

Foreclosure Fairness Program 2022 legislative report



Annual report on program performance per RCW 61.24.163

**HOMEOWNERSHIP UNIT
FORECLOSURE FAIRNESS
PROGRAM**

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Report to the Legislature

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Executive summary

This report provides Foreclosure Fairness Program (FFP) data for state fiscal year 2022 (July 1, 2021, to June 30, 2022) to satisfy the annual reporting requirements in [RCW 61.24.163\(18\)](#) and additional programmatic context and background. Table 1 maps the location of the required reporting elements in this report.

Table 1: Locations of annual reporting requirements in this report

Subsection	Statutory language	Location
(a)	"The performance of the program, including the numbers of borrowers who are referred to mediation by a housing counselor or attorney."	Table 2
(b)	"The results of the mediation program, including the number of mediations requested by housing counselors and attorneys."	Tables 4, 5 and 6
(b)	"The number of certifications of good faith issued, the number of borrowers and beneficiaries who failed to mediate in good faith, and the reasons for the failure to mediate in good faith, if known, the numbers of loans restructured or modified."	Table 7
(b)	"The change in the borrower's monthly payment for principal and interest, and the number of principal write-downs and interest rate reductions." ¹	Table 4
(b)	"To the extent practical, the number of borrowers who report a default within a year of restructuring or modification."	Commerce conducted a survey in 2014, which determined that this information is unavailable.
(c)	"The information received by housing counselors regarding outcomes of foreclosures."	Table 3
(d)	"Any recommendations for changes to the statutes regarding the mediation program."	Recommendations

Key findings

- The continued impacts of the COVID-19 pandemic emergency were felt in the Washington foreclosure environment throughout state fiscal year 2022:** Due to the implementation of federal foreclosure moratoria and opportunities for mortgage forbearances, many Washington homeowners were able to avoid foreclosure. The foreclosure rate in Washington continued to be historically low throughout the fiscal year, similar to state fiscal year 2021. However, referrals to foreclosure mediation trended upward each quarter through state fiscal year 2022.
- The Homeowner Assistance Fund will strengthen Washington's foreclosure support network:** The Homeowner Assistance Fund (HAF) program, overseen by the Washington State Housing Finance Commission (WSHFC), provides direct assistance of federal funds to Washington homeowners struggling with foreclosure as the state transitions out of the pandemic. Please see the section titled '[Homeowners Assistance Fund](#)' for more information.

¹ [RCW 61.24.163\(18\)\(b\)](#) requires Commerce report on "the change in the borrower's monthly payment for principal and interest." This data is contained in private documents that are not available to Commerce and is therefore not included in this report.

Summary of issues and recommendations

Commerce identified and briefly summarized two primary issues with two recommendations: demand increase and ineffective reporting structure.

Issues recognized by Commerce:

- **Current reporting structure:** The current statutory reporting requirements for the FFP are outdated and require an unnecessary allocation of resources. The current reporting structure does not allow stakeholders and legislators to access the most current program data quickly.
- **The expected increase of referrals due to borrowers exiting forbearance:** The program is preparing for an increase in referrals due to the sizeable number of borrowers exiting COVID-19-related mortgage forbearance programs. We expect an increase in referrals beginning in state fiscal year 2023.

Commerce recommendations:

- **Revise or eliminate the legislative report requirements for the program:** Commerce recommends that the program's legislative reporting requirements be eliminated or changed to a web-based dashboard that provides a more timely reflection of program performance. This will ensure that legislators and stakeholders have the most current information available. Commerce will begin providing web-based reporting in state fiscal year 2024.
- **Request additional funding to meet the increased need:** Commerce has requested \$10 million for the FFP as part of the decision package to combat homeownership disparities. This funding will ensure the program can meet the needs of the increasing number of homeowners seeking foreclosure assistance. Funding will also be used to create a web-based training for mediators, housing counselors, and attorneys to utilize the mediation database and onboard new mediators to meet the increasing need.

Conclusions

The Foreclosure Fairness Program continues to be an important resource for households facing foreclosure and uncertainty as the economy transitions away from the COVID-19 pandemic protections. The upward trend of mediation referrals and borrowers seeking assistance will continue to rise, most likely arriving back to pre-pandemic levels in the early quarters of state fiscal year 2023. However, with the investments made by the state and federal government in financial and foreclosure assistance and our network of skilled housing counselors, legal aid attorneys, and mediators, the Washington foreclosure assistance network will be strong enough to handle the increase.

Introduction

Background

The Legislature created the Foreclosure Fairness Program (FFP) in 2011 in response to the significant number of foreclosures resulting from the Great Recession. The program allows borrowers facing foreclosure to find alternatives by demanding mediation with their lenders (beneficiaries) to look for alternatives to foreclosure. In 2013, the second full year of the program's operation, there were more than 37,000² foreclosures statewide, and the mediation program received more than 2,500 referrals.³ As the state recovered from the Great Recession, foreclosures and referrals declined steadily.

The success of the FFP is directly related to the relationships established with all stakeholders involved. The main stakeholders include homeowner advocates, the banking industry, trustees, mediators, housing counselors, attorneys and the state program partners identified in this report.

Overall, the act intended to:

- Reshape the non-judicial foreclosure⁴ process in Washington to help protect homeowners from avoidable foreclosures; and
- Even when foreclosure is unavoidable, ensure that the process is fair and transparent and allows both borrower and beneficiary to meet and make well-informed decisions.

Overview of foreclosure and mediation

Foreclosure process

The Foreclosure Fairness Act (FFA) and the corresponding FFP enable borrowers to access no-cost foreclosure prevention assistance. Through the Washington Homeownership Resource Center (WHRC), borrowers can access services before, during, and after beginning the foreclosure process. Homeowners can also choose to pay for representation by a private attorney.

Negative effects of foreclosure

Losing a home has many negative effects, primarily financial. For many middle and low-income people, their homes are their largest assets. Homeownership has long been viewed as a sound investment opportunity to fund retirement, provide for a dependent's education, and ensure general financial stability.⁵

The assets a family loses due to foreclosure can reverberate across several generations through lost inheritances.⁶ A foreclosure will result in a significant loss of points on a borrower's credit report.⁷ That effect

² From unpublished data provided by Zillow.

³ From Commerce Foreclosure Fairness Program database.

⁴ Washington is a "non-judicial foreclosure", meaning that a lender can foreclose on a property through a third party, the trustee, and not through the court system. <https://www.commerce.wa.gov/building-infrastructure/housing/foreclosure-fairness/#:~:text=Washington%20is%20a%20%E2%80%9Cnon%2Djudicial,the%20lender%20and%20the%20homeowner>.

⁵ Federal Reserve Bank of New York, "SCE Housing Survey," (2019). <https://www.newyorkfed.org/microeconomics/sce/housing#/main>

⁶ Saegert et al., "Mortgage Foreclosure and Health Disparities: Serial Displacement as Asset Extraction in African American Populations," *Journal of Urban Health: Bulletin of the New York Academy of Medicine*, Vol. 88, No. 3, (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3126937/>

⁷ Experian, "Understanding Foreclosure," (2020), <https://www.experian.com/blogs/ask-experian/what-is-a-foreclosure/>

lasts up to seven years, during which the borrower has limited access to credit at affordable rates. Tax implications can also occur if the Internal Revenue Service (IRS) identifies any forgiven debt as income.

Benefits of mediation

Mediation yields many overall benefits to beneficiaries and homeowners. Both parties benefit from a structured and organized mediation process that provides the opportunity to engage in a facilitated discussion about alternatives to foreclosure. For the borrower, a loan modification might result in the reduction of their mortgage principal, an interest rate reduction, and lower, more affordable monthly payments.

However, not all successful mediations result in the borrower keeping the home. When a family's income or other circumstances make it impossible to keep the home, a non-retention agreement can give a borrower more time to leave or sell on their terms. Non-retention agreements can also help preserve or improve a borrower's financial stability.

Overview of the Foreclosure Fairness Program

Program funding

FFP is funded by the fees mortgage lenders (beneficiaries) pay. As of Jan. 1, 2022, each beneficiary must pay a \$250 fee into the Foreclosure Fairness Fund, an account established by [RCW 61.24.172](#), for each residential real property issued a notice of default in Washington during a given quarter.⁸ The statutory language of this fee can be found in [RCW 61.24.190](#). For more information regarding the new FFP fee structure and exemptions, please see the [Effects of Chapter 151, Laws of 2021 \(ESHB 1108\)](#) section.

The fund pays for the following:

- Free-to-homeowners foreclosure counseling
- Consumer protection and enforcement of the Foreclosure Fairness Act
- Development and oversight of the mediation process⁹
- Foreclosure prevention outreach and education
- Legal assistance for low- and moderate-income homeowners

Agency partner roles and responsibilities

The FFA assigns the primary responsibility for developing and managing the FFP to the Department of Commerce (Commerce). The agency collaborates with the following entities to perform the work:

- Washington State Housing Finance Commission (WSHFC)
- Office of the Attorney General (AGO)
- Office of Civil Legal Aid (OCLA)

The FFP also partners with the following:

- Dispute Resolution Centers¹⁰

⁸ Beneficiaries who issue fewer than 250 notices of default in a calendar year are exempt from this fee beginning January 1, 2023 per [RCW 61.24.190\(6\)](#).

⁹ A separate fee split between homeowner and beneficiary pays mediators.

¹⁰ Dispute Resolution Centers provide affordable mediation to resolve several types of disputes, including parenting plans, divorces, landlord-tenant issues and foreclosures.

- Mediators
- Attorneys (private and civil legal aid)
- Housing counselors

Washington State Department of Commerce

Commerce manages the program and administers the Foreclosure Fairness Fund. Commerce is responsible for recruiting, training and approving mediators. Commerce also receives referrals and assigns mediators to eligible cases. Additionally, Commerce is responsible for maintaining a list of approved foreclosure mediators. The FFA identifies the following groups as eligible to become foreclosure mediators:

- Attorneys
- Retired judges
- U.S. Department of Housing and Urban Development-approved counselors
- Employees and volunteers of Dispute Resolution Centers

Commerce requires participating mediators to take foreclosure mediation training and have additional documented mediator training and experience.¹¹ Currently, 59 active mediators are on Commerce's approved list.¹² Mediators have full discretion in conducting the sessions and determining outcomes.

Washington State Housing Finance Commission

The WSHFC administers a homeowner-counseling program. The commission also oversees the toll-free Washington Homeownership Resource Hotline (1-877-894-HOME (4663)), which provides homeowners with free foreclosure prevention counseling. The WHRC administers the Homeownership Hotline; Washington state law requires banks and loan servicers to supply the hotline phone number to all homeowners who are late on a payment or facing default on their mortgage. Much of the FFP funds directed to the WSHFC support free-to-consumers foreclosure-related housing counseling services throughout the state, including:

- Information and referrals
- Preparation for and representation at meet-and-confer sessions
- Preparation for and representation at mediation
- Homeowner education and participation in community projects benefiting homeowners

Washington State Office of the Attorney General

The Office of the Attorney General's Consumer Protection Division created the Foreclosure Compliance Program to enforce the Deed of Trust Act ([chapter 61.24 RCW](#)). The Foreclosure Compliance Program investigates complaints related to foreclosure.

Office of Civil Legal Aid

The Office of Civil Legal Aid (OCLA) contracts with qualified legal aid programs to provide no-cost legal assistance to low- and moderate-income homeowners in matters related to foreclosure. Commerce partners with OCLA to provide this assistance. OCLA currently grants all of the Foreclosure Fairness Act funds it receives to Northwest Justice Project (NJP), which provides statewide support for this work.¹³

¹¹ Washington State Department of Commerce, "Interested in Becoming a Mediator?" (2013), <http://www.commerce.wa.gov/wp-content/uploads/2015/11/ffa-interested-in-becoming-mediator-2013.pdf>

¹² Washington State Department of Commerce

¹³ Data representing NJP's housing counselor services is included in data provided by the WSHFC.

Northwest Justice Project

NJP provides housing counseling services and no-cost legal services to low- and moderate-income homeowners facing foreclosure. These legal services include representation in defense of all forms of foreclosure, including mortgage, property tax, utility lien, court-ordered forced sale and homeowner/community associations.

Borrowers in danger of losing their homes often need help to address civil legal issues in addition to foreclosure. In certain instances, NJP's advocates address other consumer needs to achieve greater economic security. That might mean challenging or negotiating other debts and liabilities or helping the homeowner apply for property tax relief to reduce monthly expenses. The advocates refer homeowners to other resources or community partners in instances beyond their expertise.

Path to mediation

The following section provides an overview of the foreclosure mediation process for context related to the data displayed throughout the remainder of the report.

Meet and confer period

The "meet and confer," established in the Deed of Trust Act ([chapter 61.24 RCW](#)), identifies clear steps of notification before foreclosure:

- Beneficiaries must issue a Notice of Pre-Foreclosure Options letter at least 30 days before issuing a Notice of Default. The Notice of Pre-Foreclosure Options letter explains to the borrower that they are in danger of losing their home, that free housing counseling is available to help them understand their options, and that they may have an option for mediation. The letter 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 cannot 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 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 Notice of Trustee's Sale recording if their beneficiary is not exempt from mediation.
- Borrowers must be referred to Commerce for mediation by an attorney or a housing counselor. The services of the housing counselor are free to borrowers.
- Upon receipt of a complete referral, Commerce has 10 days to assign a mediator and notify all parties that mediation was requested.

The assigned mediator has 70 days to complete the mediation, with the possibility of extending beyond 70 days if both parties agree to an extension. The participants in the mediation must address the issues of foreclosure that may enable the parties to come to an agreed resolution. To do this, the mediator will ask the participants to consider the borrower's economic position, the net present value for the beneficiary 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

- 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.
- The certification must indicate whether a resolution was reached, include a description of the resolution, and indicate whether the parties participated in good faith.
- If no agreement was reached, the mediator 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 foreclosure.
- Commerce receives all certifications from mediators and sends copies of the certification showing "Beneficiary Not in Good Faith" to the AGO and the Department of Financial Institutions for review.
- A finding that the borrower failed to mediate in good faith authorizes the beneficiary to proceed with the foreclosure.

Program outcomes

Program data is collected and presented in two ways:

1. **Cumulative program data over the life of the program, from state fiscal year 2012 through 2022**
2. **Data from state fiscal year 2022**

Special note on program data and performance

Please note state fiscal year 2022 is the second full fiscal year affected by the COVID-19 pandemic. Due to this, the overall data specific to state fiscal year 2022 reflects abnormally low activity compared to previous years, excluding state fiscal year 2021. Overall referrals to mediation, as seen in Table 2, were the second lowest in program history (state fiscal year 2021 being the lowest) due to the continued federal protections provided by the CARES Act¹⁴ and other mortgage relief assistance. On the other hand, the number of clients served by housing counselors and referrals housing counselors made to other service agencies reflected in Table 3 were much higher compared to other years. The WHFC believes this is due to homeowners' financial uncertainty during the COVID-19 pandemic over the last two years.

¹⁴ [Public Law 116-136-March 27, 2020](#)

Program data

Tables 2-7 show data as required in statute. Table 2 below reflects an overview of mediation referrals the FFP has received overall and separately in state fiscal year 2022.

Table 2: Mediation referrals since the program started and state fiscal year 2022

Mediation referrals	Cases SFY 2012-2022	Cases SFY 2022
Total mediation referrals received	12,173	238*
Referred by housing counselors	5,347	148
Referred by attorneys (private and civil legal aid)	6,826	90
Cases assigned to mediators (includes cases that have been mediated, closed or currently pending an outcome)	11,002	217
Cases completed/closed	10,552	147
Cases ineligible for mediation (typically because the beneficiary was exempt or the referral missed the statutory eligibility window)	1,229	18

Source: Washington State Department of Commerce

* uncharacteristically low due to the protections provided to homeowners in the CARES Act

Table 3: Housing counseling agencies' overall outcomes¹⁵

Category description	Cases SFY 2022
Outputs	
Clients	7,645
Number of meet and confer sessions attended	1,034
Referrals to other services	18,886
Outcomes	
Pending outcomes (still in counseling)	1,380
Withdrawals from counseling	299
Home retention agreements	725
Non-retention agreements	27
No agreements	178
Foreclosures	1

Source: Washington State Housing Finance Commission

Tables 4, 5 and 6 reflect the outcomes of cases certified since the program's inception, with state fiscal year 2022 results broken out. These tables contain data from the FFP database and include referrals from housing counselors, legal aid attorneys and private attorneys.

¹⁵ The number of "Clients" and "Referrals to other services" is significantly higher than previous years due to increased outreach by homeowners facing uncertainty throughout the aftermath of the COVID-19 pandemic.

Table 4: Mediation session outcomes where agreements were reached

Outcomes	Cases SFY 2022	Cases SFY 2012-22
Mediation session(s) occurred – agreement reached	65	3,150
Borrower stayed in home (subcategories not mutually exclusive)	48	2,429
Reinstatements	12	227
Repayments	2	81
Extension	4	208
Adjusted rate to fixed rate	0	230
Amortization extensions	5	526
Interest rate reductions	12	985
Principal reductions	1	119
Monthly principal payment reductions	4	390
Monthly interest payment reductions	1	274
Refinances	2	70
Other loan structures/modifications	17	936
Principal forbearances	0	178
Interest forbearances/write-offs	0	47
Fees and penalties forbearances/write-offs	1	37
Other forbearances ¹⁶	0	74

Source: Washington State Department of Commerce

¹⁶ Because of the way the certification is structured, Commerce is not able to identify unique restrictions and modifications.

Table 5: Outcomes in which no mediation occurred

Outcomes in which no mediation occurred	Cases SFY 2012-2022	Cases SFY 2022
Number of mediations in which no mediation occurred	4,342	61
Home-retention agreement reached before session	2,309	35
Non-retention agreement reached before session	308	5
Borrower withdrawal from mediation (not included in other categories)	684	3

Source: Washington State Department of Commerce

Table 6: Mediation session outcomes – borrower did not stay in home

Non-Retention(categories are not mutually exclusive)	Cases SFY 2012-22	Cases SFY 2022
Deeds in lieu	55	0
Short sales	237	0
Voluntary surrenders	49	1
Cash for keys	30	0
Other non-retention agreements	455	6

Source: Washington State Department of Commerce

Table 7: Mediation session outcomes – findings of not in good faith

Findings of not in good faith	Cases SFY 2012-22	Cases SFY 2022
Borrower not in good faith ¹⁷	1,073	6
Beneficiary not in good faith	349	2
Both borrower and beneficiary not in good faith ¹⁸	15	0

Source: Washington State Department of Commerce

¹⁷ Typically reported reasons for lack of good faith for either or both the borrower and beneficiary include: Lack of timely or accurate provisioning of documents to the mediator or other party; failure to appear at or participate in mediation; failure to pay the mandated share of the mediation fee; beneficiary's representative was not authorized to make binding decisions.

¹⁸ Even though the certification specifically tracks parties "not in good faith," multiple outcomes are not explicitly tracked as being in "good faith."

Challenges and programmatic opportunities

During state fiscal year 2021, the number of foreclosures and referrals to mediation decreased significantly due to protections provided to homeowners in the CARES Act. In state fiscal year 2019, the most recent full year before COVID-19, there were 140 quarterly mediation referrals on average. During state fiscal year 2022, the average was 60. While the number of referrals for mediation dropped significantly, the legal aid and housing counselor organizations have experienced an increase in the number of calls from homeowners seeking to understand their options. With many pandemic-related homeowner protections expiring by the end of state fiscal year 2022, foreclosures and referrals for mediation are increasing.

Homeowner Assistance Fund overview

During the end of fiscal year 2022, distressed homeowners in Washington could seek and obtain much-needed financial help through the HAF. The HAF program is a federal program created by the American Rescue Plan,¹⁹ signed into law by President Joe Biden in March 2021 as a \$1.9 trillion investment into the U.S. economy embattled by the pandemic. The American Rescue Plan allocated \$9.3 billion to the HAF program, \$173.1 million of which was awarded to Washington.²⁰ The HAF program addresses current and future homeowner needs. The program is designed to mitigate the impacts of the pandemic on homeowners.

The Department of the Treasury, the entity overseeing the funding distribution of the HAF program, outlined its purpose as being,

"...to prevent mortgage delinquencies and defaults, foreclosures, loss of utilities or home energy services, and displacement of homeowners experiencing financial hardship after January 21, 2020. ...The law prioritizes funds for homeowners who have experienced the greatest hardships, leveraging local and national income indicators to maximize impact."²¹

The first step of developing the full HAF program was deploying a pilot program utilizing 10% of the overall funding. The HAF Pilot program was launched in January 2022 and offered support to homeowners facing imminent housing loss due to an active foreclosure action filed before Dec. 31, 2021. During the deployment of the pilot program, the WSHFC worked on developing the full HAF program to submit to the Treasury to access the remaining 90% of funds. The full HAF program development was informed with public comment periods. Input from non-profits and government agencies was considered throughout the process.

Originally, Commerce administered this program. Through an interagency agreement with the WSHFC, the program has since been transferred from Commerce to the WSHFC as of Dec. 27, 2021. The Washington HAF plan was formally approved by the commissioners of the WSHFC on March 24, 2022. The HAF plan was subsequently approved by the Department of the Treasury on April 21, 2022.²²

¹⁹ U.S. Congress, "H.R. 1319, American Rescue Plan Act of 2021," <https://www.congress.gov/bill/117th-congress/house-bill/1319/all-actions?overview=closed#tabs>

²⁰ U.S. Department of the Treasury, "Homeowner Assistance Fund: Data and Methodology for State and Territory Allocations," <https://home.treasury.gov/system/files/136/HAF-state-territory-data-and-allocations.pdf>

²¹ U.S. Department of the Treasury, "Homeowner Assistance Fund," <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/homeowner-assistance-fund>

²² Washington State Housing Finance Commission, "Commission Board Meeting Additional Materials Packet - 4/28/2022," <https://www.wshfc.org/admin/Packets/20220428MeetingPacket.pdf>

Currently, the program offers the following:²³

- A maximum grant amount of up to \$15,000 for homeowners that choose not to access the services of a housing counselor. Individuals can directly access the program's online portal and apply without the assistance of a housing counselor.
- A maximum grant amount of up to \$60,000 for homeowners that work with a housing counselor or legal aid attorney to evaluate all options and determine the best use of the program funds in addressing the needs of the homeowner.
- Financial assistance for payment of delinquent property taxes to cure the default and for homeowner's association fees or liens, condominium association fees, common charges, and similar costs payable under a unit occupancy agreement by a resident member in a cooperative housing development.²⁴

Outlined requirements of program applicants:

- The property must be located in Washington.
- Applicant household must have a household income of 100%, or less, of the Area Median Income (AMI) for the county of residence.
- Has a demonstrable hardship caused by COVID-19 that began on Jan. 20, 2020, or after.
- Is the owner of the dwelling, up to four units, and it is the primary residence (owner-occupied) of the applicant. Please note that this can include a manufactured/mobile home in a rented space.
- Reasonable expectation that the homeowner will be able to continue to make mortgage payments in the future.²⁵

Washington HAF funds can cover the following:

- Reinstatement of a mortgage
- Reduction of the amount owed on a mortgage
- Reduction of the mortgage interest rate

Funds are also available for the following:

- Home-related insurance
- Homeowner's association fees or liens
- Delinquent property taxes

Information on additional benefits can be found in the WSHFC packet.²⁶

Washington HAF funds do not cover the following:

- Utilities
- Internet service
- Mortgage payment assistance for future mortgage payments
- Home repairs
- Reimbursement of funds previously expended by state or local governments.²⁷

This program will be available until the funds are exhausted or through June 30, 2024.

For more information regarding the HAF program, please visit the WSHFC's Homeowner Assistance Fund website at www.washingtonhaf.org.

²³ The guidelines of the HAF program can be modified and are subject to change.

²⁴ WSHFC Board Meeting Information Packet - 3/24/2022

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

Effects of Chapter 151, Laws of 2021 (ESHB 1108)

The 2021 Legislature passed [Chapter 151, Laws of 2021](#) (ESHB 1108), making several changes to the FFP in response to the pandemic.

Funding structure revision

Since the FFP is primarily funded by financial institutions accessing the foreclosure process, the dramatic decline in foreclosure activity due to the COVID-19 foreclosure moratoria significantly impacted available funds. Chapter 151, Laws of 2021 changed the fee financial institutions pay from a \$325 quarterly fee per original Notice of Trustee's Sale (NOTS) recorded to a \$250 quarterly fee per residential real property issued a Notice of Default (NOD). The new \$250 fee took effect on Jan. 1, 2022. However, due to the continued low foreclosure rate through the second half of the state fiscal year 2022, it is still unknown if the change in the fee structure will increase funding to the program. The fee continues to be a lump payment to the FFA quarterly.

The new program fee structure is housed in [RCW 61.24.190](#). In addition, a timing issue was produced due to the transition from the NOTS fee to the NOD, enabling some foreclosure activity to escape a fee. For example, if a financial institution issued a fee before the establishment of RCW 61.24.190 and then subsequently recorded a NOTS after the establishment of RCW 61.24.190, a fee would not be collected, and this was a detriment to the program. [Chapter 151, Laws of 2021](#), resolved this issue with the inclusion of [RCW 61.24.173\(8\)](#), which states that if a fee was not collected on the NOD, then the \$325 NOTS fee will apply to the NOTS when it is recorded. [RCW 61.24.173](#) expires on June 30, 2023, which should allow the program to negate the issue of missing applicable fees on foreclosure activity.

Beneficiary exemption revisions

Similarly, [Chapter 151, Laws of 2021](#), revised the FFP beneficiary exemption structure in response to the pandemic. During the last two calendar years, 2021 and 2022, exemptions have been based on foreclosure activity from 2019, the last calendar year unaffected by the pandemic. This change safeguarded the program's funding by not allowing financial institutions to utilize the exemption process due to the extremely low foreclosure activity in Washington.

As of Jan. 1, 2023, eligibility for fee and mediation exemptions for each calendar year will once again be based on foreclosure activity initiated during the immediate past calendar year. The fee exemption for 2023 will be for institutions that issued fewer than 250 notices of default in 2022, as outlined in [RCW 61.24.190\(6\)](#). The mediation exemption for 2023 will be for institutions that were not the beneficiary of deeds of trust in more than 250 trustee sales of residential real property of up to four units in Washington during 2022, as outlined in [RCW 61.24.166](#). This will negatively impact the program's funding, as the moratorium on foreclosures ensured that the number of trustee sales was drastically reduced for all lending institutions.

Removal of owner-occupied requirement

[Chapter 151, Laws of 2021](#) removed the owner-occupied requirement from the eligibility criteria for a mediation referral, except if the borrower is a successor-in-interest. This change was included in the bill's emergency clause and took effect immediately upon signing in May 2021. The definition of residential real property, in terms of the FFP, includes properties of up to four units, whether or not the property is occupied. Due to this change, the referral form was updated to clarify the change in eligibility criteria. Program staff also alerted referrers, borrower representatives, and mediators of the expanded referral eligibility criteria. In light of the decrease in overall referrals for reasons cited earlier, it is unclear at this point what percentage of referrals stem from the expanded eligibility criteria.

New program database implementation

Commerce developed a new mediation database during state fiscal year 2022. The new database will help process referrals and certifications more efficiently and streamline the process by incorporating a self-service component for external users. External users will be able to enter referral information directly into the database themselves. This will increase efficiency as Commerce staff will no longer be required to transcribe information from a digital referral form into the database. This new system is a direct investment in the overall program and will be a much-needed tool as foreclosure mediation referrals continue to increase.

Improvements in the new database

Through an approved SecureAccess Washington (SAW) account, the following can be submitted directly into the database:

- Mediation referrals - submitted by attorneys and housing counselors
- Mediation certifications - submitted by mediators
- Quarterly fee reports- submitted by beneficiaries
- Fee and mediation exemption requests - submitted by beneficiaries

Commerce staff is currently using the new FFP database internally. External database testing was performed with the help of several mediators to test the mediation certification function. Testing and development are ongoing. Once the testing phase concludes, the official external launch of the database is planned for the beginning of the 2023 calendar year. The initial release is planned for mediators only, and then referrers and beneficiaries will have access to the database through a secondary release planned for April 2023. Please note the external launch timeline of the database is subject to change based on the findings made during the external testing and development period.

The future of mediation continues to be virtual

The pandemic drastically changed how the world operates in various ways. One of these major changes is the use of virtual and remote business tools. Since the inception of the FFP in 2011 and the ultimate beginning of the program in 2012, mediators were assigned eligible cases based on their specified county-based service areas. However, this structure created logistical challenges for Washington's rural counties due to the lack of mediators in or near those areas. Therefore, if all parties agree, Commerce interprets the current statutes to allow virtual mediation. Virtual mediation allows borrowers with mobility or transportation challenges to access the program.

The FFP aims to maintain a virtual option for all mediation cases if all parties agree. Accordingly, Commerce is implementing changes that allow virtual mediation in any county if the mediator and all parties have agreed to the virtual option. However, as stated in the FFA statute, the borrower has the right to demand an in-person mediation session in the county where they reside.

Throughout the pandemic, Commerce provided regular guidance to all FFA mediators on conducting mediations in compliance with the governor's safety guidelines. As a result, since the pandemic began, almost all mediations were virtual, with parties participating by phone or a video conference platform. The pandemic forced full integration of virtual environments, resulting in previously underserved smaller and rural counties gaining greater access to mediation through virtual sessions.

New mediator onboarding and training

Currently, the program's mediators have sufficient capacity to meet program needs as the state returns to pre-pandemic activity levels. However, with the significant rise in referrals due to the state and federal foreclosure moratoria being lifted and the rising attrition rate as mediators retire, the program is preparing to bring on new mediators as needed. Having consulted with Dispute Resolution Centers and independent mediators already serving with the program, we plan to develop a new web-based on-demand training to orient new mediators and provide current mediators an opportunity to update their knowledge base. The program intends to recruit and train mediators to increase capacity, especially in underserved and multilingual communities and rural counties, as referrals rise beyond the capacity of current mediators.

Recommendations

Eliminate or revise document reporting requirement

By statute, Commerce is required to provide an annual report to the Legislature. However, since the beginning of the FFP, these reports have been static narrative documents out of sync with the FFP's fluid environment. Decision-making for the FFP is driven by an active and engaged stakeholder group, including:

- Members of the Legislature
- Commerce staff
- Borrowers' advocates (housing counselors and attorneys)
- Beneficiaries' advocates (attorneys and trustees)
- Representatives from the financial institutions (lenders, mortgage bankers and credit unions).

The key meetings where legislative decisions are often held after the report is published. Once the report is published and available internally and externally, it often contains information at least six months out of date.

As technology and direct access to information continue to evolve, the methods of reporting data and activity for the FFP should be addressed. The structure and requirements of the annual legislative report are not currently meeting the program's or stakeholders' needs. Current technology allows Commerce to present FFP data and performance in a timely format on our website. With this technology, the static annual report can be replaced with a streamlined and accessible data sheet with current and accurate data.

Starting in state fiscal year 2024, Commerce will provide the required data quarterly on the [program's website](#) instead of providing an annual report in the form of a narrative document. The required data is better suited for a web-based format. This will also ensure stakeholders have up-to-date information on the program's outcomes readily available. Commerce recommends the Legislature eliminate the existing reporting requirements or revise them to only include web-based reporting.

Provide for the funding shortfall

Commerce requested \$10 million for the FFP as part of the decision package to combat homeownership disparities. Funding is at a historic low as the pandemic moratorium on foreclosures meant that the fees that fund the program were not generated. Additionally, due to the low number of foreclosures in the past year, most lending financial institutions will be able to claim an exemption for the current year, continuing to limit program funding.

If granted, this funding will ensure the program can meet the needs of the increasing number of homeowners seeking foreclosure assistance. This funding will also be used to create a web-based training for mediators, housing counselors, and attorneys to utilize the mediation database and to onboard new mediators to meet the increasing need.

Current foreclosure climate and trends

At the time of writing this report, the first quarter of fiscal year 2023 has concluded. Between July 1, 2022, and Sept. 30, 2022, the program experienced a dramatic increase in referrals for foreclosure mediation. During the first quarter of fiscal year 2023, Commerce received 131 referrals for foreclosure mediation from housing counselors and attorneys, a 46% increase from the previous quarter. One-hundred-thirty-one referrals are the most referrals received for foreclosure mediation since the third quarter of 2020, Jan. 1, 2020, to March 31, 2020, which was just prior to the official COVID-19 emergency, receiving 132 total referrals. At this pace of increase, mediation referrals will reach official pre-COVID-19 levels during the second quarter of state fiscal year 2023. However, effective use of local, state and federal funding will allow for Washington's homeownership and foreclosure network to remain prepared and available to assist homeowners.