



**Department of Commerce**

# Foreclosure Fairness Program

*Annual Report on Program Performance (RCW 61.24.163)*

December 2016  
Report to the Legislature  
Brian Bonlender, Director

## Acknowledgements

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# Executive Summary

## Overview

The 2011 Foreclosure Fairness Act (RCW 61.24.163) reshapes the non-judicial foreclosure process in Washington State to help protect homeowners from unnecessary foreclosures.

The act assigns the primary responsibility for developing and managing the Foreclosure Fairness Program to the Department of Commerce (Commerce). This work is done in collaboration with the Washington State Housing Finance Commission, Department of Financial Institutions, Office of the Attorney General, Office of Civil Legal Aid, and with Dispute Resolution Centers,<sup>1</sup> mediators, attorneys (private and legal aid), and housing professionals.

The act calls for the development of the Foreclosure Fairness Fund and the Foreclosure Mediation Program. The Mediation Program, developed and managed by Commerce, assists homeowners (“borrowers”) in navigating through the foreclosure process and avoiding foreclosure when possible.

The program is funded through fees paid by mortgage lenders (“beneficiaries”). Beneficiaries are required to pay a \$250 fee into the Foreclosure Fairness Fund for each Notice of Default issued to owner-occupied residential real properties. As a result of legislation passed in the 2015 session (SHB 2876), beneficiaries must report and pay for each recorded Notice of Trustee’s Sale after July 1, 2016. Some beneficiaries are exempt from this fee. Money deposited in the fund is expended on homeowner counseling, development and operation of the program, enforcement and consumer protection, foreclosure prevention outreach and education, and legal assistance for low- and moderate-income homeowners.

Housing professionals agree that keeping people in their homes is not the only possible positive outcome of mediation. The intent of the program is to ensure that, even when foreclosure is unavoidable, the process is fair and transparent, and gives both the borrower and the beneficiary the opportunity to meet and make well-informed decisions. Mediation gives borrowers the chance to understand their options and requires beneficiaries to explain why some options may not be available.

This report fulfills the requirement of RCW 61.24.163(18) for Commerce to report annually on the results of the Foreclosure Fairness Act and the Mediation Program.

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<sup>1</sup> Dispute Resolution Centers (DRCs) are a statewide network of organizations that provide alternatives to legal remedies. The state has provided funding for these organizations for several years to reduce court caseloads by providing affordable mediation to resolve several types of disputes, including parenting plans, divorce, landlord-tenant issues, and most recently, foreclosure. Learn more: <http://resolutionwa.org/>.

## Key Program Outcomes

Most data presented in this report is cumulative, covering the first five state fiscal years of the program, from its enactment on July 22, 2011, through June 30, 2016, unless otherwise indicated. Key outcomes include:

- In partnership with several Dispute Resolution Centers and other key stakeholders, Commerce trained more than 300 potential foreclosure mediators; 229 were approved to conduct foreclosure mediations in the state. There are currently 95 active mediators.
- There are currently 52 housing counselors (including legal aid attorneys) experienced in foreclosure counseling in the state.
- Housing counselors and attorneys referred 9,166 borrowers to Commerce for mediation.
- Of the 9,166 referrals, 7,108 cases have been closed and/or certified by the mediators. The rest are either pending, were certified after June 30, 2016, or were ineligible for mediation.
- Out of all the closed/certified cases, 51 percent of them ended with agreement being reached between the homeowner and the beneficiary (most of which were home-retention agreements).

## Recommendations

### Declining Foreclosures, Declining Revenue

With the numbers of foreclosures declining in our state (see Figures 1 and 2), and with program funding tied to the number of foreclosures, appropriately funding the program remains a challenge. With the reduction of foreclosures and program revenue, the cost associated with administering the program and providing access to services remains unchanged. The program is facing a pivotal moment where the current revenue structure may not be adequate to sustain services and meet the requirements of the act in the near future.

Stakeholders met prior to the last legislative session to identify a structure that could potentially fund the program and services provided under the Foreclosure Fairness Act at an appropriate level. Data on the impact of these changes is starting to become available and will be monitored closely. At this time, it is too early to determine if the desired outcomes of the legislative changes will be achieved.

It is vitally important to the citizens of our state that this program continues and homeowners are offered the opportunity to meet with their lender to identify possible alternatives to foreclosure. There have been a variety of benefits identified through the foreclosure mediation process that provide value to both homeowners and beneficiaries – beyond the initial foreclosure crisis. In order to sustain these essential and consistent services, alternative sources of revenue or revenue structures may need to be identified.

**Removing References to Making Home Affordable Program in the RCW**

The Making Home Affordable Program (MHA) is set to conclude at the end of this calendar year. Programs under MHA, including the Home Affordable Modification Program (HAMP), will no longer be options for homeowners facing foreclosure. References to HAMP are made at RCW 61.24.163(4) and (9)(c); Commerce recommends removal of these references during the next legislative session in order to eliminate potential confusion.

## Background

### Program Creation and Amendments to the Act

#### Stakeholder Work

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

Over the years, Commerce has hosted several meetings with these stakeholders to discuss changes to make the program more effective. The changes included shifting the order of documents exchanged, lengthening the period for mediation, providing civil immunity to mediators, and clarifying and expanding the borrowers' eligibility criteria for the program.

#### Foreclosure Fairness Act: 2011

The Foreclosure Fairness Program originated in the [Foreclosure Fairness Act](#),<sup>2</sup> a bipartisan effort in the 2011 legislative session to reduce the impact of foreclosures in our state. The program's purpose is to reduce unnecessary foreclosures by providing homeowner counseling and foreclosure mediation.

#### Early Amendments: 2011-2012

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

In addition, 2012 amendments provided civil immunity to mediators to prevent them from withdrawing from the program. Changing the borrowers' eligibility requirements has also proven to be beneficial. Prior to this change, many borrowers were missing the opportunity to meet and confer with their beneficiary and going straight to mediation. Now borrowers are waiting until they receive a Notice of Default to be referred to mediation. This is more in line with the design of the Deed of Trust Act legislation (RCW 61.24).

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<sup>2</sup> <http://app.leg.wa.gov/billinfo/summary.aspx?year=2011&bill=1362>

Representatives of the beneficiaries (mortgage lenders), housing advocates, trustees, counselors, and mediators supported these changes. These changes were codified in [SSB 5988](#)<sup>3</sup> during the special session of 2011, [SHB 2614](#)<sup>4</sup> during the 2012 session.

### **2014 Amendments**

[House Bill 2723](#),<sup>5</sup> was passed unanimously by both the House and Senate, and signed into law by the Governor on March 31, 2014. Commerce convened six stakeholder meetings to discuss these amendments and reach consensus before [HB 2723](#)<sup>6</sup> was written. The amendments in HB 2723 provided many improvements to the Foreclosure Fairness Act, including a broadening of “borrower” and “residential real property” definitions that expand program eligibility criteria; modifications to beneficiary procedures that increase transparency and borrower knowledge of the foreclosure process; voluntary participation in the foreclosure mediation program if certain criteria are met; permission for Commerce to authorize mediation fees; and fund allocation modifications that will ensure the continuous operations of the program given the decreasing level of program revenue.

### **2015 Amendments**

Passage of [ESSB 6052](#)<sup>7</sup> during the 2015 third special legislative session resulted in Commerce receiving direction via a proviso to convene a workgroup of stakeholders to review the state’s Deed of Trust Act (RCW 61.24). The workgroup included stakeholders from financial institutions, loan servicing and trustee service companies, advocacy groups representing homeowners and borrowers, and approved foreclosure mediators. Results of the workgroup were discussed in a separate report to the Governor and Legislature, published December 2015.

### **2016 Amendments**

[SHB 2876](#)<sup>8</sup> passed in the 2016 session and resulted<sup>8</sup> in three major changes to the statute: 1) revision of the funding allocation to the entities providing services under the act; 2) a change to when beneficiary fees are paid – at the recording of the Notice of Trustee’s Sale rather than the issuance of the Notice of Default; and 3) the exemption from paying the fees applies to beneficiaries with fewer than 50 Notices of Trustee’s Sale in the preceding year, rather than 250 issuances of Notices of Default.

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<sup>3</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5988&year=2011>

<sup>4</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2614&year=2011>

<sup>5</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?year=2014&bill=2723>

<sup>6</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?year=2014&bill=2723>

<sup>7</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=6052&year=2015>

<sup>8</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2876&year=2015>



## Description of the Foreclosure Fairness Program

### Roles and Responsibilities

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

- **Washington State Department of Commerce:** Commerce is charged with the overall development and management of the Foreclosure Fairness Program, including the Mediation Program, and the administration of the Foreclosure Fairness Fund. Commerce is also responsible for training, approving, and maintaining a list of approved foreclosure mediators, and assigning them to mediation cases.
- **Washington State Housing Finance Commission:** The Washington State Housing Finance Commission (Commission) administers a homeowner-counseling program, as required by the Foreclosure Fairness Act. The Commission oversees a toll-free Homeownership Resource Hotline where homeowners in need of foreclosure prevention assistance can call and receive free foreclosure prevention counseling.
- **Washington State Department of Financial Institutions:** The Washington State Department of Financial Institutions is responsible for conducting homeowner pre-purchase and post-purchase outreach and education programs, and raising public awareness of the services provided under the Foreclosure Fairness Program. While some of these services will continue, the Department of Financial Institutions will no longer receive funding from the Foreclosure Fairness Account as of July 1, 2016 due to the most recent changes to the Foreclosure Fairness Act.
- **Washington State Office of the Attorney General:** The Consumer Protection Division of the Washington State Attorney General's Office created the Foreclosure Compliance Program to enforce the Deed of Trust Act, as required by that act, and investigate consumer protection complaints.
- **Office of Civil Legal Aid:** The Office of Civil Legal Aid contracts with qualified legal aid programs to provide free legal assistance to low- and moderate-income homeowners in matters related to foreclosure.

### Funding

The Foreclosure Fairness Program is exclusively supported by private funds. Beneficiaries pay a \$250 fee into the Foreclosure Fairness Fund for each Notice of Default issued to owner-occupied residential real properties in Washington. As a result of legislation passed in the 2016 session (SHB 2876<sup>9</sup>), beneficiaries will report and pay for each recorded Notice of Trustee's Sale after July 1, 2016. Some institutions are exempt from paying the fee.

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<sup>9</sup> <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2876&year=2015>

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

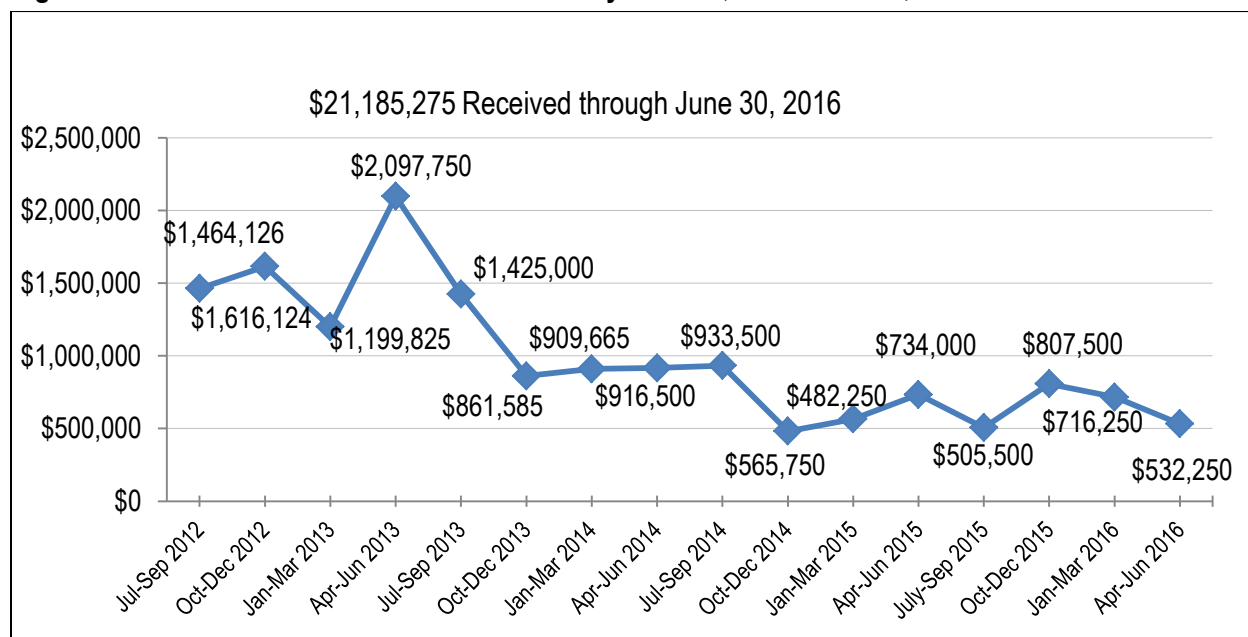
- Free homeowner foreclosure counseling.
- Consumer protection and act enforcement.
- Development and operation of the Mediation Program.
- Foreclosure prevention outreach and education.
- Free legal assistance for low- and moderate-income borrowers.

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

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

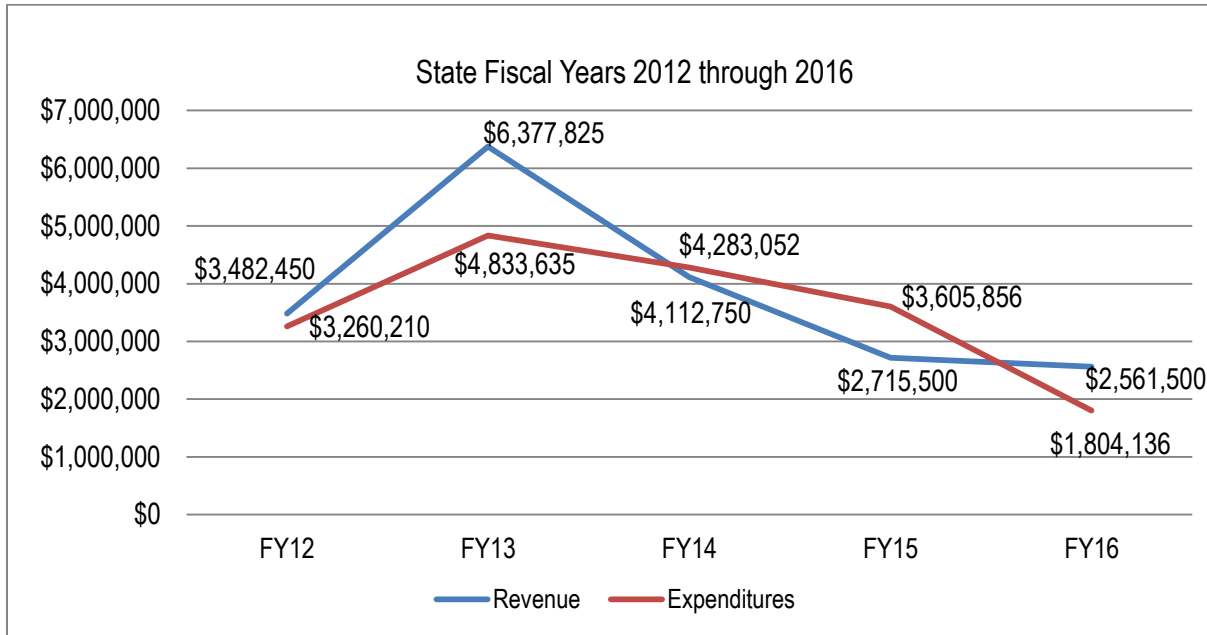
**Figures 1 and 2** below illustrate the revenue received and expenditures for the fund over the last four state fiscal years.

**Figure 1: Foreclosure Fairness Fund Revenue by Quarter, as of June 30, 2016**



*Note: Funds received by Commerce in a quarter are fees for Notices of Default issued by beneficiaries in the previous quarter. Beneficiary reports and payments are due to Commerce 45 days after the end of each quarter (RCW 61.24.173).*

**Figure 2: Foreclosure Fairness Fund Revenues and Expenditures, as of June 30, 2016**



### Meet and Confer Period

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

- Beneficiaries must issue a Notice of Pre-Foreclosure Options at least 30 days before issuing a Notice of Default. The Notice of Pre-Foreclosure Options explains to the borrower that they are in danger of losing their home, that free counseling is available to help them understand their options, and the potential for mediation. It also informs the borrower of the opportunity to meet with the beneficiary to try to resolve the issue (known as the “meet and confer” meeting).
- If the borrower responds to the Notice of Pre-Foreclosure Options and requests a “meet and confer,” a Notice of Default may not be issued for an additional 60 days.
- After the Notice of Default is issued, beneficiaries must wait at least 30 days before recording a Notice of Trustee’s Sale.

## Referral to Mediation

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

- Borrowers become eligible for mediation once a Notice of Default is issued and remain eligible until 20 days after the recording of the Notice of Trustee Sale, and if their beneficiary is not exempt from mediation.<sup>10</sup>
- Borrowers must be referred for mediation to Commerce by an attorney or a housing counselor. The services of the housing counselors are free to borrowers.
- Upon the receipt of a complete referral, Commerce has 10 days to assign a mediator and notify all of the parties that mediation was requested.
- The assigned mediator has 70 days to complete the mediation (longer if both parties agree to the extension). The participants in the mediation must address the issues of foreclosure that may enable the parties to come to an agreed resolution. To do this, the mediator will ask the participants to consider the borrower’s economic position, the Net Present Value<sup>11</sup> of receiving payments from a modified mortgage compared to the recovered costs following foreclosure, affordable modifications, and any applicable loss mitigation guidelines for loans insured by the Federal Housing Administration, the Veterans Administration, or the Rural Housing Service.

## Mediation Certification

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

- Within seven business days of the completion of the mediation, the mediator must certify the outcome of the mediation to Commerce and send copies to all parties involved.
- This certification must indicate if a resolution was reached, a description of the resolution, and whether the parties participated in good faith.
- If no agreement was reached, they must also include a description of the Net Present Value analysis used and its results.
- A finding that the beneficiary did not act in good faith constitutes a defense to the non-judicial foreclosure action. A borrower may use this finding in court to stop the foreclosure.
- A finding that the borrower failed to mediate in good faith authorizes the beneficiary to proceed with the foreclosure.

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<sup>10</sup> Federally insured depository institutions that were not a beneficiary in more than 250 trustee sales in a year may certify to Commerce their exemption from mediation status during the following calendar year.

<sup>11</sup> In the context of foreclosures, Net Present Value is an accounting calculation that the beneficiary performs in order to assist them in comparing the costs of a loan modification to the costs of a foreclosure.

Commerce receives all certifications from the mediators and sends copies of the certifications showing “Beneficiary Not in Good Faith” to the Washington State Attorney General’s Office (AGO) and to the Washington State Department of Financial Institutions (DFI).

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

DFI licenses some of the beneficiaries that are participating in foreclosure mediation in Washington. DFI reviews the “Beneficiary Not in Good Faith” certifications it receives from Commerce and may open complaints with its licensees. DFI may contact the borrower and/or the mediator to request more information. Once DFI has all needed information, it decides on the appropriate course of action, on a case-by-case basis. Data on “Not in Good Faith” decisions are included in **Figure 6** on pages 18-20 under “Mediation Results.”

## Program Performance

### Statewide Counselors

Housing counseling and mediation services are available to borrowers across the state. Borrowers seeking housing counseling contact the Homeownership Resource Hotline where their call is prioritized and referred to a free-of-charge local housing counselor. The Homeownership Resource Hotline provider reported a monthly average of **797** calls during the July 2015 to June 2016 state fiscal year.

Since the passage of the Foreclosure Fairness Act, the number of housing counselors contracted has decreased from **64** to **52** counselors (including some legal aid attorneys who provide housing counseling-like services). These counselors, as well as private attorneys, refer mediation-eligible cases to Commerce. Commerce then assigns mediators to these cases based on the borrower's county of residence and the mediators' capacity and availability.

### Approved Foreclosure Mediators

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

Commerce trained more than **300** mediators on the requirements of the Foreclosure Fairness Act, federal loan programs, and foreclosure laws during two series of two-day trainings in June 2011 and May 2013. The second day of each training series included a full day of hands-on mediation practice hosted by regional Dispute Resolution Centers around the state. Commerce approved **229** mediators to conduct foreclosure mediations in Washington. Currently, there are **95** active mediators conducting foreclosure mediations in our state.

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

## Referrals to Mediation

From July 2011, when the program began, through June 2016, Commerce received **9,166** referrals to mediation:

- Housing counselors made **3,701** (40 percent) of these referrals, and attorneys (private and legal aid) made **5,465** (60 percent).
- **1,011** (11 percent) of the referrals were deemed to be ineligible.
- **8,155** (89 percent) of the referrals were deemed eligible and assigned to the Commerce-approved mediators.
- **7,108** (87 percent) of the 8,155 assigned or eligible cases were closed or certified by the mediators as of June 30, 2016.

As of September 19, 2016, **592** referrals were pending mediator certification.

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

## Fiscal Year 2015-2016 Program Administration Accomplishments

Commerce continues to improve and streamline the administration of the Foreclosure Fairness Program, in order to more effectively serve the public and all of the program’s stakeholders. The following list includes just a few highlights of the accomplishments made in the last fiscal year (July 1, 2015 to June 30, 2016):

- Received and processed 1,352 new referrals to mediation.
- Continued streamlining the administrative process, from referral intake to assigning mediators and notifying the parties, and assisting mediators throughout the process.
- Approved one new foreclosure mediator.
- Revised and continuously improved the Foreclosure Fairness Program Guidelines,<sup>12</sup> a tool for mediators, referrers, beneficiaries, and other interested stakeholders.
- Redeveloped and improved the Commerce Foreclosure Fairness Program website<sup>13</sup> with a focus on homeowners and other stakeholders.

## Housing Finance Commission’s Performance

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

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<sup>12</sup> <http://www.commerce.wa.gov/wp-content/uploads/2015/11/ffp-guidelines-may-2016.pdf>

<sup>13</sup> <http://www.commerce.wa.gov/foreclosures>

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

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

Counseling outcomes reported by the Commission include:

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

## Department of Financial Institutions' Performance

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

From July 1, 2015 through June 30, 2016, DFI:

- Distributed **10,357** English and **5,475** translated copies of the Foreclosure Fairness brochure. Translated copies were in Arabic, Cambodian, Chinese, Korean, Russian, Samoan, Somali, Spanish, Tagalog, and Vietnamese.
- Printed **22,000** English and **2,000** Vietnamese copies of the Foreclosure Fairness brochure.
- Provided program brochures and business cards at approximately **100** state-wide events.
- Provided program outreach on multiple Hispanic Affairs Commission-coordinated radio shows (in Spanish) with a statewide audience.
- Coordinated with Seattle University Foreclosure and Mediation Outreach Project (FMOP) to provide door-to-door canvassing of homes in high-foreclosure Pierce County zip codes through the Home Ownership and Mediation Education (HOME) project. Canvassers distributed foreclosure prevention materials to more than 2,000 homes between November 2015 and February 2016. Three project-related media stories aired during the campaign. Residents in Pierce County and the city of Tacoma were informed



of the campaign in a [KPLU FM radio segment](#),<sup>14</sup> in the [Tacoma News Tribune](#),<sup>15</sup> and on KOMO 4 TV News.<sup>16</sup>

- Coordinated a media campaign with KING 5 TV and KONG 6 TV from May 2015 through October 2015. The campaign included 15-second and 30-second public service announcements on KING 5, KONG 6, and North West Cable News (NWCN) channels that reached an estimated 1,297,600 households monthly, as well as a “[New Day Northwest](#)”<sup>17</sup> episode and “[Foreclosure Prevention Minute](#)”<sup>18</sup> on NWCN with Northwest Justice Project Attorney, Lili Sotelo. An online campaign targeted users with online program advertising when they searched for key words including: foreclosure, mortgage, loan modification, unemployment, short sale, Home Affordable Modification Program (HAMP), Home Affordable Refinance Program (HARP), refinance, mortgage default, Foreclosure Fairness Act, and Foreclosure Mediation.

DFI continues to print Foreclosure Fairness Act brochures, including updates as legislation requires, and is in the process of updating all 10 translated brochures. As of July 1, 2016, DFI no longer receives funding from the Foreclosure Fairness Act program for these updates.

## Office of the Attorney General’s Performance

The Consumer Protection Division of the Attorney General’s Office (AGO) created the Foreclosure Compliance Program (FCP) to enforce the Deed of Trust Act, as required by that act. During the last state fiscal year (July 1, 2015 to June 30, 2016), the FCP received **471** complaints and inquiries.

- **413** direct consumer complaints and inquiries.
- **29** housing counselor complaints and inquiries.
- **29** attorney and other professionals’ complaints and inquiries

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

As a part of the 2012 National Mortgage Settlement, the AGO distributed \$43.8 million in grants to governmental agencies and non-profit organizations throughout the state. The agencies and organizations are using the grant funds to provide consumer access to housing counselors and legal services that help provide consumers with protections afforded under the Foreclosure

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<sup>14</sup> <http://knkx.org/post/seattle-university-teams-city-tacoma-help-prevent-foreclosures>

<sup>15</sup> <http://www.thenewstribune.com/news/business/real-estate-news/article50075215.html>

<sup>16</sup> A link to the story and video was not provided by the campaign because the story was only available for purchase.

<sup>17</sup> <http://www.king5.com/videos/entertainment/television/programs/new-day-northwest/2015/07/08/tips-to-help-prevent-home-foreclosure-with-lili-sotelo/29882859/>

<sup>18</sup> <https://kingcreates.wistia.com/medias/pa5tw4z8yi>

Fairness Act (FFA). Overall, the grant recipients reported that as of the end of June 2016, more than \$37 million has been expended through their programs throughout the state.

Between July 1, 2015, and June 30, 2016, the AGO took the following actions to enforce the Deed of Trust Act:

- On July 1, 2015 the AGO entered into an Assurance of Discontinuance with Fay Servicing, LLC, relating to the company's failure to provide required documents in the FFA mediation process.
- On December 24, 2015, the AGO entered into a consent decree with Compulink Corporation, doing business as Celinx, relating to the company's mistaken certifications that many of its clients were exempt from mediation under the FFA.
- On December 24, 2015, the AGO entered into a consent decree with First Mortgage Corporation relating to the company's mistaken certification that it was exempt from mediation under the FFA.
- On January 28, 2016, the AGO filed suit against National Servicing Center relating to the company's unlawful advertising and up-front fees for mortgage modification services that were never provided. The AGO was unable to affect service of process because the scam shut down, and was later informed that the scam's principals were incarcerated on unrelated drug charges.
- On February 5, 2016, the AGO, together with the U.S. Department of Justice, Consumer Financial Protection Bureau, Department of Housing and Urban Development, and other state attorneys general entered into a consent decree with HSBC Bank USA, NA, and its affiliates to address mortgage loan servicing violations. This settlement provides approximately \$1 million in direct cash payments to 1,300 Washington borrowers, as well as \$370 million in nationwide loan modifications and other relief to borrowers in need of assistance, imposes tough new mortgage servicing standards, and grants oversight authority to an independent monitor.
- On April 12, 2016, the AGO filed an amicus brief in *Blair v. Northwest Trustee Services, Inc. et al.*, Case No. 32816-3-III, in the Washington Court of Appeals, Division III. The AGO's amicus brief argued that a homeowner may maintain a Consumer Protection Act claim against a trustee who records a Notice of Trustee's Sale without satisfying all requisites and incurs costs to successfully enjoin the unlawful sale. On August 12, 2016, the AGO filed an amicus brief in support of the homeowner's petition for review in the same matter, Case No. 93291-3, in the Washington Supreme Court.
- The AGO monitored compliance with, and distribution of, consumer relief for Washington borrowers pursuant to its December 19, 2013, Consent Decree with Ocwen Financial Corporation and its subsidiary Ocwen Loan Servicing, and its June 17, 2014 Consent Decree with SunTrust Mortgage, Inc.
- The AGO monitored compliance of Ally (formerly known as GMAC), Bank of America, Citi, JPMorgan Chase, and Wells Fargo with the servicing standards and other terms of the 2012 National Mortgage Settlement. Monitoring of these parties ended in late 2015, pursuant to the 2012 agreement.

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

## **Office of Civil Legal Aid's Performance**

Commerce partners with the Office of Civil Legal Aid (OCLA) to provide free legal assistance to low- and moderate-income homeowners in matters related to foreclosure. OCLA grants all of the Foreclosure Fairness Act funds it receives to the statewide Northwest Justice Project (NJP) for the provision of civil legal aid services.

NJP's specialized Foreclosure Prevention Unit (FPU) continued to successfully fight for home retention among low- and moderate-income homeowners facing default on their home mortgage. Utilizing Foreclosure Fairness Act representation in mediations, housing counseling activities, and litigation, NJP's FPU estimates that it has preserved more than \$7.5 million in homeowner equity during SFY 2016 (July 1, 2015 to June 30, 2016).

During SFY 2016, NJP saw a 7 percent increase in homeowners seeking help to protect their homes over the prior fiscal year. A total 761 homeowners sought legal assistance. Of these, 59 were determined ineligible and 702 were accepted for representation. In addition, legal representation for 45 homeowners begun in the prior fiscal year was concluded in SFY 2016.

Although the majority of homeowners represented by NJP lived in the most populous Puget Sound counties of King (18 percent), Pierce (12 percent), and Snohomish (13 percent), the overall percentage of cases from these counties dropped four points to 43 percent of the total cases. Spokane County and Yakima County showed a slight increase, though their combined overall percentage of 10 percent remained the same, with 6 percent and 4 percent respectively.

NJP's foreclosure prevention representation during SFY 2016 continued to focus on utilizing Foreclosure Fairness Act protections and provisions, including "meet and confer" and mediation, as well as successfully pursuing Not-in-Good Faith certifications, to ensure homeowners are provided the benefit of all options and opportunities to retaining their home.

As appropriate, litigation is used to continue to define the scope of protections available to homeowners. In *Cabage v. Northwest Trustee Services, Inc., PNC Mortgage, et al.*, 2015 WL 7909545 (Dec. 1, 2015) (unpublished), the Division II Court of Appeals reversed a summary judgment against homeowners and found that they can assert Consumer Protection Act and misrepresentation claims against the mortgage loan servicer and trustee for not clearly identifying the loan beneficiary in the foreclosure process. In deciding *Cabage*, the court relied on several cases (*Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 785, 336 P.3d 1142 (2014), *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012), and *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 433, 334 P.3d 529 (2014)), in which NJP had a significant role as counsel or *amicus* counsel.

NJP has also continued to successfully represent homeowners facing foreclosure following a divorce or the death of a family member. These are complex, time-intensive cases requiring other NJP staff and/or volunteer attorney assistance and expertise across a broad range of areas of substantive law.

NJP continues to play a major role in homeowner community education and outreach. Advocates regularly attend debt defense clinics and other similar events. An FPU attorney sits on the board for Habitat for Humanity of East Jefferson County. The FPU recently contacted senior centers throughout Washington to educate staff on our services and provide literature for seniors facing foreclosure. An NJP advocate testified before the state legislature about the critical services provided by the FPU.

Also, an FPU advocate continues to chair the Foreclosure Prevention Action Team of the Financial Empowerment Network of Seattle-King County. In the last year, this group successfully updated the comprehensive Foreclosure Prevention Guide. The guide reflects current law on foreclosure defense and contains expanded information available to homeowners and tenants facing foreclosure. NJP collaborated with Seattle University School of Law, Northwest Consumer Law Center, and several other housing counseling and financial services non-profits in Western Washington to update the guide.

FPU advocates have also garnered media attention for their efforts, with their work having been highlighted in both print and broadcast media. Especially noteworthy was then-FPU Senior Attorney Lili Sotelo, being [featured on King 5 New Day Northwest](#)<sup>19</sup> addressing the law and impacts of foreclosure and how NJP can help. Ms. Sotelo was also the featured speaker in a KING 5 public service announcement video called [Foreclosure Minute](#),<sup>20</sup> sponsored by the Washington departments of Commerce and Financial Institutions.

At the outset of SFY 2016, NJP had anticipated an increase in foreclosure activity due to rising market values and the significant tightening of the overall residential market. At the same time, the reduction in housing counselors focused on foreclosure prevention activities continued to accelerate, which also contributed to increased demand on NJP services.

Foreclosure prevention funding made available through the Office of the Attorney General from the National Foreclosure Settlement Agreement is winding down. This will result in a significant loss of foreclosure prevention capacity at NJP in SFY 2018 and beyond, making it ever more critical the FFA funding be directed to these purposes.

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<sup>19</sup> <http://www.king5.com/videos/entertainment/television/programs/new-day-northwest/2015/07/08/tips-to-help-prevent-home-foreclosure-with-lili-sotelo/29882859/>

<sup>20</sup> <https://kingcreates.wistia.com/medias/pa5tw4z8yi>

## Results of the Mediation Program

The data presented in this section is cumulative, covering the first five fiscal years of the program, from its enactment on July 22, 2011 through June 30, 2016. The Mediation Program was developed and is administered by Commerce.

### Referrals to Mediation

Mediation cases are referred to Commerce by either housing counselors (about 40 percent) or attorneys (about 60 percent). Of the 9,166 referrals received through June 30, 2016, Commerce assigned 8,155 to approved mediators, and 1,011 were deemed ineligible. 7,108 of the assigned cases have been mediated, completed, or both. The remaining assigned cases were pending mediation, completion, or both as of June 30, 2016.

**Figure 3** below tallies the mediation referrals that Commerce received through the end of this reporting period, and their outcomes. **Figure 4** identifies the 10 counties with the highest numbers of referrals received by Commerce through June 30, 2016. **Figure 5** illustrates the number of referrals received each quarter from the beginning of the program.

**Figure 3: Mediation Referrals from Beginning of Program through June 30, 2016**

Category Description	Cases
Mediation Referrals Received Through June 30, 2016	9,166
Referred by housing counselors	3,701 (40%)
Referred by attorneys (private and legal aid)	5,465 (60%)
Cases assigned to mediators*	8,155
Cases completed/closed through June 30, 2016	7,108
Cases ineligible for mediation***	1,011

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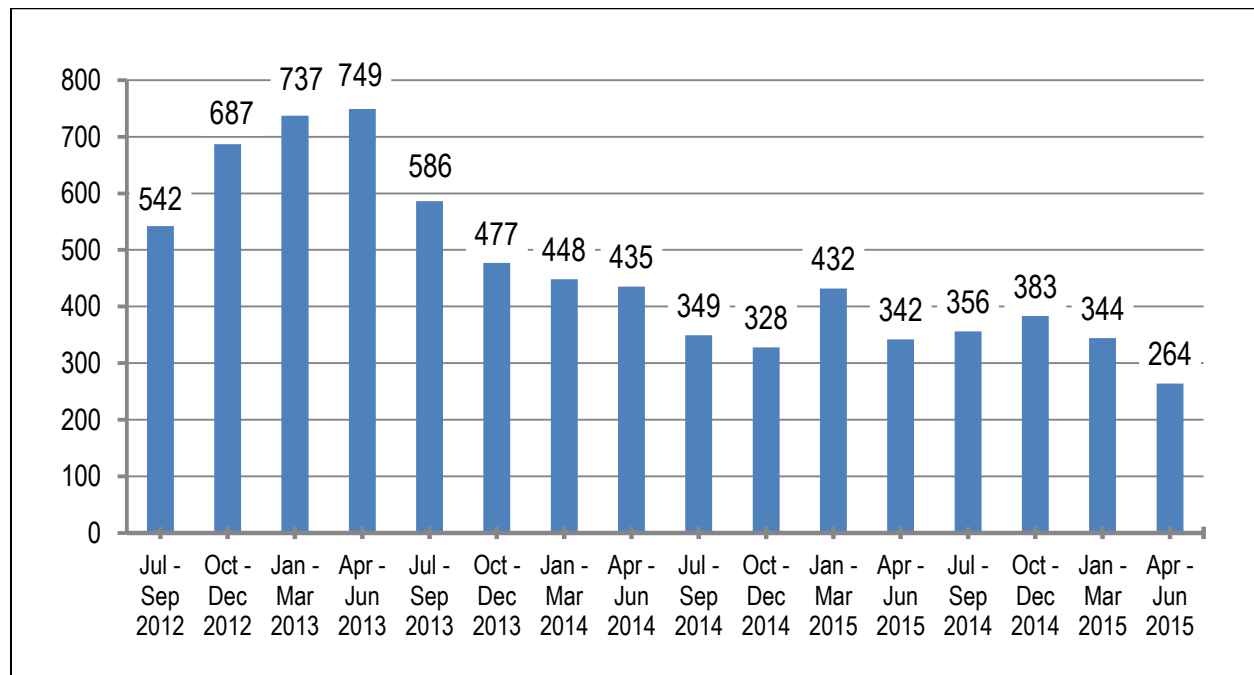
\* Includes cases that have been mediated or closed, as well as cases that are currently pending an outcome.

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

**Figure 4: Counties with the Highest Numbers of Referrals Received through June 30, 2016**

Top 10 Counties	Referrals Received
King	3,586
Snohomish	1,581
Pierce	1,493
Spokane	625
Clark	430
Kitsap	247
Thurston	239
Whatcom	154
Yakima	117
Skagit	107

**Figure 5: Referrals Received per Quarter through June 30, 2016**



*Note: Some of the numbers in Figure 5 have been slightly adjusted from the numbers reported in previous legislative reports. Commerce has undertaken a large database maintenance and data integrity project during the past two fiscal years, resulting in some necessary corrections to previously reported data.*

## Mediation Results

**Figure 6** below analyzes the **7,108** cases that have been mediated and completed. The data presented is based on the mediator certifications received by Commerce. Some cases do not reach a mediation session due to a variety of factors, such as agreements between borrower and beneficiary reached prior to session, the borrower’s withdrawal from the mediation process, or one or both parties being unresponsive to the mediator (e.g., lack of good faith on either the borrower’s or the beneficiary’s part).

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

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

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

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

**Figure 6: Mediations/Cases Completed from Beginning of Program through June 30, 2016**

Category Description	Cases
<b>Cases Certified/Closed</b>	<b>7,108</b>
Referred by housing counselors	3,011
Referred by attorneys (private and legal aid)	4,097

<b>Mediation Session(s) Occurred – Agreement Reached</b>	<b>2,095</b>
<b>Borrower Stayed in Home (subcategories below are not mutually exclusive)</b>	<b>1,655</b>
Reinstatements	121
Repayments	39
Extensions	150
Adjusted rate to fixed rates	156
Amortizations extended	372
Interest rate reductions	747
Principal reductions	99
Monthly principal payments reduced	301
Monthly interest payments reduced	211
Refinances	30
Other loan restructures/modifications	702
Principal forbearances	131
Interest forbearances/write-offs	34
Fees and penalties forbearances/write-offs	26
Other forbearances	46
<b>Borrower Did Not Stay in Home (subcategories below are not mutually exclusive)</b>	<b>440</b>
Deeds in lieu	41
Short sales	184
Voluntary surrenders	37
Cash for keys	24
Other non-retention agreements	187
<b>Mediation Session(s) Occurred – No Agreement Reached</b>	<b>2,323</b>
Parties mediated in good faith but were unable to reach agreement	1,690
Borrower not in good faith	236
Beneficiary not in good faith	231
Both borrower and beneficiary not in good faith	14



<b>No Mediation Session Occurred</b>	<b>2,690</b>
Home-retention agreement reached prior to session	1,370
Non-retention agreement reached prior to session	184
Borrower withdrew from mediation (not included in other categories)	509
Borrower unresponsive* and/or borrower not in good faith	444
Beneficiary not in good faith	46
Both borrower and beneficiary not in good faith	9
Other than above	137

Source: Mediators' certifications

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

## **Borrowers in Default Within a Year of Loan Restructuring/Modification**

In the statute establishing the Foreclosure Mediation Program, Commerce is asked to report performance and data about the program, including, "to the extent practical, the number of borrowers who report a default within a year of restructuring or modification" (RCW 61.24.163 (18)(b)).

The Foreclosure Fairness Program worked with Commerce's Research Services in March/April 2014 to develop a pilot survey for borrowers who completed the mediation process with their beneficiaries and reached home-retention agreements, allowing them to stay in their homes. The [survey](#)<sup>21</sup> consisted of telephone interviews with homeowners who had completed mediation through the Mediation Program and reached home-retention agreements approximately one year prior to the survey being conducted.

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<sup>21</sup> <http://www.commerce.wa.gov/wp-content/uploads/2015/11/ffp-home-retention-survey-2014.pdf>

## Outcomes of Housing Counseling

The data presented in this section was provided by the Washington State Housing Finance Commission (Commission) as required by RCW 61.24.160(6). It covers the last state fiscal year of the program, from July 1, 2015 through June 30, 2016.

Commerce partners with the Commission to administer a homeowner-counseling program, as required by the Foreclosure Fairness Act. Counseling is available at no cost to Washington homeowners in need of assistance. From the beginning of the Foreclosure Fairness Program, the Commission partnered with 16 housing counseling agencies around the state (including two legal aid agencies, Northwest Justice Project and Northwest Consumer Law Center) that had at least two years of experience in providing foreclosure prevention counseling. Due to decreasing demand, the number of foreclosure-prevention counselors decreased from 64 to 52 at the time this report was prepared.

Figure 7 shows a breakdown by category of the total number of clients assisted by the Commission's counselors and legal aid attorneys and the outcomes of counseling. The Total Outputs and Total Outcomes include all parts of the counseling process and are not exclusive to the Meet and Confer, Mediation, and Appeals or Escalation.

The Commission reports that between July 1, 2015, and June 30, 2016, its counselors and legal aid attorneys assisted 3,998 borrowers in need of assistance. Counselors and legal aid attorneys attended 1,474 "meet and confer" meetings between borrowers and their beneficiaries, and 444 mediation sessions. The Commission also reports that 1,009 borrowers were referred to other types of assistance, such as legal and financial assistance.

Before, during, and after mediation outcomes reported by the Commission include (more details in Figure 7 below):

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

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

**Figure 7: Outcomes of Housing Counseling, July 1, 2015, to June 30, 2016**

Category Description	Cases
<b>Totals*</b>	
<b>Outputs:</b>	
Clients	3,998
Referrals to Other Services	1,009
<b>Outcomes:</b>	
Pending Outcomes (still in counseling)	1,903
Withdrawals from Counseling	527
Home Retention Agreements	639
Non-Retention Agreements	108
No Agreements	779
Foreclosures	42
<b>Meet and Confer</b>	
<b>Outputs:</b>	
Meet and Confer Sessions Attended	1,474
<b>Outcomes:</b>	
Pending Outcomes	1,249
Withdrawals from Counseling	0
Home-Retention Agreements	150
Non-Retention Agreements	4
No Agreements	71
<b>Mediation</b>	
<b>Outputs:</b>	
Mediation Referrals	602
Clients Assisted in Mediation	478
Mediation Sessions Attended	444
<b>Outcomes:</b>	
Referrals Ineligible for Mediation	23
Agreements Prior to Mediation	80
Withdrawals from Mediation	20
Loan Modifications Reached in Mediation	91

Other Home-Retention Agreements Reached in Mediation	47
Non-Retention Agreements Reached in Mediation	21
No Agreements Reached in Mediation	58
Mediation Sessions Continued (Outcome Pending)	227
<b>Appeals or Escalations</b>	
<b>Outputs:</b>	
Appeals or Escalations	345
<b>Outcomes:</b>	
Pending Outcomes	157
Withdrawals From Counseling	5
Home-Retention Agreements	120
Non-Retention Agreements	42
No Agreements	21

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

## Recommendations

### **Declining Foreclosures, Declining Revenue**

With the numbers of foreclosures declining in our state (see Figures 1 and 2), and with program funding tied to the number of foreclosures, appropriately funding the program remains a challenge. With the reduction of foreclosures and program revenue, the cost associated with administering the program and providing access to services remains unchanged. The program is facing a pivotal moment where the current revenue structure may not be adequate to sustain services and meet the requirements of the act in the near future.

Stakeholders met prior to the last legislative session to identify a structure that could potentially fund the program and services provided under the Foreclosure Fairness Act at an appropriate level. Data on the impact of these changes is starting to become available and will be monitored closely. At this time, it is too early to determine if the desired outcomes of the legislative changes will be achieved.

It is vitally important to the citizens of our state that this program continues and homeowners are offered the opportunity to meet with their lender to identify possible alternatives to foreclosure. There have been a variety of benefits identified through the foreclosure mediation process that provide value to both homeowners and beneficiaries – beyond the initial foreclosure crisis. In order to sustain these essential and consistent services, alternative sources of revenue or revenue structures may need to be identified.

### **Removing References to Making Home Affordable Program in the RCW**

The Making Home Affordable Program (MHA) is set to conclude at the end of this calendar year. Programs under MHA, including the Home Affordable Modification Program (HAMP), will no longer be options for homeowners facing foreclosure. References to HAMP are made at RCW 61.24.163(4) and (9)(c); Commerce recommends removal of these references during the next legislative session in order to eliminate potential confusion.