FINANCIAL VALUE TRANSPARENCY AND GAINFUL EMPLOYMENT FINAL RULE & KEY PENDING REGULATIONS

OCTOBER 13, 2023

CONGRESSIONAL LANDSCAPE

- House in Turmoil – Shutdown in November seems likely given turmoil over speakership
  - CR keeping government open until Nov. 17
  - Zero chance full year funding bills will be enacted by then
  - Very unlikely new speaker will take same tact as McCarthy – pass new CR with Democratic (and Republican) support
- House had been considering FY '24 appropriations bills with funding levels well below those agreed to in debt ceiling legislation
- Progress in Senate also slowed by small number of Republicans
  - 12 appropriations bills all passed out of committee with overwhelming, bipartisan support

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

CONGRESSIONAL LANDSCAPE

- Some Activity (Mostly Behind the Scenes) on Other AACC Priorities
  - Ongoing, bipartisan negotiations in House on short-term Pell, WIOA
    - Both Education and Workforce Committee leads have expressed strong interest in passing both bills, but nothing on paper yet
  - Tax-Free Pell Grant Act introduced in both House and Senate on bipartisan basis – field support needed
  - Work continues on Farm Bill
    - AACC advocating for new CC program, better SNAP access for students

GAINFUL EMPLOYMENT HISTORY

- June 2011: Obama administration publishes first gainful employment (GE) rule; had not been regulated previously
- July 2012: GE rule struck down by U.S. District Court over “repayment rate” metric
- October 2014: New GE regulations upheld in subsequent lawsuits
- October 2017: Trump administration stops GE implementation and rescinds in 2019
- January 2022: Biden administration begins broad negotiated rulemaking, including GE — AACC represented by two negotiators
- October 10, 2023 – Final GE Rule Published in Federal Register
- AACC analysis of Final Rule

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

GE/TRANSPARENCY -- BIG PICTURE

- For community colleges, GE programs are Title IV eligible certificate and other non-degree programs
- Regulation represents Biden Administration's most important "accountability" initiative
- GE impacts for-profit institutions most intensively by far, but also impacts community colleges
- Rule decried by Congressional Republicans
- Transparency data component potential game changer
- Substantial institutional reporting burdens

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

GE METRICS -- DEBT TO EARNINGS

- Annual debt-to-earnings is the ratio of a program's annual loan payment amount to completers' median annual earnings
- Discretionary debt-to-earnings is the percentage of a program's annual loan payments compared to completers' discretionary earnings (Median Earnings – 150% of Federal Poverty Guideline)
- Program fails if annual D/E rate is above 8% and discretionary D/E rate is above 20%
- If it isn't possible to calculate D/E rates for an award year, the program remains in the same status as the previous award year for up to four years

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

GE METRICS -- EARNINGS PREMIUM

- Compares median annual earnings of completers to an earnings threshold -- Program passes if completers' earnings exceeds threshold
- Threshold is the median annual earnings for adults aged 25 to 34 with only a high school diploma in the state where the college is located (or nationally if fewer than 50% of students are in that state)
  - Earnings threshold will vary by state but is about $25,000 nationally
- If earnings premium can't be calculated for an award year, the program remains in the same status as previous award year for up to four years
- AACC strongly opposed earnings premium in negotiations and formal comments; ED rejected proposed AACC alternative to accommodate regional wage variations

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

CONSEQUENCES OF FAILING A METRIC

- Programs that fail either or both metrics in a single year must provide a warning to students that the program may lose federal aid eligibility; other programmatic information required
- If program fails the same measure for two out of three consecutive years, it loses Title IV eligibility
  - Three years must pass before program can re-seek eligibility
  - Institutions can only appeal a program eligibility termination action on the basis that ED miscalculated the D/E rates or earnings premium

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

PREDICTED OUTCOMES--ED

- Most community colleges do not have certificate programs that would fail either the D/E or earnings metrics
  - 94% of two-year public institutions have zero enrollment in programs that would fail GE metrics
- Metrics cannot be calculated for most programs
  - Only 4.8% of public undergraduate certificate programs will have sufficient program completers to produce D/E rates and earnings premiums, but that encompasses 21.4% of enrollees
- ED wants to capture greatest percentage of enrollment, not greatest number of programs
  - The 3,937 GE programs across all sectors that will have metrics calculated constitute 64.0% of all students enrolled in GE programs

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

PREDICTED OUTCOMES (CONTINUED)

- ED projects nearly 700,000 students in 1,709 failing GE programs
- The NRPM indicates 193 public GE programs (representing 38,000 students), 73 private, non-profit degree programs (representing 32,600 students), and 1,440 proprietary GE programs (representing 620,800 students) would fail at least one of the D/E rate or earnings premium tests
- Of the 1,440 proprietary GE programs that fail one of the two tests, 873 (61%) are undergraduate certificate programs that fail only the earnings premium test
  - The highest rate of failure is in Personal and Culinary Services, where 73 percent of enrolled students are in programs that would have failing metrics

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

FINANCIAL VALUE TRANSPARENCY

- Provides information to stakeholders about the “financial value” of programs along with other program details
- ED will create a program information website that includes outcomes data about each program at a college
- Same data and metrics as used for GE regulations, but applies to nearly all non-GE Title IV higher education undergraduate and graduate programs
- Some overlap with College Scorecard data

FINANCIAL VALUE TRANSPARENCY (CONTINUED)

- Colleges will be required to provide current and prospective students with information about how to access the website
- For non-GE programs labeled high-debt-burden:
  - Students will have to acknowledge that they've seen the information about the program through the disclosure website
  - Students cannot receive Title IV funds until they provide the acknowledgement
  - Undergraduate degrees excepted

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

REPORTING REQUIREMENTS

- Data will have to be submitted to ED for both GE and non-GE programs
- Institutions will have to report program-level data and student-level data annually
  - Student-level data only includes Title IV recipients except in reports about program data. THIS EXCLUDES MORE THAN HALF OF ALL COMMUNITY COLLEGE STUDENTS!
- Considerable retroactive data reporting will be necessary – as many as seven award years prior by July 31, 2024, though colleges can opt for two-year window.

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

REPORTING - COHORT PERIODS

- ED will use either a two-year or four-year cohort period to calculate D/E rates and earnings premium
  - Four-year cohort will be used if <30 completers in two-year cohort
  - Colleges won't always know up front if a program will hit these thresholds
- Two-year cohort will consist of third and fourth award years prior to the year for which the most recent data are available
- Four-year cohort will consist of third, fourth, fifth, and sixth award years prior to the year for which the most recent data are available
- Initially, colleges may report cohorts for two award years most recently completed before July 31. For 7/31/24 reporting, award years 22-23 and 23-24 could be used

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

ESTIMATED COST AND BURDEN

- ED's cost and burden estimates are likely far lower than what the actual cost and burden will be
  - Last GE was tremendously costly, though aggregate sectoral impact could not be determined. [N.B.: Campus estimates are welcome!]
- ED's time estimation (for the first year):
  - 95.75 hours per college + 7.75 hours per GE program at the college
  - A total of 1.3 million hours across all public two-year institutions
- ED estimates it will cost all public two-year institutions a total of $60.8 million to implement GE in the first year and $17.3 million annually in subsequent years

AACC'S PERSPECTIVE

- Longstanding support for broad transparency for all higher education programs
- Supports debt-oriented GE metric, which reinforces community college financing structure (low tuition and low debt)
- Rejects earnings premium metric because it does not make a fair comparison to the wages of high school graduates and is ultimately arbitrary; doesn't reflect labor market realities
- Limiting data to Title IV-aided students is a tremendous flaw

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

FLSA OVERTIME RULES - BACKGROUND

- Fair Labor Standards Act (FLSA)
  - Establishes federal minimum wage and overtime pay standards
  - Generally, employers must track employees' hours worked and pay an "overtime rate" for all hours in excess of 40 hours per week
  - FLSA includes some exemptions to these overtime pay requirements
- This rulemaking specifically addresses the exemptions for **executive, administrative and professional (EAP) employees**, also known as "white collar" employees

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

FLSA OVERTIME RULES - BACKGROUND

- Employees must meet three criteria to be classified as white collar employees and exempt from overtime pay requirements
  - Paid on a salaried basis
  - Earn at least as much the minimum salary level
  - Have primary duties that are executive, administrative, or professional in nature
- The Department of Labor is proposing a regulatory change to the salary threshold

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

FLSA OVERTIME RULES - BACKGROUND

- In 2016, the Obama administration issued a final rule that increased the salary threshold from $23,660 to $47,476
  - Previously, the salary threshold hadn't been updated since 2004
  - Also created automatic increases every three years
  - Was ultimately overturned by a federal court in 2017
- The Trump administration issued a new final rule in 2019 that increased the threshold to $35,568
  - Went into effect on January 1, 2020 and is the current minimum salary level
  - Did not include automatic increases

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

FLSA OVERTIME RULES – 2023 PROPOSED RULEMAKING

- Sets minimum salary level to 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South)
  - **At least** $55,068 annually ($1,059 a week), but final rule will reflect most recent wage data, which is projected to be **$60,209 annually ($1,158 a week)**
- Would automatically update salary level every three years based on the same formula
- Would also increase the highly compensated employee salary threshold to $143,988 annually

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

FLSA OVERTIME RULES - POTENTIAL IMPACT

- Employees most likely to be impacted on college campuses may be:
  - Academic advisors and counselors, student admissions counselors, administrative specialists and coordinators, student success professionals, and student financial aid counselors*
  - **Does not** affect faculty
- To comply with the proposed change, colleges will have to either reclassify EAP employees to hourly or increase their compensation
  - Stark personnel and financial decisions will be necessary
  - May impact remote work
  - May lead to a ripple effect/wage compression

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

*Based on an analysis conducted by CUPA-HR of salary data and the proposed salary level

FLSA OVERTIME RULES – WHAT'S NEXT

- Comment period on the NPRM ends on November 7
  - AACC joined other higher education associations in requesting an extension, was not granted
- A final implementation date has not been provided, but it could be as early as 60 days after the final rule is published
  - The proposed rule is expected to face legal challenges
- AACC will be submitting comments outlining sector's concerns
  - Please reach out to OGR if you have a sense of the potential impact on your campus
  - Feel free to submit comments directly to DOL

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

ADA, TITLE II - WEB ACCESSIBILITY

- The Department of Justice is proposing regulatory changes to Title II of the Americans with Disabilities Act (ADA), which states that public entities' services, programs, and activities must be accessible to people with disabilities
    - This includes services, programs, and activities that are offered through websites or mobile apps
    - As public entities, community colleges will have to comply with the proposed changes

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

PROPOSED WEB ACCESSIBILITY CHANGES

- Adopt a technical standard for websites and mobile apps that public entities would need to follow
  - Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA
  - Provides guidelines for how text, sound, images, controls, and animations should appear in public-facing digital content to be accessible
  - Would be DOJ's first adoption of specific technical requirements
- Mandate public entities' compliance with the technical standard
  - Rules include some proposed exceptions and limits to those exceptions
  - Most relevant to colleges, this includes an exception for password-protected course content *unless* a student with a disability who needs accessible content is enrolled in the course

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

WEB ACCESSIBILITY COMPLIANCE DEADLINE

- Compliance dates will be three years after the final rule is published for public entities with a population <50,000 and two years for those with a population >50,000
- To determine the size of a public IHE, DOJ proposes using population data "associated with the entity the… university belongs to, like a county or State"
  - From the NPRM: "Though a specific county school may create and maintain web content or a mobile app, the county, as the legal entity governed by title II, is also responsible for what happens in the individual school. The Department expects that the specific school benefits from the resources made available or allocated by the county."

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

POTENTIAL CHALLENGES

- Short time frame to comply with regulations
  - WCAG 2.1 Level AA has a total of 50 success criteria
- Complexity of digital ecosystems at colleges
  - Mixed oversight of websites, learning management systems, and mobile apps
- Increased financial burden
  - Community colleges estimated by DOL to incur a total of $635 million in initial testing, website remediation, PDF remediation, and video and audio captioning costs
  - Mean annual operation and maintenance costs calculated at about $55,000
- Staff capacity

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

WEB ACCESSIBILITY - COMMENTS AND FINAL RULE

- Joined ACE and other higher education associations in submitting comments to DOJ
  - Affirmed importance of providing web access to students with disabilities and asked for a final rule that allows for colleges to have the time and resources to comply
- Unclear when final rule will be published
  - DOJ received about 400 comments on the NPRM

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

STUDENT LOAN DEBT RELIEF COMMITTEE

- ED convened the first session of the Student Loan Debt Relief Committee – the negotiated rulemaking table considering broad student debt relief under the Higher Education Act.
- The issue paper asks negotiators to consider debt relief measures with a particular emphasis on borrowers who:
  - Have loan balances greater than the amount they originally borrowed;
  - Are eligible for forgiveness under income-driven repayment plans but who have not applied;
  - Took out loans to attend programs that provided low financial value relative to the loan amount;
  - Entered repayment on loans taken out before more generous repayment terms were offered;
  - Experience financial hardship.
- ED could be considering changes to the previously proposed debt relief policy to provide more targeted relief.
- The Committee will reconvene in November and December.

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

OTHER LOAN ISSUES

- Debt cancellation through existing avenues remains a top Biden Administration priority
- ED has led an aggressive education and outreach campaign encouraging borrowers to enroll in the new SAVE IDR plan and to avail themselves of existing options for forgiveness
- So far, ED has cancelled more than $127 billion in federal student loans:
  - $42B – SAVE retroactive forgiveness and fixing IDR errors
  - $51B – Public Service Loan Forgiveness
  - $11.7B – Discharge for borrowers who have a total and permanent disability
  - $22.5B – Borrower Defense to Repayment

BORROWER DEFENSE

- Over the past few months, colleges across sectors have reported receiving a higher than usual volume of borrower defense claim notifications
  - Borrower defense to repayment provides a process for borrowers who have been defrauded or misled by their college to have their loans forgiven.
  - The increase in claims may be due to a few factors:
    - Backlog of claims – ED waited to release claims under the *Sweet v. Cardona* settlement was reached in June
    - End of the repayment pause
- Borrowers initiate the process by filling out an application with FSA. ED then sends the claims to colleges to give them an opportunity to respond before ED adjudicates the claims.
- To be approved, applications must be *materially complete*, but colleges are reporting that many of the claims they are receiving lack required information.

BORROWER DEFENSE (CONT.)

- Colleges should consider working with legal counsel to determine whether to respond to claims based on material completeness, merit, and institutional capacity
- Two different sets of regulations apply to BDR claims:
  - **Loans dispersed before November 15, 2022:** claim will be adjudicated under the 2016 BDR rules. Non-response from the institution is not viewed as favorable to the borrower's claim
  - **Loans dispersed after November 15, 2022:** claim would fall under the 2023 BDR rules, which do see non-response as favorable to the borrower. As those rules are currently blocked under a national injunction, colleges are not obligated to respond.
- The higher education community has asked ED to offer additional clarity on institutions' responsibilities in borrower defense to repayment

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

QUESTIONS?

SAVE THE DATE!

ADVOCATES IN ACTION

SEPT. 16 -17, 2024!

ADVOCATES
IN ACTION

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES

AACC POINTS OF CONTACT

- David Baime, Senior VP, Government Relations: dbaime@aacc.nche.edu
- Jim Hermes, Associate VP, Government Relations: jhermes@aacc.nche.edu
- Kathryn Gimborys, Government Relations Manager: kgimborys@aacc.nche.edu
- Alexis Gravely, Legislative Analyst, Government Relations: agravely@aacc.nche.edu

AMERICAN ASSOCIATION OF COMMUNITY COLLEGES