



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

# Foreclosure Fairness Program

*Annual Report on Program Performance (RCW 61.24.163)*

November 2013  
Report to the Legislature  
Brian Bonlender, Director

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# Executive Summary

## **Overview**

The Foreclosure Fairness Act ([RCW 61.24.163](#)), initially passed by the Legislature in April 2011, reshapes the non-judicial foreclosure process in Washington State to help protect homeowners from unnecessary foreclosures.

It assigns the primary responsibility for developing and 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, and housing professionals.

The legislation 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. Some smaller beneficiaries are exempt from this fee. Money deposited in the fund is expended on homeowner counseling, act enforcement, development and operation of the mediation program, foreclosure prevention outreach and education, and legal assistance for low-income homeowners.

Housing professionals agree that keeping people in their homes is not the only possible positive outcome of the mediation program. 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.

## **Key Outcomes**

The data presented in this report is cumulative, covering the first two fiscal years of the program, from its enactment on July 22, 2011, through June 30, 2013. Key outcomes include:

- In partnership with several Dispute Resolution Centers, Commerce trained more than 300 potential foreclosure mediators, 207 of which were then certified. There are currently 108 active mediators.
- There currently are 58 housing counselors experienced in foreclosure counseling in the state.
- Housing counselors and attorneys referred 4,369 borrowers to Commerce for mediation.
- Of the 4,369 referrals, 2,059 cases have been closed and certified by a mediator. The rest are either pending, were certified after June 30, 2013, or have been found to be ineligible for mediation.

## **Legislative Improvements**

The success of the Foreclosure Fairness Program is directly related to the relationships established with all of the stakeholders. Each time the Act has been amended, Commerce has worked with stakeholders to achieve consensus on implementation of the new guidance. As the program has matured, Commerce has identified some areas that may benefit from future legislative attention. In general, these recommendations would reduce confusion, improve program effectiveness, and lead to more efficient resolution of foreclosure issues. These detailed recommendations, along with Commerce's concerns about the sustainability of the Foreclosure Fairness Program, begin on page 19.

## Background

### Program Creation and Amendments to the Statute

The Foreclosure Fairness Program originated in the Foreclosure Fairness Act, 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.

After its original enactment, the Legislature made significant changes to the act (SSB 5988 during the special session of 2011 and SHB 2614 during the 2012 session) to improve the productivity of the foreclosure mediations and to make the overall process more efficient and transparent. Representatives of the beneficiaries (mortgage lenders), housing advocates, trustees, and mediators supported these changes.

Commerce 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 the borrowers' eligibility criteria for the program.

### 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, what they are responsible for, and what is being reported on in this report.

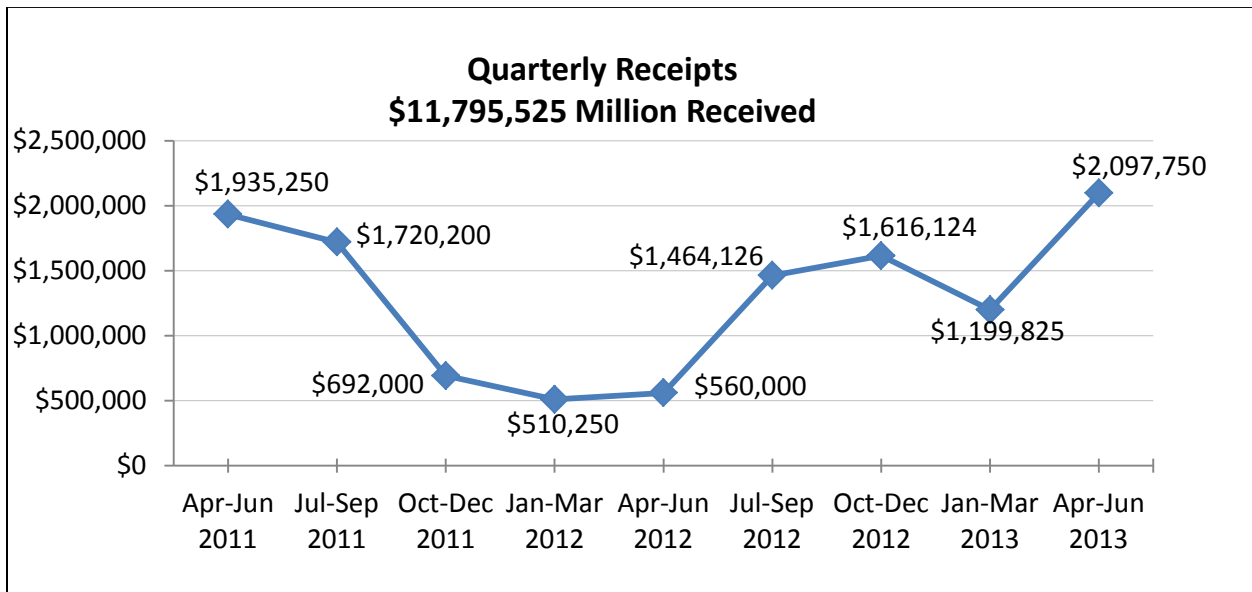
- **Washington State Department of Commerce:** Commerce is charged with the overall development and management of the Foreclosure Fairness Program, including the mediation program. Commerce is also responsible for certifying and maintaining a list of approved mediators.
- **Washington State Housing Finance Commission:** The Washington State Housing Finance Commission (the Commission) administers a homeowner-counseling program, as required by the Foreclosure Fairness Act. The Commission set up a toll-free Homeownership Resource Hotline where homeowners in need of assistance can call and receive free 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.

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

## Funding

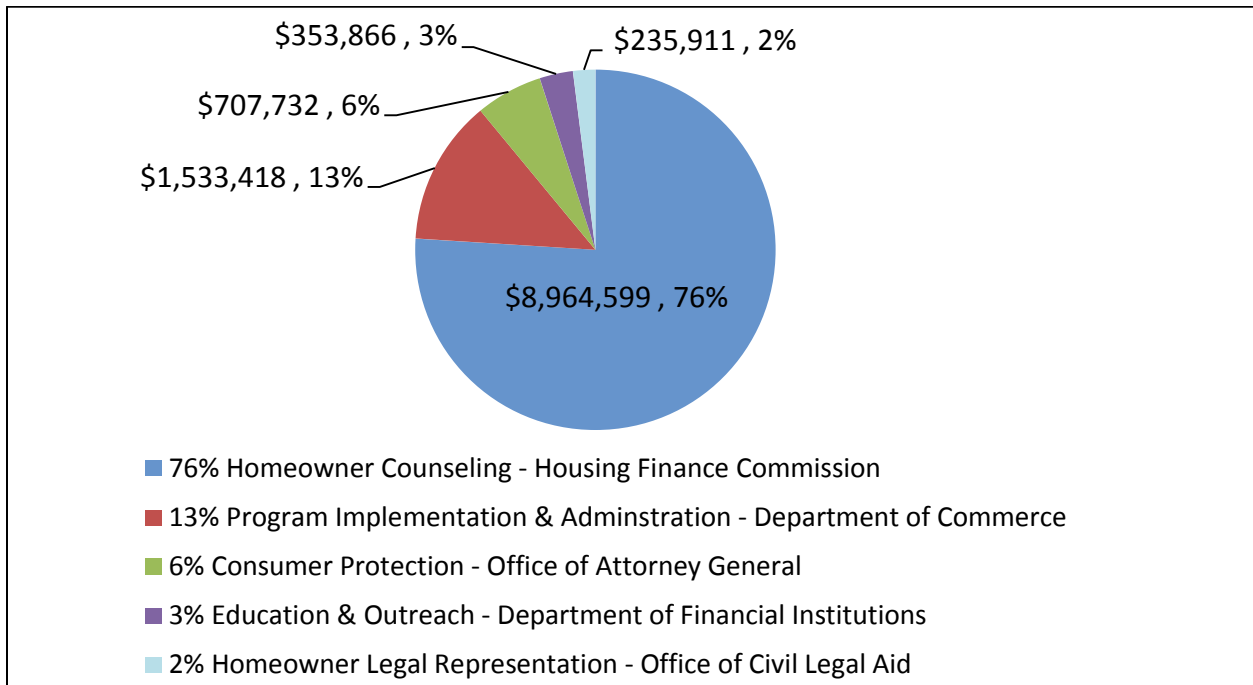
The Foreclosure Fairness Program is supported by private funds. Beneficiaries pay a \$250 fee into the Foreclosure Fairness Fund for each Notice of Default issued to owner-occupied residential real properties. Federally insured financial institutions that issue fewer than 250 Notices of Default in a year may apply for an exemption to these fees during the following calendar year. The Fund provides free homeowner foreclosure counseling, act enforcement, development and operation of the mediation program, foreclosure prevention outreach and education, and free legal assistance for low-income borrowers. **Figures 1 and 2** below illustrate the revenue received into the Fund and its distribution, as of June 30, 2013.

Figure 1: Foreclosure Fairness Fund Revenue, as of June 30, 2013



Note: Funds received in a quarter are fees for Notices of Default issued in the previous quarter. Beneficiary reports and payments are due to Commerce 45 days after the end of each quarter ([RCW 61.24.174](#)).

Figure 2: Foreclosure Fairness Fund Distribution, as of June 30, 2013



### **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.
- 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.
- Beneficiaries must wait at least 30 days after the Notice of Default is issued before recording a Notice of Trustee Sale.

### **Referral to Mediation**

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

- Borrowers become eligible for mediation once they receive a Notice of Default and remain eligible until 20 days after the recording of the Notice of Trustee Sale, and if their beneficiary is not exempt from mediation. 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 next calendar year.



- 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.
- Commerce has 10 days to appoint a mediator and notify all of the parties that mediation was requested.
- The appointed mediator has 70 days to complete the mediation (sometimes 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>2</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**

Commerce developed standards, coordinated training, and approved 207 mediators. In addition, Commerce developed guidelines 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>2</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.

# 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. Since the passage of the Foreclosure Fairness Act, the number of housing counselors contracted has increased from 44 to 58 counselors. 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 mediator's capacity and availability.

## **Approved Foreclosure Mediators**

In addition to receiving referrals and assigning mediators, Commerce is responsible for maintaining a list of approved 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 skills and practice training hosted by regional Dispute Resolution Centers around the state. Commerce approved 207 mediators to conduct foreclosure mediations in Washington. Currently, there are 108 active mediators conducting foreclosure mediations in our state.

## **Referrals to Mediation**

From July 2011, when the program began, through June 2013, Commerce received 4,369 referrals to mediation:

- Housing counselors made 1,654 (or 38 percent) of these referrals, and private attorneys made 2,715 (or 62 percent).
- 3,906 (or 89 percent) of the referrals were assigned to the Commerce-approved mediators.<sup>3</sup>
- 548 (or 13 percent) of the referrals were found to be ineligible.
- 2,059 (or 47 percent) of these cases were closed and/or certified as of June 30, 2013, according to Commerce's records.

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<sup>3</sup> "Cases assigned to mediators" include some cases that have later been deemed ineligible.

More details about the mediation outcomes are included in the “Results of the Mediation Program” section on page 12.

### **Fiscal Year 2012-13 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, 2012, to June 30, 2013):

- Received and processed more than 2,700 new referrals to mediation.
- Streamlined the administrative process, from referral intake to assigning mediators and notifying the parties.
- Hosted the second foreclosure mediators training for more than 200 mediators, including 100 new mediators, in partnership with Resolution Washington.
- Approved 12 new mediators (remaining 88 are working towards meeting all requirements or withdrew).
- Wrote a *Foreclosure Fairness Program Guidelines Manual* for mediators, referrers, beneficiaries, and other interested stakeholders.
- Redeveloped and improved the Commerce’s Foreclosure Fairness Act website with a focus on stakeholders.
- Revised old forms and created a variety of new forms, notices, instructions, and guidelines for mediators, referrers, and beneficiaries.
- Redesigned the Foreclosure Fairness Program brochure to meet the latest legislative amendment, and finalizing translation in 10 languages, in partnership with Department of Financial Institutions.

### **Housing Finance Commission’s Performance**

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

The Commission has executed contracts with Commerce to do all things necessary to operate and maintain a statewide foreclosure-counseling program. In this role, the Commission agrees to such things as:

- Subcontract 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.
- Make efforts to align practices, policies, and quality of service of the counseling agencies in a consistent manner on a statewide basis.

- Collect and provide data to Commerce regarding the performance of the counseling agencies and the outcomes of their clients.
- Monitor complaints against housing counselors and take corrective action when necessary.

### **Department of Financial Institutions' Performance**

The Washington State Department of Financial Institutions is responsible for conducting homeowner pre-purchase and post-purchase outreach and education programs. From the beginning of the program through June 30, 2013, the agency:

- Printed 60,000 Foreclosure Fairness Program brochures, including updating information resulting from legislative and program changes.
- Distributed 39,515 brochures to the public.
- Distributed 24,274 *Guide to Home Loans* workbooks.
- Printed and distributed 20,000 Foreclosure Fairness Program business card-style handouts.
- Mailed 5,646 postcards to homeowners identified to be in foreclosure.
- Produced video public service announcements that ran 835 times on statewide television channels.
- Shared Foreclosure Fairness Act/homeownership/financial education information at 130 conferences and workshops, reaching several thousand Washington residents.
- Provided information at six Realtor events.
- Provided funding and support for Seattle University Law School and Northwest Justice Project direct mail campaign in Seattle.
- Provided Foreclosure Fairness Act outreach on multiple Hispanic Affairs Commission-sponsored radio shows in Spanish with a statewide audience reach.
- Maintained relations with Asset Building Coalitions and other organizations working on foreclosure prevention.

At the time of this report, Department of Financial Institutions and Commerce are translating the Foreclosure Fairness Act brochure into the top 10 non-English languages in the state. The languages are Spanish, Chinese, Vietnamese, Korean, Russian, Tagalog, Cambodian, Arabic, Somali, and Samoan. The new brochures are expected to be ready and on the market by the end of 2013.

### **Office of the Attorney General's Performance**

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.

The Foreclosure Compliance Program has received 1,374 complaints and inquiries since August of 2011, as follows:<sup>4</sup>

- 1,013 direct consumer complaints.
- 275 housing counselor complaints.
- 86 private attorney inquiries regarding clients with mortgage servicing and foreclosure problems.

In addition to the complaints, the Foreclosure Compliance Program responded to multiple legislative and state agency inquiries.

The Foreclosure Compliance Program regularly receives case-specific and issue-related input from Commerce, including requests to respond to homeowners and counselors. The Foreclosure Compliance Program and Commerce meet quarterly to identify areas of concern and to work collaboratively to solve common issues. The Foreclosure Compliance Program participates in mediator training and gives presentations throughout the region.

On February 9, 2012, the Attorney General's Office, along with 48 other states and the federal government, obtained consent judgments against five of the largest servicers of home loans: Citi, Ally/GMAC, Bank of America, JPMorgan Chase, and Wells Fargo. As of June 30, 2013, the Settlement Monitor reported that approximately \$1.2 billion in consumer relief was provided to Washington homeowners in loan modifications, lower interest rates, and transitional assistance for those unable to remain in their homes. In addition to this substantial monetary relief, the settlement contains injunctive relief that requires servicers to comply with state foreclosure laws. It requires servicers to have actual, identified authority to foreclose, which is a Deed of Trust Act requirement, and that they use lawful procedures to create the documents necessary to foreclose under the Deed of Trust Act, e.g., the assignment and the appointment of a successor trustee.

Also as a part of the settlement, the Attorney General's Office convened the Washington Consumer Foreclosure Remedies Fund Committee to make recommendations on the distribution of \$43.8 million the state received under the national settlement to directly address the foreclosure crisis.

After issuing a Request for Proposals, the Attorney General's Office distributed the funds at the end of 2012 in the form of grants to governmental agencies and non-profit organizations throughout the state. The agencies and organizations are using the grant funds to provide consumer access to housing counselors and legal services that help provide consumers with protections afforded under the Foreclosure Fairness Act. Specifically, a grant of over \$2 million was distributed to Resolution Washington to assist the Dispute Resolution Centers throughout the state to supplement their foreclosure mediation programs.

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<sup>4</sup> All numbers are approximate because some inquiries do not always immediately present themselves as complaints and not all telephone calls made directly to attorneys or investigators are counted.

Overall, the grant recipients reported that as of the end of June of 2013, more than \$6 million has been expended through their programs throughout the state, and the Attorney General's Office anticipates that this figure will grow at an exponential rate over the next two to three years.

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

Commerce partners with the Office of Civil Legal Aid to provide free legal assistance to low-income homeowners in matters related to foreclosure. The office contracts with qualified legal aid programs and submits quarterly reports to Commerce on its activities. From the beginning of the program through June 2013, 2,948 calls were received from individual homeowners seeking legal assistance. Of those calls, 445 calls were rejected as ineligible and 2,503 were accepted for representation.

## Results of the Mediation Program

The data presented in this report is cumulative, covering the first two fiscal years of the program, from its enactment on July 22, 2011, through June 30, 2013. The mediation program was developed and is administered by Commerce.

**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. **Figure 5** illustrates the number of referrals received each quarter.

Mediation cases are referred to Commerce by either housing counselors (approximately 38 percent) or private attorneys (approximately 62 percent). Of the 4,369 referrals, Commerce assigned 3,906 to certified mediators; 2,059 of those referrals have been mediated and/or completed. The remaining assigned cases were either pending mediation/completion or have been found to be ineligible for the mediation program.

**Figure 3: Mediation Referrals from Beginning of Program, Through June 30, 2013**

Category Description	Cases
<b>Mediation Referrals Received Through June 30, 2013</b>	<b>4,369</b>
Referred by housing counselors	1,654
Referred by private attorneys	2,715
Cases assigned to mediators*	3,906
Cases completed/closed through June 30, 2013	2,059
Cases pending mediations/certifications**	1,762
Cases ineligible for mediation***	548

\* “Cases assigned to mediators” include cases that have been mediated or closed, cases that are currently pending outcome, as well as some cases that have later been deemed ineligible.

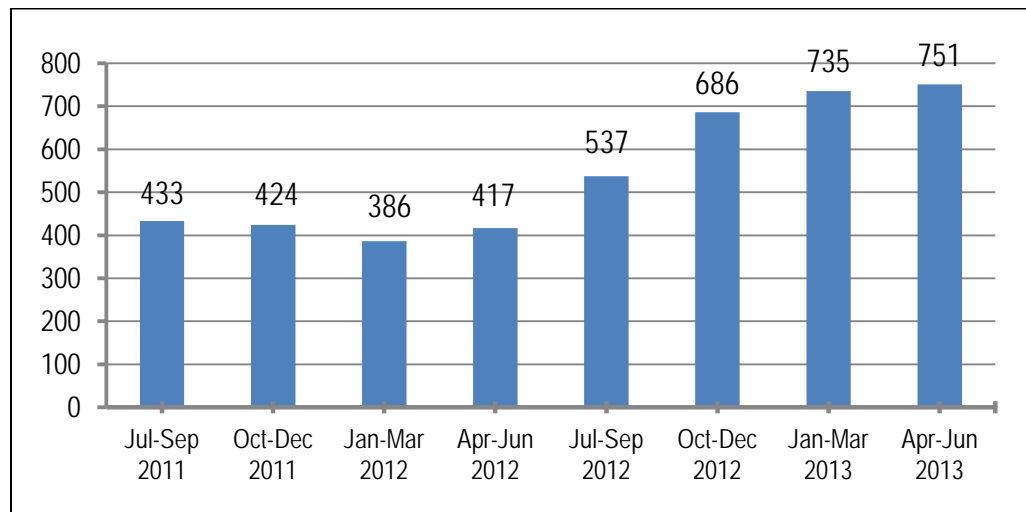
\*\* “Cases pending mediations/certifications” are cases that have been assigned to a mediator and Commerce has not received the certification from the mediator indicating if the mediation has occurred and the result of the mediation.

\*\*\* “Cases ineligible for mediation” are cases that have been referred to Commerce but upon further review have been found to be ineligible, most typically because the beneficiary is exempt, or the timing of the referral missed the window of eligibility specified under the Foreclosure Fairness Act. On occasion, some of these cases were assigned to a mediator, but were later determined to be ineligible.

Figure 4: Counties with the Highest Numbers of Referrals Received, Through June 30, 2013

Top 10 Counties	Referrals Received
King	1,796
Snohomish	819
Pierce	657
Spokane	273
Clark	185
Thurston	102
Kitsap	95
Whatcom	67
Yakima	57
Skagit	43

Figure 5: Referrals Received by Quarter



**Figure 6** analyzes the 2,059 cases that have been mediated or completed. Some cases do not reach mediation due to a variety of factors, such as the borrower’s withdrawal from the mediation process, agreements reached prior to mediation, or one or both parties being unresponsive to the mediator (i.e., lack of good faith on either the borrower’s or the beneficiary’s part).



For the cases that reached mediation, mediators submitted to Commerce certifications that indicated whether an agreement was reached. Reaching an agreement does not necessarily mean the borrower was able to stay in the house. In some cases, staying in the home is not possible because of the borrower’s financial situation.

However, it is important to note that “borrower staying in the home” is not the only possible positive outcome of this program. The purpose of the mediation program is fulfilled if both the borrower and the beneficiary are able to communicate openly, understand all the available options or why they are not available, and as a result make well-informed decisions.

The subcategories listed under “Agreement Reached – Stayed in Home” are **not** mutually exclusive. For instance, a borrower may receive a loan amortization extension, have the principal reduced, and also have the interest rate reduced. In this case, that same loan would be counted in all three subcategories.

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

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

Figure 6: Mediations/Cases Completed from Beginning of Program through June 30, 2013

Category Description	Cases
<b>Cases Certified/Closed</b>	<b>2,059</b>
Referred by housing counselors	767
Referred by private attorneys	1,292
<b>Agreement Reached at Mediation – Borrowers Stayed in Home</b>	<b>326</b>
Reinstatements	28
Repayments	9
Extensions	36
Adjusted rate to fixed rates	44
Amortizations extended	60
Interest rate reductions	165

Principal reductions	26
Monthly principal payments reduced	88
Monthly interest payments reduced	51
Refinances	9
Other loan restructures/modifications	111
Principal forbearances	34
Other forbearances/interest write-offs	6
Other forbearances/fees and penalties write-offs	10
Other forbearances	24
<b>Agreement Reached at Mediation – Borrowers Did Not Stay in Home</b>	<b>189</b>
Deeds in lieu	8
Short sales	69
Voluntary surrenders	14
Cash for keys	7
Other non-retention agreements	91
<b>No Agreement Reached at Mediation</b>	<b>731</b>
Parties in good faith but unable to reach agreement	583
Borrower not in good faith*	67
Beneficiary not in good faith*	91
<b>No Mediation Occurred</b>	<b>813</b>
Agreement reached prior to mediation	256
Borrower withdrew from mediation	297
Borrower unresponsive, mediation cancelled by mediator per RCW 61.24.163(11)	33
Borrower not in good faith	107
Beneficiary not in good faith	16
Other than above	104

\* Some of these cases are reported as both borrower and beneficiary not having acted in good faith.

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

Commerce is unable at this time to provide 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 is developing a pilot survey for borrowers who completed the mediation process with the beneficiaries and reached home-retention agreements, allowing them to stay in their homes. This pilot would include surveying a sample of borrowers to assess the feasibility of surveying the full set of borrowers. Commerce staff will compile contact information for a sample group of homeowners, develop a short survey questionnaire, conduct the survey, and analyze and compile the data. Commerce anticipates that data and analysis from the pilot survey may be available in the next report to the Legislature.

## Outcomes of Housing Counseling

Commerce partners with the Washington State Housing Finance Commission (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 14 housing counseling agencies around the state that had at least two years of experience in providing foreclosure prevention counseling. The Foreclosure Fairness Act allowed for these agencies to hire new counselors, which resulted in increasing the number of foreclosure counselors from 44 to 58 at the time this report was prepared.

The data represented in this section was provided by the Commission as required by [RCW 61.24.160\(6\)](#). It covers the first two fiscal years of the program, from July 22, 2011, through June 30, 2013. **Figure 7** shows a breakdown by category of the total number of clients assisted by the Commission's counselors and the outcomes of counseling.

The Commission reports that their counselors received and processed 15,223 calls from borrowers in need of assistance, and held face-to-face meetings with 8,525 borrowers to discuss their specific circumstances. Counselors attended 1,803 meet-and-confer meetings between borrowers and their beneficiaries. Commerce received 1,526 referrals to mediation made by the counselors subcontracted by the Commission. The Commission also reports that 1,654 borrowers were referred to other types of assistance, such as legal and financial.

Before and after mediation outcomes reported by the Commission include:

- 2,295 participating homeowners were able to retain their home – 2,191 before mediation was requested and 754 because of mediation or further negotiation with their beneficiaries.
- 543 borrowers reached agreements that did not result in them staying in the home, such as short sale, cash for keys, or deed-in-lieu.
- 421 borrowers are reported as not reaching agreement and/or having their house foreclosed by the beneficiary.
- 4,123 are pending outcomes, withdrew from counseling, filed for bankruptcy, or the outcome is unknown.

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. As a result, counselors report numerous agreements reached after the conclusion of the mediation process.

Figure 7: Outcomes of Housing Counseling, Through June 30, 2013

Category Description	Cases
Borrower calls intake and process	15,223
Attended face-to-face counselor-borrower meetings	8,525
Attended meet-and-confer meetings (with borrower and beneficiary)	1,803
Borrowers referred to mediation*	1,526
Borrowers referred to other assistance (legal, financial, etc.)	1,765
<b>Agreements Reached Before or After Mediation – Borrowers Stayed in Home</b>	
Loan modifications/refinances	2,295
Loan reinstatements	205
Other home-retention options	445
<b>Agreements Reached Before or After Mediation – Borrowers Did Not Stay in Home</b>	
Short sales	273
Other non-retention agreements	270
<b>Mortgages Foreclosed, No Agreements Reached</b>	421
<b>Other</b>	
Cases still in process, withdrew, or filed for bankruptcy	3,419
Cases suspended, no client response, HECM** counseled	704

\* The “Borrowers referred to mediation” number is lower than the number identified in **Figure 3** (previous section) because Commerce received referrals from counselors who are not under contract with the Commission for Foreclosure Fairness Program services.

\*\* Home Equity Conversion Mortgage (HECM) is the only reverse mortgage insured by the U.S. Federal Government and is available only through an FHA approved lender.

## Legislative Improvements

The Foreclosure Fairness Act amendments contained in [SHB 2614 \(2012\)](#) have improved the ability for mediators to conduct productive mediations and made the process more efficient and transparent. In particular, the new legislation improved the timing and order of the document exchange to make it work more effectively for both the borrower and the beneficiary. It now allows the beneficiary to use the information provided by the borrower to complete their review prior to the mediation.

In addition, the 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](#)).

The success of the Foreclosure Fairness Program is directly related to the relationships established with all stakeholders involved. The main stakeholders include the banking industry, trustees, homeowner advocates, mediators, and counselors. Each time the Foreclosure Fairness Act was amended, Commerce worked with these stakeholders to achieve consensus. As the program has matured, Commerce has identified some areas that may benefit from either administrative or legislative changes.

While Commerce and the stakeholders continue to discuss these and other potential areas for improvement, Commerce is not ready to recommend specific legislative changes until further consultation with these stakeholders. The following are the areas identified by Commerce as having the highest need for such changes.

1. **Beneficiary Identification:** The Deed of Trust Act defines the beneficiary as “the holder of the instrument or document evidencing the obligations secured by the deed of trust...” Later in the statute, there are references to the beneficiary being the “owner” or the “actual holder” of the note. Potential legislative amendments could provide clarity on whether these entities are in fact different and, if so, clarify which of these entities should be participating in mediation. Furthermore, legislative changes could also provide a framework to address changes in beneficiary after mediation has been requested and the process started.
2. **Eligibility Criteria and Determination:** The statute assigns the eligibility review to the referring counselor/attorney ([RCW 61.24.160](#)). Commerce's eligibility review covers only statutory threshold issues, such as the exemption status of the beneficiary, cut-off eligibility deadlines, and repeat referrals. However, complaints arise from a variety of fact-specific eligibility issues that are not addressed in statute. Potential legislative

amendments could provide further clarification for the eligibility determination and Commerce's limited role.

3. **Repeat Referrals:** The statute is silent on borrowers' eligibility to request repeat mediations on the same foreclosure proceeding. Potential legislative amendments may provide clear direction whether repeat referrals are allowed and, if so, specify eligibility criteria for repeat referrals.
4. **Mediators' Decision Review:** The statute does not contemplate an appeal or review process. Once a mediation is certified by the mediator the case is closed. Commerce receives complaints but has no authority to modify a certification or instruct a mediator to do so, or reopen a case. In reviewing the complaints, Commerce watches for patterns of mediator bias or egregious conduct and can remove a mediator from the approved list should such a pattern become clear. Potential legislative amendments may provide the framework to review mediator decisions.
5. **Mediator Fees:** The statute only contemplates the fee "for preparing, scheduling, and conducting a mediation session lasting between one hour and three hours." Potential legislative amendments could provide clarification regarding other fees incurred by mediators throughout the mediation process. These include, but are not limited to, fees for additional sessions, rescheduling sessions, telephone consultations, late cancellations, multiple document exchanges, and other related mediator services.

### **Program Sustainability**

Commerce continues to look at new ways to streamline, reach efficiencies, and improve its administration of the Foreclosure Fairness Program. However, Commerce is concerned with the unpredictability of the revenue stream and, as a result, with the long-term sustainability of the program.

The statute ([RCW 61.24.172](#)) allows Commerce to retain up to 13 percent of the revenue to administer the Foreclosure Fairness Program. The rest of the revenue is distributed as follows:

- 76 percent for housing counseling.
- 6 percent for the Office of the Attorney General for the Consumer Protection Division.
- 3 percent for Department of Financial Institutions for homeowner outreach and education.
- 2 percent for the Office of Civil Legal Aid to provide legal aid programs.

From its beginning in July 2011 through June 2013, Commerce's costs to administer the program have averaged almost \$190,000 per quarter. We estimate that if the revenue were to drop below \$1,500,000 per quarter, it would provide insufficient funding for Commerce to administer the program at the current levels of administration.

Although the number of new referrals may drop as foreclosures in our state slow down due to a recovering housing market, the open and pending cases in the system would demand a similar administrative workload for some time into the future, possibly one to two years. Should further drops in revenue impair Commerce's ability to administer the program, legislative amendments may be necessary to adjust the distribution of funds prescribed in [RCW 61.24.172](#).