf of the beneficiary during the mediation session(s). Further definition review and additional guidance is on the list for future consideration.*

### Should there be a different question to ask the beneficiary than asking if they have full settlement authority, since they often don’t appear to?

*Per [Program Guidelines](#), 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. If the parties are working towards a specific resolution, they may choose to discuss the attendance of a beneficiary representative with the specific authority for a specific resolution prior to the mediation session.*

## Surveys

### Borrower/Beneficiary survey – Out of the 15% response, what percentage was borrower response?

*Please see the survey responses per Borrower Representative and Beneficiary Represented posted on Foreclosure Fairness Program website (click on the ["November 2015 All-Foreclosure Mediator Event"](#) Training page link).*

**I wonder if it would be appropriate to send out a response to the beneficiary and borrower rep survey addressing their concerns regarding bias (mediators should be biased towards the intent of the law), and mediators impartiality (mediators should not necessarily be following up regarding the requests/needs of one party or the other -beyond the required docs and "enforcing" agreements-, that is the job of the representatives).**

*This topic is on the list for future consideration.*

## **Miscellaneous**

### **Why not require application for mediation to include all Borrowers' package?**

*The statute does not require borrower documentation ("borrower's package") at time of mediation referral. The statute requires borrower documents be submitted within 23 of Commerce's notice that the parties have been referred to mediation. ([RCW 61.24.163\(4\)](#))*

### **Can you identify the mediators who also do advocacy for lenders or borrowers?**

*It is not Commerce's position that we should share information provided by mediators regarding their individual foreclosure mediation practices.*

### **Build in a second session for mediators to use as leverage**

*The statute specifically allows for one mediation session ([RCW 61.24.163\(6\)](#)). Under [RCW 61.24.163\(8\)\(b\)](#), the mediator has the discretion to continue the session once after a mediation session commences. Any further continuances must be with consent of both parties. Additional "required" sessions would need a legislative change. Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for additional information.*

**Commerce received the following questions/comments about the federal guidelines; our response addresses all issues.**

- **Regarding CFPB, HAMP, FFA, etc., what trumps which? Also please have someone other than borrower's advocates explain – too one-sided**
- **Federal guidelines non-HAMP successor bound by HAMP?**

Please refer to the "Federal Regulatory Guidelines and NPV Inputs & Test" content on the Foreclosure Fairness Program website (click on the ["November 2015 All-Foreclosure Mediator Event"](#) Training page link). If you cannot find the guidance you are looking for please contact Sheila O'Sullivan via email at Northwest Consumer Law Center (NWCLC) ([sheila@nwclc.org](mailto:sheila@nwclc.org)), Ariel Speser via email at Northwest Justice Project (NJP) ([ariels@nwjustice.org](mailto:ariels@nwjustice.org)), Meredith Bruch via email at Northwest Justice Project (NJP) ([meredithb@nwjustice.org](mailto:meredithb@nwjustice.org)), or Randy Lowell via email at Parkview Services ([randy@parkviewservices.org](mailto:randy@parkviewservices.org)). An inquiry was made to a beneficiary representative for input prior to the November 2015 Mediator Event; the representative did not respond with input or materials. You may also visit the websites for each of the Federal HAMP Servicing Guidelines as follows. Please contact the individuals listed above if you have difficulty accessing these documents.

- Non-GSE Servicers: [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/mhahandbook\\_45.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_45.pdf)
- Fannie Mae: <https://www.fanniemae.com/content/guide/svc081215.pdf>
- Freddie Mac: <http://www.freddiemac.com/singlefamily/guide/>
- FHA: <http://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf><http://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf>

### **Why not do mediations by "facetime?"**

"Facetime" is a video chat application. Not all parties may have access to video chat applications. [RCW 61.24.163\(8\)\(a\)](#) requires the parties and mediator to meet in person for the mediation session, with exception for the person with authority to agree to resolution on behalf of the beneficiary (they may participate via phone or videoconference). Commerce revised our [Program Guidelines](#) to include appearance at a continued (or subsequent sessions) by phone or video if certain conditions are met (see "Guidance Regarding Mediation Sessions").

### **What is the legislative history behind RCW 61.24.163 (10)(c)?**

[RCW 61.24.163\(10\)\(c\)](#) states "A violation of the duty to mediate in good faith as required under this section may include:... (c) "Failure of a party to designate representatives with adequate authority to fully settle, compromise or otherwise reach resolution with the borrower in mediation". The language in (10)(c) supports the intent of the Foreclosure Fairness Act as written in [RCW 61.24.005, Findings -- Intent](#). At this time, researching the full legislative history behind (10)(c) is on Commerce's list of topics to address at a later date.

### **What do I do with a take it now or leave it offer by the beneficiary?**

*Per [RCW 61.24.163\(9\)](#), mediators must ensure the parties "address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution..." Per [RCW 61.24.163\(10\)](#), mediators have the discretion to determine good faith participation of the beneficiary. Ultimately, the mediator must decide if a beneficiary's "take it or leave it offer" is allowing the parties to address all issues of foreclosure per (9) and is the offer a demonstration of good faith participation per (10). Commerce believes a situation like the one proposed is a great example of mediators using the "art" as well as the "science" of mediation ("art" is the use of mediator skills to "Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible." [\(RCW 61.24.005, "Findings -- Intent"\)](#); "science" is the use of the FFA and Program Guidelines).*

### **Stop calling this process "mediation" – it sours expectations.**

*The drafters of the original FFA legislation used the term "mediation". This can only be changed via a legislative amendment. Commerce does not intend to request a change in terminology via the legislative process.*

### **Can we send case back to Commerce if we are unable to reach beneficiary? Please update Commerce guidelines to say that if there is a question as to who the beneficiary is that the borrower's rep needs to go back to Commerce.**

*Commerce relies on the referrer to identify the beneficiary on the referral form. 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, and for purposes of foreclosure mediation, the **current holder** of the Note is the beneficiary. If, during the course of the mediation process, a mediator has difficulty reaching the beneficiary, do **not** send the case back to Commerce. Communication with the following entities may be helpful in locating/contacting the appropriate beneficiary: 1) the referrer, 2) the Trustee as listed on the referral, and 3) the Beneficiary Representative. Please see "Guidance Regarding Mediation Sessions" in the [Program Guidelines](#) for guidance regarding a change in beneficiary after the mediation process has started.*