UNITED STATES DEPARTMENT OF EDUCATION

THE UNDER SECRETARY

June 2, 2015

MEMORANDUM

TO: James Runcie
Chief Operating Officer
Federal Student Aid

CC: James Cole, Jr.
General Counsel

Jamienne Studley
Deputy Under Secretary Delegated Duties of the Assistant Secretary for Postsecondary Education

FROM: Ted Mitchell
Under Secretary

SUBJECT: Enforcement of the statutory prohibition on payment of incentive compensation by postsecondary institutions

The purpose of this memorandum is to provide direction to the Department in responding to violations of section 487(a)(20) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1094(a)(20) (incentive compensation prohibition). Effective immediately, as part of our HEA enforcement activities, Department staff should recover Department losses caused by violations of the incentive compensation prohibition, as described below.

Under the incentive compensation prohibition, postsecondary educational institutions that participate in the student financial assistance programs authorized pursuant to Title IV of the HEA, 20 U.S.C. §§ 1070 *et seq.* (Title IV programs), are barred from providing incentive payments to any person or entity engaged in any student recruiting or admissions activities or in making decisions regarding the award of student financial assistance based directly or indirectly upon success in securing enrollments or financial aid. Institutions agree that they will comply with the incentive compensation prohibition as a condition of their participation in the Title IV programs and their receipt of Title IV program funds.

Until 2002, long after the enactment of the incentive compensation prohibition, the Department measured damages resulting from a violation of the prohibition as the total amount of student aid provided to improperly recruited students. In 2002, however, the Department's Deputy Secretary issued a memorandum (the 2002 memorandum) that changed the Department's approach for measuring damages in the context of establishing administrative liabilities, to view a violation of section 487(a)(20) as not resulting in monetary loss to the Department. The 2002 memorandum rested on the view that the Department purportedly suffers no loss when an institution receives Title IV funds by violating the promises and representations it made as a condition of participation in the Title IV programs.

To the contrary, the Department, in fact, incurs monetary loss upon a violation of section 487(a)(20), and the appropriate response is to recover that loss, as provided for in the Department's original policy. When acting as the Department's fiduciary, an institution may receive funds only in accord with the representations it makes in order to become eligible for those funds. When an institution makes an incentive payment based upon the number of students enrolled, the institution breaches those representations. It thus violates a condition of its Title IV program eligibility and is not entitled to receive those Title IV funds. In this situation, an institution is liable to the Department for the cost of the funds it received.

In administrative enforcement actions, the Department should calculate the amount of the institutional liability based on the cost to the Department of the Title IV funds improperly received by the institution. This would include the cost to the Department of all of the Title IV funds received by the institution over a particular time period if those funds were obtained through implementation of a policy or practice in which students were recruited in violation of the incentive compensation prohibition.

The Department may also, of course, impose a fine upon an institution, or take an administrative action to limit, suspend, revoke, deny, or terminate the institution's eligibility to participate in the Title IV programs, when the institution violates the statutory prohibition on payment of incentive compensation. Such additional remedies are available to the Department whenever an institution violates program requirements, and thus their availability is consistent with the conclusion that section 487(a)(20) is a condition of both participation and receipt of program funds, and that a violation of the prohibition on incentive payments results in a loss to the United States.