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HOUSE BILL 2723

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State of Washington

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**By** Representatives Gregerson, Rodne, Orwall, Jenkins, Robinson, Freeman, Takko, Farrell, Bergquist, Riccelli, Fitzgibbon, Senn, Ryu, Morrell, Ortiz-Self, Clibborn, Kagi, and Goodman

Read first time 01/28/14. Referred to Committee on Judiciary.

1 AN ACT Relating to foreclosures; amending RCW 61.24.031, 61.24.163,  
2 61.24.165, and 61.24.172; and reenacting and amending RCW 61.24.005.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 61.24.005 and 2011 c 364 s 3 and 2011 c 58 s 3 are  
5 each reenacted and amended to read as follows:

6 The definitions in this section apply throughout this chapter  
7 unless the context clearly requires otherwise.

8 (1) "Affiliate of beneficiary" means any entity which controls, is  
9 controlled by, or is under common control with a beneficiary.

10 (2) "Beneficiary" means the holder of the instrument or document  
11 evidencing the obligations secured by the deed of trust, excluding  
12 persons holding the same as security for a different obligation.

13 (3) "Borrower" means a person or a general partner in a  
14 partnership, including a joint venture, that is liable for all or part  
15 of the obligations secured by the deed of trust under the instrument or  
16 other document that is the principal evidence of such obligations, or  
17 the person's successors if they are liable for those obligations under  
18 a written agreement with the beneficiary.

1 (4) "Commercial loan" means a loan that is not made primarily for  
2 personal, family, or household purposes.

3 (5) "Department" means the department of commerce or its designee.

4 (6) "Fair value" means the value of the property encumbered by a  
5 deed of trust that is sold pursuant to a trustee's sale. This value  
6 shall be determined by the court or other appropriate adjudicator by  
7 reference to the most probable price, as of the date of the trustee's  
8 sale, which would be paid in cash or other immediately available funds,  
9 after deduction of prior liens and encumbrances with interest to the  
10 date of the trustee's sale, for which the property would sell on such  
11 date after reasonable exposure in the market under conditions requisite  
12 to a fair sale, with the buyer and seller each acting prudently,  
13 knowledgeably, and for self-interest, and assuming that neither is  
14 under duress.

15 (7) "Grantor" means a person, or its successors, who executes a  
16 deed of trust to encumber the person's interest in property as security  
17 for the performance of all or part of the borrower's obligations.

18 (8) "Guarantor" means any person and its successors who is not a  
19 borrower and who guarantees any of the obligations secured by a deed of  
20 trust in any written agreement other than the deed of trust.

21 (9) "Housing counselor" means a housing counselor that has been  
22 approved by the United States department of housing and urban  
23 development or approved by the Washington state housing finance  
24 commission.

25 (10) "Owner-occupied" means property that is the principal  
26 residence of the borrower.

27 (11) "Person" means any natural person, or legal or governmental  
28 entity.

29 (12) "Record" and "recorded" includes the appropriate registration  
30 proceedings, in the instance of registered land.

31 (13) "Residential real property" means property consisting solely  
32 of a single-family residence, a residential condominium unit, or a  
33 residential cooperative unit. For the purposes of the application of  
34 RCW 61.24.163, owner-occupied residential real property includes  
35 residential real property of up to four units.

36 (14) "Senior beneficiary" means the beneficiary of a deed of trust  
37 that has priority over any other deeds of trust encumbering the same  
38 residential real property.

1 (15) "Tenant-occupied property" means property consisting solely of  
2 residential real property that is the principal residence of a tenant  
3 subject to chapter 59.18 RCW or other building with four or fewer  
4 residential units that is the principal residence of a tenant subject  
5 to chapter 59.18 RCW.

6 (16) "Trustee" means the person designated as the trustee in the  
7 deed of trust or appointed under RCW 61.24.010(2).

8 (17) "Trustee's sale" means a nonjudicial sale under a deed of  
9 trust undertaken pursuant to this chapter.

10 **Sec. 2.** RCW 61.24.031 and 2012 c 185 s 4 are each amended to read  
11 as follows:

12 (1)(a) A trustee, beneficiary, or authorized agent may not issue a  
13 notice of default under RCW 61.24.030(8) until: (i) Thirty days after  
14 satisfying the due diligence requirements as described in subsection  
15 (5) of this section and the borrower has not responded; or (ii) if the  
16 borrower responds to the initial contact, ninety days after the initial  
17 contact with the borrower was initiated.

18 (b) A beneficiary or authorized agent shall make initial contact  
19 with the borrower by letter to provide the borrower with information  
20 required under (c) of this subsection and by telephone as required  
21 under subsection (5) of this section. The letter required under this  
22 subsection must be mailed in accordance with subsection (5)(a) of this  
23 section and must include the information described in (c) of this  
24 subsection and subsection (5)(e)(i) through (iv) of this section.

25 (c) The letter required under this subsection, developed by the  
26 department pursuant to RCW 61.24.033, at a minimum shall include:

27 (i) A paragraph printed in no less than twelve-point font and  
28 bolded that reads:

29 "You must respond within thirty days of the date of this letter.  
30 IF YOU DO NOT RESPOND within thirty days, a notice of default may be  
31 issued and you may lose your home in foreclosure.

32 IF YOU DO RESPOND within thirty days of the date of this letter,  
33 you will have an additional sixty days to meet with your lender before  
34 a notice of default may be issued.

35 You should contact a housing counselor or attorney as soon as  
36 possible. Failure to contact a housing counselor or attorney may  
37 result in your losing certain opportunities, such as meeting with your

1 lender or participating in mediation in front of a neutral third party.  
2 A housing counselor or attorney can help you work with your lender to  
3 avoid foreclosure.

4 If you filed bankruptcy or have been discharged in bankruptcy, this  
5 communication is not intended as an attempt to collect a debt from you  
6 personally, but is notice of enforcement of the deed of trust lien  
7 against the property. If you wish to avoid foreclosure and keep your  
8 property, this notice sets forth your rights and options.";

9 (ii) The toll-free telephone number from the United States  
10 department of housing and urban development to find a department-  
11 approved housing counseling agency, the toll-free numbers for the  
12 statewide foreclosure hotline recommended by the housing finance  
13 commission, and the statewide civil legal aid hotline for assistance  
14 and referrals to other housing counselors and attorneys;

15 (iii) A paragraph stating that a housing counselor may be available  
16 at little or no cost to the borrower and that whether or not the  
17 borrower contacts a housing counselor or attorney, the borrower has the  
18 right to request a meeting with the beneficiary; and

19 (iv) A paragraph explaining how the borrower may respond to the  
20 letter and stating that after responding the borrower will have an  
21 opportunity to meet with his or her beneficiary in an attempt to  
22 resolve and try to work out an alternative to the foreclosure and that,  
23 after ninety days from the date of the letter, a notice of default may  
24 be issued, which starts the foreclosure process.

25 (d) If the beneficiary has exercised due diligence as required  
26 under subsection (5) of this section and the borrower does not respond  
27 by contacting the beneficiary within thirty days of the initial  
28 contact, the notice of default may be issued. "Initial contact" with  
29 the borrower is considered made three days after the date the letter  
30 required in (b) of this subsection is sent.

31 (e) If a meeting is requested by the borrower or the borrower's  
32 housing counselor or attorney, the beneficiary or authorized agent  
33 shall schedule the meeting to occur before the notice of default is  
34 issued. An assessment of the borrower's financial ability to modify or  
35 restructure the loan obligation and a discussion of options must occur  
36 during the meeting scheduled for that purpose.

37 (f) The meeting scheduled to assess the borrower's financial  
38 ability to modify or restructure the loan obligation and discuss

1 options to avoid foreclosure may be held telephonically, unless the  
2 borrower or borrower's representative requests in writing that a  
3 meeting be held in person. The written request for an in-person  
4 meeting must be made within thirty days of the initial contact with the  
5 borrower. If the meeting is requested to be held in person, the  
6 meeting must be held in the county where the (~~borrower resides~~)  
7 property is located unless the parties agree otherwise. A person who  
8 is authorized to agree to a resolution, including modifying or  
9 restructuring the loan obligation or other alternative resolution to  
10 foreclosure on behalf of the beneficiary, must be present either in  
11 person or on the telephone or videoconference during the meeting.

12 (2) A notice of default issued under RCW 61.24.030(8) must include  
13 a declaration, as provided in subsection (9) of this section, from the  
14 beneficiary or authorized agent that it has contacted the borrower as  
15 provided in subsection (1) of this section, it has tried with due  
16 diligence to contact the borrower under subsection (5) of this section,  
17 or the borrower has surrendered the property to the trustee,  
18 beneficiary, or authorized agent. Unless the trustee has violated his  
19 or her duty under RCW 61.24.010(4), the trustee is entitled to rely on  
20 the declaration as evidence that the requirements of this section have  
21 been satisfied, and the trustee is not liable for the beneficiary's or  
22 its authorized agent's failure to comply with the requirements of this  
23 section.

24 (3) If, after the initial contact under subsection (1) of this  
25 section, a borrower has designated a housing counseling agency, housing  
26 counselor, or attorney to discuss with the beneficiary or authorized  
27 agent, on the borrower's behalf, options for the borrower to avoid  
28 foreclosure, the borrower shall inform the beneficiary or authorized  
29 agent and provide the contact information to the beneficiary or  
30 authorized agent. The beneficiary or authorized agent shall contact  
31 the designated representative for the borrower to meet.

32 (4) The beneficiary or authorized agent and the borrower or the  
33 borrower's representative shall attempt to reach a resolution for the  
34 borrower within the ninety days from the time the initial contact is  
35 sent and the notice of default is issued. A resolution may include,  
36 but is not limited to, a loan modification, an agreement to conduct a  
37 short sale, or a deed in lieu of foreclosure transaction, or some other

1 workout plan. Any modification or workout plan offered at the meeting  
2 with the borrower's designated representative by the beneficiary or  
3 authorized agent is subject to approval by the borrower.

4 (5) A notice of default may be issued under RCW 61.24.030(8) if a  
5 beneficiary or authorized agent has initiated contact with the borrower  
6 as required under subsection (1)(b) of this section and the failure to  
7 meet with the borrower occurred despite the due diligence of the  
8 beneficiary or authorized agent. Due diligence requires the following:

9 (a) A beneficiary or authorized agent shall first attempt to  
10 contact a borrower by sending ((a)), by both first-class and either  
11 registered or certified mail, return receipt requested, a letter to the  
12 address in the beneficiary's records for sending account statements to  
13 the borrower and to the address of the property encumbered by the deed  
14 of trust. The letter must be the letter described in subsection (1)(c)  
15 of this section.

16 (b)(i) After the letter has been sent, the beneficiary or  
17 authorized agent shall attempt to contact the borrower by telephone at  
18 least three times at different hours and on different days. Telephone  
19 calls must be made to the primary and secondary telephone numbers on  
20 file with the beneficiary or authorized agent.

21 (ii) A beneficiary or authorized agent may attempt to contact a  
22 borrower using an automated system to dial borrowers if the telephone  
23 call, when answered, is connected to a live representative of the  
24 beneficiary or authorized agent.

25 (iii) A beneficiary or authorized agent satisfies the telephone  
26 contact requirements of this subsection (5)(b) if the beneficiary or  
27 authorized agent determines, after attempting contact under this  
28 subsection (5)(b), that the borrower's primary telephone number and  
29 secondary telephone number or numbers on file, if any, have been  
30 disconnected or are not good contact numbers for the borrower.

31 (iv) The telephonic contact under this subsection (5)(b) does not  
32 constitute the meeting under subsection (1)(f) of this section.

33 (c) If the borrower does not respond within fourteen days after the  
34 telephone call requirements of (b) of this subsection have been  
35 satisfied, the beneficiary or authorized agent shall send a certified  
36 letter, with return receipt requested, to the borrower at the address  
37 in the beneficiary's records for sending account statements to the  
38 borrower and to the address of the property encumbered by the deed of

1 trust. The letter must include the information described in (e)(i)  
2 through (iv) of this subsection. The letter must also include a  
3 paragraph stating: "Your failure to contact a housing counselor or  
4 attorney may result in your losing certain opportunities, such as  
5 meeting with your lender or participating in mediation in front of a  
6 neutral third party."

7 (d) The beneficiary or authorized agent shall provide a means for  
8 the borrower to contact the beneficiary or authorized agent in a timely  
9 manner, including a toll-free telephone number or charge-free  
10 equivalent that will provide access to a live representative during  
11 business hours for the purpose of initiating and scheduling the meeting  
12 under subsection (1)(f) of this section.

13 (e) The beneficiary or authorized agent shall post a link on the  
14 home page of the beneficiary's or authorized agent's internet web site,  
15 if any, to the following information:

16 (i) Options that may be available to borrowers who are unable to  
17 afford their mortgage payments and who wish to avoid foreclosure, and  
18 instructions to borrowers advising them on steps to take to explore  
19 those options;

20 (ii) A list of financial documents borrowers should collect and be  
21 prepared to present to the beneficiary or authorized agent when  
22 discussing options for avoiding foreclosure;

23 (iii) A toll-free telephone number or charge-free equivalent for  
24 borrowers who wish to discuss options for avoiding foreclosure with  
25 their beneficiary or authorized agent; and

26 (iv) The toll-free telephone number or charge-free equivalent made  
27 available by the department to find a department-approved housing  
28 counseling agency.

29 (6) Subsections (1) and (5) of this section do not apply if the  
30 borrower has surrendered the property as evidenced by either a letter  
31 confirming the surrender or delivery of the keys to the property to the  
32 trustee, beneficiary, or authorized agent.

33 (7)(a) This section applies only to deeds of trust that are  
34 recorded against owner-occupied residential real property. This  
35 section does not apply to deeds of trust: (i) Securing a commercial  
36 loan; (ii) securing obligations of a grantor who is not the borrower or  
37 a guarantor; or (iii) securing a purchaser's obligations under a  
38 seller-financed sale.

1 (b) This section does not apply to association beneficiaries  
2 subject to chapter 64.32, 64.34, or 64.38 RCW.

3 (8) As used in this section:

4 (a) "Department" means the United States department of housing and  
5 urban development.

6 (b) "Seller-financed sale" means a residential real property  
7 transaction where the seller finances all or part of the purchase  
8 price, and that financed amount is secured by a deed of trust against  
9 the subject residential real property.

10 (9) The form of declaration to be provided by the beneficiary or  
11 authorized agent as required under subsection (2) of this section must  
12 be in substantially the following form:

13 **"FORECLOSURE LOSS MITIGATION FORM**

14 **Please select applicable option(s) below.**

15 The undersigned beneficiary or authorized agent for the beneficiary  
16 hereby represents and declares under the penalty of perjury that [check  
17 the applicable box and fill in any blanks so that the beneficiary,  
18 authorized agent, or trustee can insert, on the beneficiary's behalf,  
19 the applicable declaration in the notice of default required under  
20 chapter 61.24 RCW]:

21 (1) [ ] The beneficiary or beneficiary's authorized agent has  
22 contacted the borrower under, and has complied with, RCW 61.24.031  
23 (contact provision to "assess the borrower's financial ability to pay  
24 the debt secured by the deed of trust and explore options for the  
25 borrower to avoid foreclosure") and the borrower responded but did not  
26 request a meeting.

27 (2) [ ] The beneficiary or beneficiary's authorized agent has  
28 contacted the borrower as required under RCW 61.24.031 and the borrower  
29 or the borrower's designated representative requested a meeting. A  
30 meeting was held on (insert date, time, and location/telephonic here)  
31 in compliance with RCW 61.24.031.

32 (3) [ ] The beneficiary or beneficiary's authorized agent has  
33 contacted the borrower as required in RCW 61.24.031 and the borrower or  
34 the borrower's designated representative requested a meeting. A  
35 meeting was scheduled for (insert date, time, and location/telephonic  
36 here) and neither the borrower nor the borrower's designated  
37 representative appeared.

1       (4) [ ] The beneficiary or beneficiary's authorized agent has  
2 exercised due diligence to contact the borrower as required in RCW  
3 61.24.031(5) and the borrower did not respond.

4       (~~(4)~~) (5) [ ] The borrower has surrendered the secured property  
5 as evidenced by either a letter confirming the surrender or by delivery  
6 of the keys to the secured property to the beneficiary, the  
7 beneficiary's authorized agent or to the trustee.

8       Additional Optional Explanatory Comments:

9 .....  
10 ....."

11       **Sec. 3.** RCW 61.24.163 and 2012 c 185 s 6 are each amended to read  
12 as follows:

13       (1) The foreclosure mediation program established in this section  
14 applies only to borrowers who have been referred to mediation by a  
15 housing counselor or attorney. The referral to mediation may be made  
16 any time after a notice of default has been issued but no later than  
17 twenty days after the date a notice of sale has been recorded. If the  
18 borrower has failed to elect to mediate within the applicable time  
19 frame, the borrower and the beneficiary may, but are under no duty to,  
20 agree in writing to enter the foreclosure mediation program. The  
21 mediation program under this section is not governed by chapter 7.07  
22 RCW and does not preclude mediation required by a court or other  
23 provision of law.

24       (2) A housing counselor or attorney referring a borrower to  
25 mediation shall send a notice to the borrower and the department,  
26 stating that mediation is appropriate.

27       (3) Within ten days of receiving the notice, the department shall:

28       (a) Send a notice to the beneficiary, the borrower, the housing  
29 counselor or attorney who referred the borrower, and the trustee  
30 stating that the parties have been referred to mediation. The notice  
31 must include the statements and list of documents and information  
32 described in subsections (4) and (5) of this section and a statement  
33 explaining each party's responsibility to pay the mediator's fee; and

34       (b) Select a mediator and notify the parties of the selection.

35       (4) Within twenty-three days of the department's notice that the  
36 parties have been referred to mediation, the borrower shall transmit  
37 the documents required for mediation to the mediator and the

1 beneficiary. The required documents include an initial Making Home  
2 Affordable Application (HAMP) package or such other equivalent  
3 homeowner financial information worksheet as required by the  
4 department. In the event the department is required to create a  
5 worksheet, the worksheet must include, at a minimum, the following  
6 information:

7 (a) The borrower's current and future income;

8 (b) Debts and obligations;

9 (c) Assets;

10 (d) Expenses;

11 (e) Tax returns for the previous two years;

12 (f) Hardship information;

13 (g) Other applicable information commonly required by any  
14 applicable federal mortgage relief program.

15 (5) Within twenty days of the beneficiary's receipt of the  
16 borrower's documents, the beneficiary shall transmit the documents  
17 required for mediation to the mediator and the borrower. The required  
18 documents include:

19 (a) An accurate statement containing the balance of the loan within  
20 thirty days of the date on which the beneficiary's documents are due to  
21 the parties;

22 (b) Copies of the note and deed of trust;

23 (c) Proof that the entity claiming to be the beneficiary is the  
24 owner of any promissory note or obligation secured by the deed of  
25 trust. Sufficient proof may be a copy of the declaration described in  
26 RCW 61.24.030(7)(a);

27 (d) The best estimate of any arrearage and an itemized statement of  
28 the arrearages;

29 (e) An itemized list of the best estimate of fees and charges  
30 outstanding;

31 (f) The payment history and schedule for the preceding twelve  
32 months, or since default, whichever is longer, including a breakdown of  
33 all fees and charges claimed;

34 (g) All borrower-related and mortgage-related input data used in  
35 any net present values analysis. If no net present values analysis is  
36 required by the applicable federal mortgage relief program, then the  
37 input data required under the federal deposit insurance corporation and

1 published in the federal deposit insurance corporation loan  
2 modification program guide, or if that calculation becomes unavailable,  
3 substantially similar input data as determined by the department;

4 (h) An explanation regarding any denial for a loan modification,  
5 forbearance, or other alternative to foreclosure in sufficient detail  
6 for a reasonable person to understand why the decision was made;

7 (i) Appraisal or other broker price opinion most recently relied  
8 upon by the beneficiary not more than ninety days old at the time of  
9 the scheduled mediation; and

10 (j) The portion or excerpt of the pooling and servicing agreement  
11 or other investor restriction that prohibits the beneficiary from  
12 implementing a modification, if the beneficiary claims it cannot  
13 implement a modification due ((solely)) to limitations in a pooling and  
14 servicing agreement or other investor restriction, and documentation or  
15 a statement detailing the efforts of the beneficiary to obtain a waiver  
16 of the pooling and servicing agreement or other investor restriction  
17 provisions.

18 (6) Within seventy days of receiving the referral from the  
19 department, the mediator shall convene a mediation session in the  
20 county where the ((~~borrower resides~~)) property is located, unless the  
21 parties agree on another location. The parties may agree to extend the  
22 time in which to schedule the mediation session. If the parties agree  
23 to extend the time, the beneficiary shall notify the trustee of the  
24 extension and the date the mediator is expected to issue the mediator's  
25 certification.

26 (7)(a) The mediator may schedule phone conferences, consultations  
27 with the parties individually, and other communications to ensure that  
28 the parties have all the necessary information and documents to engage  
29 in a productive mediation.

30 (b) The mediator must send written notice of the time, date, and  
31 location of the mediation session to the borrower, the beneficiary, and  
32 the department at least thirty days prior to the mediation session. At  
33 a minimum, the notice must contain:

34 (i) A statement that the borrower may be represented in the  
35 mediation session by an attorney or other advocate;

36 (ii) A statement that a person with authority to agree to a  
37 resolution, including a proposed settlement, loan modification, or

1 dismissal or continuation of the foreclosure proceeding, must be  
2 present either in person or on the telephone or videoconference during  
3 the mediation session; and

4 (iii) A statement that the parties have a duty to mediate in good  
5 faith and that failure to mediate in good faith may impair the  
6 beneficiary's ability to foreclose on the property or the borrower's  
7 ability to modify the loan or take advantage of other alternatives to  
8 foreclosure.

9 (8)(a) The borrower, the beneficiary or authorized agent, and the  
10 mediator must meet in person for the mediation session. However, a  
11 person with authority to agree to a resolution on behalf of the  
12 beneficiary may be present over the telephone or videoconference during  
13 the mediation session.

14 (b) After the mediation session commences, the mediator may  
15 continue the mediation session once, and any further continuances must  
16 be with the consent of the parties.

17 (9) The participants in mediation must address the issues of  
18 foreclosure that may enable the borrower and the beneficiary to reach  
19 a resolution, including but not limited to reinstatement, modification  
20 of the loan, restructuring of the debt, or some other workout plan. To  
21 assist the parties in addressing issues of foreclosure, the mediator  
22 may require the participants to consider the following:

23 (a) The borrower's current and future economic circumstances,  
24 including the borrower's current and future income, debts, and  
25 obligations for the previous sixty days or greater time period as  
26 determined by the mediator;

27 (b) The net present value of receiving payments pursuant to a  
28 modified mortgage loan as compared to the anticipated net recovery  
29 following foreclosure;

30 (c) Any affordable loan modification calculation and net present  
31 value calculation when required under any federal mortgage relief  
32 program, including the home affordable modification program (HAMP) as  
33 applicable to government-sponsored enterprise and nongovernment-  
34 sponsored enterprise loans and any HAMP-related modification program  
35 applicable to loans insured by the federal housing administration, the  
36 veterans administration, and the rural housing service. If such a  
37 calculation is not provided or required, then the beneficiary must  
38 provide the net present value data inputs established by the federal

1 deposit insurance corporation and published in the federal deposit  
2 insurance corporation loan modification program guide or other net  
3 present value data inputs as designated by the department. The  
4 mediator may run the calculation in order for a productive mediation to  
5 occur and to comply with the mediator certification requirement; and

6 (d) Any other loss mitigation guidelines to loans insured by the  
7 federal housing administration, the veterans administration, and the  
8 rural housing service, if applicable.

9 (10) A violation of the duty to mediate in good faith as required  
10 under this section may include:

11 (a) Failure to timely participate in mediation without good cause;

12 (b) Failure of the borrower or the beneficiary to provide the  
13 documentation required before mediation or pursuant to the mediator's  
14 instructions;

15 (c) Failure of a party to designate representatives with adequate  
16 authority to fully settle, compromise, or otherwise reach resolution  
17 with the borrower in mediation; and

18 (d) A request by a beneficiary that the borrower waive future  
19 claims he or she may have in connection with the deed of trust, as a  
20 condition of agreeing to a modification, except for rescission claims  
21 under the federal truth in lending act. Nothing in this section  
22 precludes a beneficiary from requesting that a borrower dismiss with  
23 prejudice any pending claims against the beneficiary, its agents, loan  
24 servicer, or trustee, arising from the underlying deed of trust, as a  
25 condition of modification.

26 (11) If the mediator reasonably believes a borrower will not attend  
27 a mediation session based on the borrower's conduct, such as the lack  
28 of response to the mediator's communications, the mediator may cancel  
29 a scheduled mediation session and send a written cancellation to the  
30 department and the trustee and send copies to the parties. The  
31 beneficiary may proceed with the foreclosure after receipt of the  
32 mediator's written confirmation of cancellation.

33 (12) Within seven business days after the conclusion of the  
34 mediation session, the mediator must send a written certification to  
35 the department and the trustee and send copies to the parties of:

36 (a) The date, time, and location of the mediation session;

37 (b) The names of all persons attending in person and by telephone  
38 or videoconference, at the mediation session;

1 (c) Whether a resolution was reached by the parties, including  
2 whether the default was cured by reinstatement, modification, or  
3 restructuring of the debt, or some other alternative to foreclosure was  
4 agreed upon by the parties;

5 (d) Whether the parties participated in the mediation in good  
6 faith; and

7 (e) If a written agreement was not reached, a description of any  
8 net present value test used, along with a copy of the inputs, including  
9 the result of any net present value test expressed in a dollar amount.

10 (13) If the parties are unable to reach an agreement, the  
11 beneficiary may proceed with the foreclosure after receipt of the  
12 mediator's written certification.

13 (14)(a) The mediator's certification that the beneficiary failed to  
14 act in good faith in mediation constitutes a defense to the nonjudicial  
15 foreclosure action that was the basis for initiating the mediation. In  
16 any action to enjoin the foreclosure, the beneficiary is entitled to  
17 rebut the allegation that it failed to act in good faith.

18 (b) The mediator's certification that the beneficiary failed to act  
19 in good faith during mediation does not constitute a defense to a  
20 judicial foreclosure or a future nonjudicial foreclosure action if a  
21 modification of the loan is agreed upon and the borrower subsequently  
22 defaults.

23 (c) If an affordable loan modification is not offered in the  
24 mediation or a written agreement was not reached and the mediator's  
25 certification shows that the net present value of the modified loan  
26 exceeds the anticipated net recovery at foreclosure, that showing in  
27 the certification constitutes a basis for the borrower to enjoin the  
28 foreclosure.

29 (15) The mediator's certification that the borrower failed to act  
30 in good faith in mediation authorizes the beneficiary to proceed with  
31 the foreclosure.

32 (16)(a) If a borrower has been referred to mediation before a  
33 notice of trustee sale has been recorded, a trustee may not record the  
34 notice of sale until the trustee receives the mediator's certification  
35 stating that the mediation has been completed. If the trustee does not  
36 receive the mediator's certification, the trustee may record the notice  
37 of sale after ten days from the date the certification to the trustee  
38 was due. If, after a notice of sale is recorded under this subsection

1 (16)(a), the mediator subsequently issues a certification finding that  
2 the beneficiary violated the duty of good faith, the certification  
3 constitutes a basis for the borrower to enjoin the foreclosure.

4 (b) If a borrower has been referred to mediation after the notice  
5 of sale was recorded, the sale may not occur until the trustee receives  
6 the mediator's certification stating that the mediation has been  
7 completed.

8 (17) A mediator may charge reasonable fees as authorized by this  
9 subsection (~~and~~) or as authorized by the department. Unless the fee  
10 is waived (~~or~~), the parties agree otherwise, or the department  
11 otherwise authorizes, a foreclosure mediator's fee may not exceed four  
12 hundred dollars for preparing, scheduling, and conducting a mediation  
13 session lasting between one hour and three hours. For a mediation  
14 session exceeding three hours, the foreclosure mediator may charge a  
15 reasonable fee, as authorized by the department. The mediator must  
16 provide an estimated fee before the mediation, and payment of the  
17 mediator's fee must be divided equally between the beneficiary and the  
18 borrower. The beneficiary and the borrower must tender the loan  
19 mediator's fee within thirty calendar days from receipt of the  
20 department's letter referring the parties to mediation or pursuant to  
21 the mediator's instructions.

22 (18) Beginning December 1, 2012, and every year thereafter, the  
23 department shall report annually to the legislature on:

24 (a) The performance of the program, including the numbers of  
25 borrowers who are referred to mediation by a housing counselor or  
26 attorney;

27 (b) The results of the mediation program, including the number of  
28 mediations requested by housing counselors and attorneys, the number of  
29 certifications of good faith issued, the number of borrowers and  
30 beneficiaries who failed to mediate in good faith, and the reasons for  
31 the failure to mediate in good faith, if known, the numbers of loans  
32 restructured or modified, the change in the borrower's monthly payment  
33 for principal and interest and the number of principal write-downs and  
34 interest rate reductions, and, to the extent practical, the number of  
35 borrowers who report a default within a year of restructuring or  
36 modification;

37 (c) The information received by housing counselors regarding  
38 outcomes of foreclosures; and

1 (d) Any recommendations for changes to the statutes regarding the  
2 mediation program.

3 **Sec. 4.** RCW 61.24.165 and 2011 c 58 s 8 are each amended to read  
4 as follows:

5 (1) RCW 61.24.163 applies only to deeds of trust that are recorded  
6 against owner-occupied residential real property of up to four units.  
7 The property must have been owner-occupied as of the date ((of)) the  
8 initial contact under RCW 61.24.031 was made.

9 (2) A borrower under a deed of trust on owner-occupied residential  
10 real property who has received a notice of default on or before July  
11 22, 2011, may be referred to mediation under RCW 61.24.163 by a housing  
12 counselor or attorney.

13 (3) RCW 61.24.163 does not apply to deeds of trust:

14 (a) Securing a commercial loan;

15 (b) Securing obligations of a grantor who is not the borrower or a  
16 guarantor; or

17 (c) Securing a purchaser's obligations under a seller-financed  
18 sale.

19 (4) RCW 61.24.163 does not apply to association beneficiaries  
20 subject to chapter 64.32, 64.34, or 64.38 RCW.

21 (5) For purposes of referral and mediation under RCW 61.24.163, a  
22 person may be referred to mediation if the borrower is deceased and the  
23 person is a successor in interest of the deceased borrower who occupies  
24 the property as his or her primary residence. The referring counselor  
25 or attorney must determine a person's eligibility under this section  
26 and indicate the grounds for eligibility on the referral to mediation  
27 submitted to the department. For the purposes of mediation under RCW  
28 61.24.163, the person must be treated as a "borrower." This subsection  
29 does not impose an affirmative duty on the beneficiary to accept an  
30 assumption of the loan.

31 (6) For purposes of referral and mediation under RCW 61.24.163, a  
32 person may be referred to mediation if the person has been awarded  
33 title to the property in a proceeding for dissolution or legal  
34 separation. The referring counselor or attorney must determine the  
35 person's eligibility under this section and indicate the grounds for  
36 eligibility on the referral to mediation submitted to the department.  
37 For the purposes of mediation under RCW 61.24.163, the person must be

1 treated as a "borrower." This subsection does not impose an  
2 affirmative duty on the beneficiary to accept an assumption of the  
3 loan.

4 **Sec. 5.** RCW 61.24.172 and 2012 c 185 s 12 are each amended to read  
5 as follows:

6 The foreclosure fairness account is created in the custody of the  
7 state treasurer. All receipts received under RCW 61.24.174 must be  
8 deposited into the account. Only the director of the department of  
9 commerce or the director's designee may authorize expenditures from the  
10 account. Funding to agencies and organizations under this section must  
11 be provided by the department through an interagency agreement or other  
12 applicable contract instrument. The account is subject to allotment  
13 procedures under chapter 43.88 RCW, but an appropriation is not  
14 required for expenditures. Expenditures from the account must be used  
15 as follows: (1) No less than seventy-~~((six))~~ one percent must be used  
16 for the purposes of providing housing counseling activities to benefit  
17 borrowers, except that this amount may be less than seventy-~~((six))~~ one  
18 percent only if necessary to meet the funding level specified for the  
19 office of the attorney general under subsection (2) of this section and  
20 the department under subsection (4) of this section; (2) up to six  
21 percent, or six hundred fifty-five thousand dollars per biennium,  
22 whichever amount is greater, to the office of the attorney general to  
23 be used by the consumer protection division to enforce this chapter;  
24 (3) up to two percent to the office of civil legal aid to be used for  
25 the purpose of contracting with qualified legal aid programs for legal  
26 representation of homeowners in matters relating to foreclosure. Funds  
27 provided under this subsection (3) must be used to supplement, not  
28 supplant, other federal, state, and local funds; (4) up to ~~((thirteen))~~  
29 eighteen percent, or ~~((five hundred ninety))~~ one million four hundred  
30 thousand dollars per biennium, whichever amount is greater, to the  
31 department to be used for implementation and operation of the  
32 foreclosure fairness act; and (5) up to three percent to the department  
33 of financial institutions to conduct homeowner prepurchase and  
34 postpurchase outreach and education programs as defined in RCW  
35 43.320.150.

36 The department shall enter into interagency agreements to contract

1 with the Washington state housing finance commission and other  
2 appropriate entities to implement the foreclosure fairness act.

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