Alliance
for International Educational and
Cultural Exchange

July 23, 2007

Mr. Stanley Colvin
Director
Office of Exchange Coordination and Designation
Department of State
Washington, D.C. 20547

Re: 22 CFR Part 62 RIN: 1400-AC29 (Subpart D-Sanctions and Subpart E-Termination and Revocation of Programs)

Dear Stanley:

This letter constitutes the formal comment of the Alliance for International Educational and Cultural Exchange on the Department of State's proposed rule on sanctions and termination and revocation of programs, published May 31, 2007. The Alliance, an association of 78 U.S.-based non-governmental organizations that conduct exchange programs of all types, serves as the collective policy voice of the U.S. exchange community.

We appreciate the opportunity to comment on this proposed rule, and share the Department's view that an effective sanctions regime is an important component of a successful Exchange Visitor Program. We are deeply concerned, however, by the specific content of this rulemaking. The rule provides inadequate opportunities for due process, and imposes inadequate standards of transparency and accountability on the Department.

Overall, the rulemaking empowers the Department to take far-reaching steps – based on very general criteria – that will prove extraordinarily damaging to an affected sponsor, and offers very limited recourse to appeal sanctions decisions. One of the key thrusts of the sanctions rule seems to be to minimize the Department's administrative burdens. While this goal is understandable, efficiency must not come at the expense of a process that is fair and transparent.

The problems engendered by this proposed rule are so significant that we recommend that the Department convene a public hearing as a part of the rulemaking process. This would allow for an open exchange of views between the Department and the sponsor community, and could be scheduled after the Department has had time to carefully review written comments on the proposed rule.

Comments on specific aspects of the rule follow.

Lesser sanctions appeal process – When the Office of Exchange Coordination and Designation imposes lesser sanctions under this rulemaking, the only recourse available to a sponsor will be an appeal to the very same office. The proposed rule makes clear that the decision of the Office on lesser sanctions will constitute the decision of the Department.

This is a completely inadequate appeal process. If a sponsor must appeal the imposition of lesser sanctions, the appeal should be made to an authority higher than the Office. The original imposition of sanctions presumably will not be undertaken lightly and will reflect the Office's considered views. An appeal to the Office to revise its own decision seems unlikely to result in meaningful change, and projects the appearance of unfairness and a lack of due process. While it makes sense that a sponsor may file an initial appeal with the Office, the regulations must provide for a review and final decision by a higher authority.

While the appearance of fairness is a critical element in the success of any sanctions process, it is worth noting that the community's concern here is not only about process. Even lesser sanctions carry serious practical implications. A 15 per cent reduction in a sponsor's allocation of DS-2019 forms is a very serious penalty, one that would cause painful staff reductions for any sponsor, and would have ramifications for business partnerships around the world. The mildest sanction, a written reprimand, is hardly insignificant, as it presumably would make a sponsor more likely to receive a more serious sanction in the future.

These very serious consequences argue for a fairer and more transparent appeal process for lesser sanctions.

Lack of specific criteria for imposing sanctions – The criteria for imposing sanctions are extremely broad. Programs can be sanctioned for not serving U.S. public diplomacy goals, for undermining our foreign policy objectives and compromising national security interests, for endangering the health and safety of participants, and for bringing the Department into 'notoriety and disrepute'. These all are serious matters, and in extreme cases, would certainly dictate the imposition of sanctions.

In the community's experience, however, there are very few extreme cases. The recent history of the Exchange Visitor Program has shown that reasonable people – even within the Department's own staff – can and often do differ about whether particular practices constitute compliance violations. The rule proposes no requirement that the Department provide any documentary or empirical evidence to justify a sanction. Moreover, the rule specifies no criteria for violations that would rise to the level of serious sanctions. This lack of transparency and accountability will inevitably call the Department's decisions into question, and will contribute to a continuing perception – justified or not – that sanctions decisions can be arbitrary or capricious.

The community also notes with concern the Department's revision of existing criteria to eliminate the requirement that violations be willful or negligent. No one disputes the

Department's assertion that sponsors are required to know the program regulations. It is indisputably true, however, that the regulations contain a great deal of ambiguity. We have seen instances in the past year in which staff members of the Office of Exchange Coordination and Designation have publicly expressed differing views over the meaning of specific regulations. On several occasions, the Compliance Unit has initiated reinterpretations of existing program rules without seeking public comment or providing timely notification. The meaning of the rules is a moving target, and to require a sponsor to maintain mastery of both the Federal Register text and evolving Department interpretations is both unreasonable and unwise.

The rule should incorporate more specificity about violations, and maintain existing language requiring that violations be willful or negligent.

Immediate program suspension – The rulemaking provides that an appeal to the imposition of a program suspension does not stay the suspension. This guilty-until-proven-innocent approach is extraordinarily harsh, particularly given that the proposed rule holds the Department to no specific standard in reaching its finding that a suspension is in order.

Even if the regulatory deadlines are met, a 10-day suspension of operations will mean disruption for Exchange Visitors and loss of jobs and operating revenue to an American sponsor that may be guilty of nothing at all, and that has not experienced any sort of due process. Exchange business will be suspended, essentially, on the basis of an accusation by the Office, an accusation that could be modified or even overturned by the Principal Deputy Assistant Secretary.

This uncommonly severe approach should be eliminated from the final rule.

Revocation of designation –The procedures for revocation of a J-1 designation appear to place a higher premium on efficiency than on due process. To be clear, what is involved in revocation is putting an American organization out of business, or at least out of a significant element of its business. The extreme nature of the sanction is amplified by the imposition of revocation for any act or omission under §62.50(a), rather than the higher standard set within the suspension section requiring that the act or omission be serious.

Basic principles of fairness and transparency would suggest that in such a dire circumstance, an American sponsor would be entitled to the fullest opportunity to defend itself. The rulemaking, however, denies the sponsor even the opportunity for a hearing, unless a Department review panel decides to call a meeting. Such a meeting would be extraordinarily circumscribed, and would not in fact be a hearing in any traditional sense. According to the rulemaking, the meeting may last no more than two hours, and must be confined to clarifying written submissions (which themselves are circumscribed by specific page limits). No additional evidence of any sort may be presented.

In addition, the proposed rulemaking specifically states that no transcript of such a meeting will be produced, a disturbing provision that calls into question the Department's willingness

to be accountable in such an important matter. The proposed rule points to a process that includes 'a clear, manageable record' as a strong point of the new provisions. It seems inappropriate that such a record would not include a transcript of any proceedings.

The exchange community is well aware of the Department's recent unsuccessful experience with a more traditional hearing. That unwelcome outcome, however, should not inform the rulemaking to the extent that a sponsor is so aggressively restricted from defending itself and its activities in what amounts to a professional life-or-death decision process.

The Department needs to substantially revise this section to restore access to a fair hearing process that affords adequate opportunity for a sponsor to defend itself.

Denial of redesignation – The proposed rule permits the Department to deny an application for redesignation – the functional equivalent of revoking a designation – with 30 days written notice to the sponsor. The rule specifically notes that this decision can be made even if a sponsor has had no previous sanctions or notice of problems, and provides the same inadequate appeal process as for a revocation. Under the rule as written, the Department apparently could use a complaint or audit result that is two years old and has never been discussed with the sponsor as a basis for closing down an exchange program.

We recommend that the Department revise this language to make sure that the denial of a redesignation is the end point in an ongoing process which informs a sponsor of perceived deficiencies and allows ample time for the sponsor to respond and, if necessary, take corrective action.

Termination of a class of programs – We find it hard to understand why the Department feels it necessary to assert the right to terminate an entire class of programs, particularly when it has so assertively staked out procedures for terminating problem programs. While the term 'class of program' is vague (An entire J-1 category? Programs in particular fields within a category? Certain types of participants from specific countries?), we find it difficult to imagine a circumstance when such an action would be necessary. Further, the rulemaking appears to allow for no appeal or review process of any kind for such a sweeping decision, and only requires 30 days notice.

We urge that this section of the proposed rule be eliminated.

Conclusion – We believe that in its emphasis on expediency over fairness, transparency, due process, and accountability, the proposed rule will not inspire public confidence, and thus is fatally flawed. This judgment represents a broad consensus in the sponsor community, and one way to rebuild public confidence will be to invite more public participation in the rulemaking process.

A public hearing, scheduled after the Department has an opportunity to review the public comments received, would contribute substantially to this process. A hearing would allow a representative group of sponsors from across the U.S. to share their concerns with the

Department, and to consider together ways to craft an effective sanctions package that both strengthens our public diplomacy and enjoys public support.

Enforcement of the Department's regulations is important, and penalties are a significant part of that process. But by creating a sanctions regime that inhibits or prevents meaningful appeals and thus restricts due process, the Department will create a process that lacks public credibility. This will be exacerbated by the minimal accountability required of the Department, as well as the lack of specific criteria and the reduction in the level of intent or seriousness required for serious sanctions. The Department's use of sanctions in the past has been perceived by many to be unfair and inequitable. A process that so severely limits the ability of sponsors to defend themselves will only add to that perception, and invite aggrieved parties to seek relief outside the processes outlined in the proposed rule.

Sincerely,

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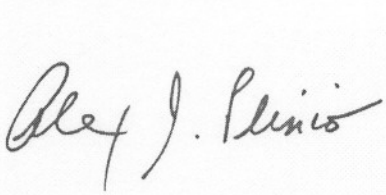

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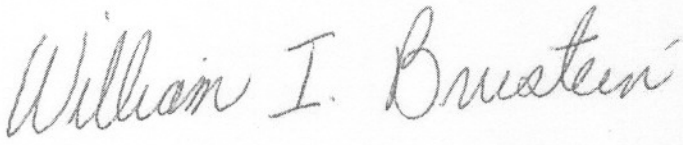

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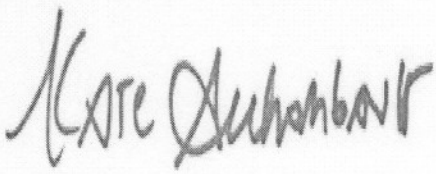

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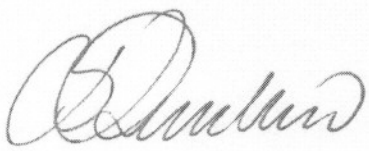

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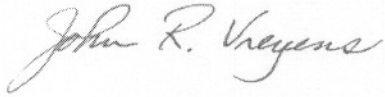

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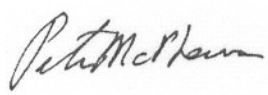

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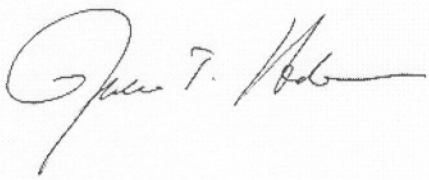

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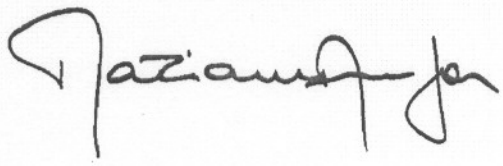

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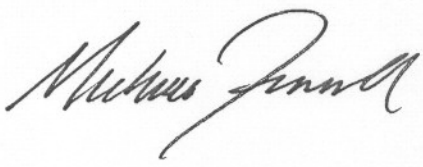

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