

▷ SEX OFFENDER MANAGEMENT POLICY IN THE STATES



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On the 25th anniversary of Adam Walsh's kidnapping, the federal government enacted the Adam Walsh Child Protection and Safety Act to protect children and the public from violent sex offenders. Adam was abducted from a Sears department store in Hollywood, Fla., July 27, 1981, and later found murdered. His death drew national publicity, and his father, John Walsh, later became an advocate for

victims of violent crime and the host of the television program *America's Most Wanted*.

The Adam Walsh Act sets a minimum national standard for state sex offender registries and notification laws and has the potential to overhaul sex offender laws across the nation. The act, which is divided into seven titles, calls for a more detailed, uniform and nationalized system of sex offender registries; addresses issues of child pornography, Internet safety and civil commitment; creates grants for electronic monitoring; and revises the Immigration and Nationality Act to address immigrants who are sex offenders.

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Registration Act. This law created the first set of standards for sex offender registration and notification, requiring convicted sex offenders to register their addresses with local law enforcement agencies and mandating the creation of state sex offender Web sites. States had a great deal of discretion to decide which offenders should be required to register and what information should be posted about them online. This led to wide discrepancies between states.

To this end, Title I of the Adam Walsh Act, commonly known as the Sex Offender Registration and Notification Act, or SORNA, seeks to standardize registration and notification requirements across the country, while also providing for greater offender accountability and increased sanctions for noncompliance. The legislation creates the Office of Sex Offender Sentencing Monitoring, Apprehending, Registering and Tracking—known as the SMART

Office—to oversee the implementation of the standards for sex offender registration and notification as set forth in SORNA and to issue guidelines to help states and other covered jurisdictions implement the provisions of the law.

States that fail to substantially implement the SORNA guidelines will see a 10 percent reduction in their Byrne Justice Assistance Grant (JAG) funds, which are used to support multi-jurisdiction drug task forces and to provide other support to local law enforcement agencies. The standard of “substantial implementation” is satisfied if a jurisdiction carries out the requirements of SORNA as interpreted and explained in the Final Guidelines. SORNA requires certain requirements for sex offender notification and registration programs, and jurisdictions are free to exceed the minimum standards. Jurisdictions are free to implement SORNA in any way, as long as it meets the minimum requirements.

The law originally gave states three years from July 27, 2006, to comply with the provisions set forth in SORNA, but allowed states to apply for two one-year extensions. On May 26, however, U.S. Attorney General Eric Holder issued a one-year blanket extension of the July 27, 2009, deadline in Order No. 3081-2009. Forty-eight states had already applied for an extension.

During the 2007 and 2008 legislative sessions, many states began revising their laws to meet the requirements laid out in SORNA. On September 23, 2009, Attorney General Eric Holder announced that Ohio and the Confederated Tribes of the Umatilla Indian Reservation (located in Oregon) are the first two jurisdictions to substantially implement SORNA.

## OVERVIEW OF SORNA PROVISIONS

SORNA sets minimum standards for all 50 states, Washington, D.C., U.S. territories and tribal governments. Most notably, the law expands the definition of sexual offenses as previously used in the Jacob Wetterling Crimes Against Children Sex Offender Registration Act and increases the number of offenders affected by the registration laws of the Wetterling Act and its public notification amendment added in 1996. That amendment is commonly known as Megan's Law, named after 7-year-old Megan Kanka, who was kidnapped, sexually assaulted,

## ▷ SORNA's Three-Tiered Classification System

- ▷ Tier I sex offenders—defined as those other than a Tier II or Tier III offender—must register for 15 years, but can appeal for removal from the registry after 10 years of compliance or a reduction of their registration requirement after five years of compliance. Since federal law prohibits prison terms for greater than one year in tribal court convictions, those cases require a Tier I classification.
- ▷ Tier II offenders are those not classified as a Tier III and who are convicted of a felony or attempt to commit sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, or abusive sexual contact; use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or production or distribution of child pornography. Tier II is also used for offenders who are already classified as Tier I and who commit any subsequent sex offense. Tier II offenders must register for 25 years.
- ▷ Tier III offenders are felony sex offenders convicted of aggravated sexual abuse, sexual abuse or abusive sexual contact of a minor under age 13, and non-custodial kidnapping. Tier III offenders also include Tier II offenders who commit subsequent sex crimes. Tier III offenders must register for life.

and murdered in 1994 by a man who had two prior convictions for sexual offenses.

### Classifying Sex Offenders

SORNA provides for a nationwide system of sex offender registration that must be publicly available on the Internet. States must establish a

three-tiered classification system for sex offenders, based on the nature of the crime committed and the offender's criminal history. Though jurisdictions do not have to adopt the tier terminology, they do need to meet or exceed the standards SORNA spells out.

### Registration Information and Frequency

SORNA greatly expands the amount of information collected and how frequently this information must be updated, both by the offender and by the agency controlling the registry Web site. Registration is required in each jurisdiction in which the offender lives, attends school and is employed.

Offenders must confirm their registration in person and have an updated photograph taken annually if they are in Tier I, every six months if they are in Tier II, and every three months if in the Tier III category. The offender must report any change in the information required for registration, such as an address, within three days.

At a minimum, each sex offender must provide his/her name, Social Security number, address where he/she habitually lives, employer and address, school (if a student) and address, license plate number and description of any vehicle owned or operated by the offender. The offender will also need to provide any Internet or electronic identifiers, such as e-mail addresses or instant messenger IDs. A criminal history must also be included, with dates of arrests and convictions, as well as the offender's incarceration status. The offender must also provide a DNA sample and finger and palm prints.

Information published on a state sex offender Web site must now include "sex offenders' names, addresses or locations, vehicle descriptions and license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs," according to SORNA guidelines. Web sites must be set up to allow for searches

by ZIP code or by a geographical area. Jurisdictions may elect not to publicly post employment or education-related information for Tier I offenders under SORNA.

Some items are exempt from being publicly posted, including the identity of any victim, the offender's Social Security number, and arrests that did not result in conviction. Some items are left to the state's discretion, including any information about a Tier I offender convicted of an offense other than a specified offense against a minor, the name of the employer of the sex offender and the name of a school where the sex offender is a student.

Information provided on the state's Web site must be contemporaneously updated and notice should be provided to various individuals and entities, including the U.S. attorney general, law enforcement agencies, schools and public housing authorities in each area where the individual resides, works or attends school, any volunteer organizations having contact with minors and any organization or individual requesting notification.

### Homeless or Transient Sex Offenders

SORNA's Final Guidelines account for homeless or transient offenders by requiring, under the "habitually lives" definition, any park or street where the sex offender frequents during the day or sleeps at night, shelters where the sex offender circulates, or places in public buildings, restaurants, libraries or other establishments where the offender may loiter. Transient offenders are also required to report the addresses of places they may visit for more than seven days.

### Crimes Expanded

States must also make failure to register a criminal offense with a maximum penalty of greater than one year in prison.

Registration for criminal activity against an adult victim is no longer limited to sexual penetration, as crimes involving sexual contact are now also registrable offenses.

## New Rules for Juveniles

Prior to the passage of SORNA, only juveniles prosecuted and convicted as adults were required to register as sex offenders. Under the act, juveniles adjudicated delinquent of certain serious sexual offenses are treated in the same manner as adult sex offenders, and must register with local law enforcement. In addition, information about them can be released to the public.

SORNA does not require registration for all juveniles adjudicated delinquent for all sex offenses, but does require registration for juveniles who are at least 14 years old at the time of the offense who are adjudicated delinquent for committing, attempting to commit or conspiring to commit serious sexual assaults. The final guidelines specify that in order for SORNA requirements to apply, the act committed must be one that, if perpetrated by an adult, would result in a Tier III classification.

SORNA allows states to reduce the registration period for such juveniles if the offender maintains a clean record for 25 years.

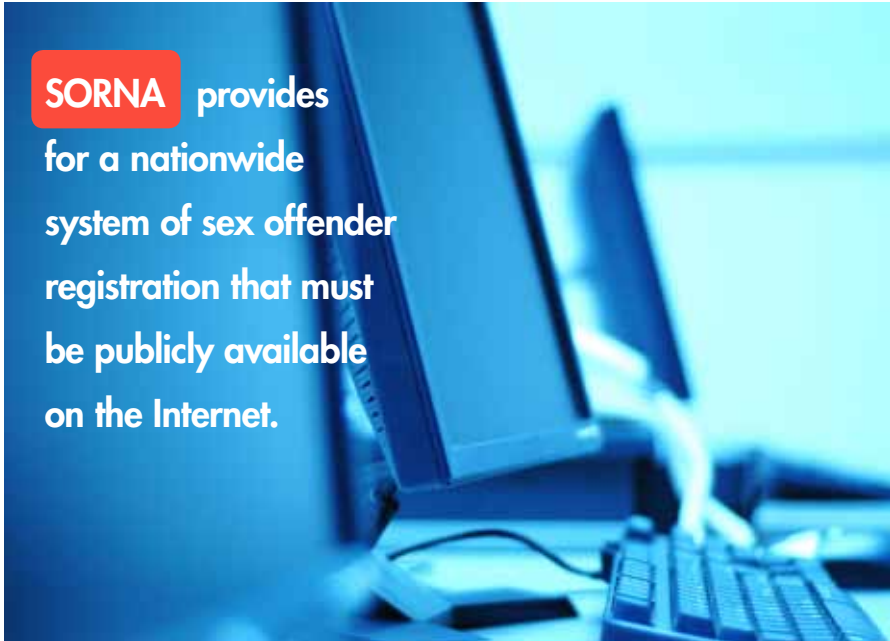
## Retroactivity

SORNA took effect immediately when the Adam Walsh Act was signed, and applies to all sex offenders in the federal system, regardless of date of conviction. Ostensibly, this is true for jurisdictions that adopt SORNA requirements, which means states will need to reclassify all of their current sex offenders and apply new standards to their registration.

SORNA will also require sex offenders who have been out of the system and no longer under registration requirements to re-register should they commit another crime, regardless of whether the new crime is sexual in nature or not.

## Immigrant Offenders and Foreign Convictions

SORNA amended the Immigration and Nationality Act to make failing to register as a sex offender a deportable offense. States may choose to register individuals who



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have been convicted of sex offenses in other countries or can scrutinize the way the conviction was attained to determine the need to require registration of the offense.

## Romeo and Juliet Laws

SORNA does not require registration of people convicted of sex offenses involving consensual sexual conduct between a victim who is least 13 and an offender who is no more than four years older.

## ISSUES WITH COMPLIANCE

State policymakers have long struggled to find a balance between a public that wants to feel safe from sex offenders and policy that is effective in managing this class of offenders. Passage of the Adam Walsh Act created additional pressures on states to modify their laws, resulting in heated debates among state policy officials and the sex offender management community.

None of the 47 states that responded to a 2009 survey of states indicated they would meet the July 2009 deadline, which has since been extended until July 2010. That survey was conducted in February and March at the request of U.S. Sen. Patrick Leahy of Vermont by SEARCH, which is directed by a membership group consisting of a governor-appointed representative from each state.<sup>1</sup>

States that responded to the survey cited several factors impacting their ability to comply with SORNA requirements, including cost, the act's juvenile registration and reporting requirements, and the new registration requirements that are retroactive.

## Juvenile Sex Offenders

The most commonly cited barrier to compliance was the act's juvenile registration and reporting requirements, listed by 23 states. Under SORNA, juveniles as young as 14 could potentially be required to register as a sex offender and be subject to the same public disclosure as their adult counterparts, making public their names, addresses, photographs, and even the name and address of the schools they attend. But as discussed earlier, most states do use their own discretion in making this information available on a Web site.

Advocates for juvenile offenders argue that SORNA ignores significant difference between adult and juvenile sex offenders. Research shows there are important developmental differences between juveniles and adults, and as a result, juvenile sex offenders do not pose the same public safety threat as adult sex offenders. Because their brains are still developing until their early 20s, juveniles are not fixed in their sexual offending behavior and may

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respond well to treatment. Juvenile sex offenders have fewer numbers of victims than adult offenders, and on average, engage in less serious and less aggressive behaviors.<sup>2</sup>

In addition, critics of the provisions related to juveniles argue that they contradict the rehabilitative intent and confidentiality that is inherent in the juvenile justice system. There is also a concern that the harsh new registration laws for juveniles could lead to a decrease in the reporting of juvenile sex crimes.

### **Retroactive Registration**

The second most frequently referenced SORNA barrier cited by the states (20 states) is retroactive registration. SORNA requires registration to be retroactive for certain offenders whose convictions predate enactment or implementation of the act in a particular jurisdiction. Specifically, the act requires the registration of sex offenders who remain in the system as prisoners, supervisees or registrants, and those who re-enter the system through a subsequent criminal conviction, even if it is not sexual in nature.

States are concerned about applying the provisions retroactively, both in terms of the cost and time involved in re-evaluating all the sex offenders currently on the registries.

In addition, the retroactive provisions violate the constitutions of many states, which prohibit ex post facto laws that retroactively change

the legal consequences of acts committed prior to the enactment of the law. States, however, are not required to comply with provisions that would violate their constitutions, as determined by the state's highest court. To reconcile differences between SORNA's requirements and the state's constitution, the state must act in good faith with the U.S. attorney general. The jurisdiction is still required to implement alternative laws that fulfill the intent of SORNA.

A federal appeals court panel ruled Sept. 10 that juveniles convicted of sex offenses in federal court before SORNA took effect in July 2006 cannot be retroactively required to register under the law. The panel ruled the registration requirement was an unconstitutional additional punishment and would violate the confidentiality rules and the rehabilitative purpose of most juvenile court proceedings. In the ruling, Judge Stephen Reinhardt of the 9th Circuit Court of Appeals wrote that the registration "requirement serves to convert a rehabilitative judicial proceeding, sheltered from the public eye, into a punitive one, exposed for all to see, and with long-lasting substantially adverse and harsh effects."

### **Costs of Implementation**

Seven states were concerned with the cost of implementing SORNA, as the federal government has yet to provide funds to support its implementation. States that have examined complying with SORNA have, for

the most part, found the costs would far outweigh the 10 percent cut in Byrne Justice Assistance Grant funding they face in choosing not to comply. JAG funding is generally used to enforce drug laws and support law enforcement.

In recent years, Congress has slashed Byrne funding for state and local law enforcement from \$520 million in 2007 to just \$170.4 million in 2008, with upwards of \$2.5 billion cut since 2001, according to the National Criminal Justice Association. The American Recovery and Reinvestment Act of 2009 recently allocated an additional \$2 billion in the grant funding. While Recovery Act money will boost Byrne grants, the funding increases may only be temporary and still may not be enough to offset the costs of compliance with SORNA.

According to an analysis by the Justice Policy Institute, in all 50 states, the first year costs of implementing SORNA would exceed the cost of losing 10 percent of the Byrne grant funding.<sup>3</sup> States can expect to incur significant costs as they attempt to comply with SORNA, including the costs of new personnel, new software, additional jail and prison space, court and administrative costs, and law enforcement costs.

For example, a comprehensive cost analysis in Virginia found the first year of compliance with the registry requirements alone would cost approximately \$12.5 million.<sup>4</sup> After the first year, Virginia estimates the cost of SORNA compliance at nearly \$8.9 million. The amount of Byrne grant funding Virginia would lose due to noncompliance would be approximately \$600,000.<sup>5</sup>

Similarly, Ohio found the cost of implementing new software needed to create the registry would approach \$500,000 in the first year alone. The software would then cost \$85,000 annually thereafter. In addition, Ohio estimates certifying treatment programs based on the new standards and complying with increased notification laws would cost another \$100,000 annually. This is in addition to other estimated increased costs, including salaries

and benefits for new personnel, new court and administrative costs, and costs to counties and municipalities. If Ohio were not to comply with SORNA, it would lose approximately \$900,000.<sup>6</sup>

### **Effectiveness of Sex Offender Registration Laws**

Despite the high costs of compliance with SORNA, there is little empirical proof that sex offender registries and notification make communities safer.

In 1999, University of Memphis researchers conducted a survey of psychologists, social workers and counselors who treat sex offenders. The study revealed that nearly 70 percent of those surveyed felt that Internet sex offender registries create a false sense of security. The authors presented possible reasons for this false sense of security, including the fact that not all offenders are included on every site, sex offenders may move often, not all sex offenders comply with their registration requirements, and those who have committed sex crimes against children but were never caught will not be included in the registry. The same group of respondents was even more unconvinced of the effectiveness of registry sites, with more than 80 percent saying they did not think the sites would result in a decrease in the incidences of child sexual abuse.<sup>7</sup> Little research has been done to examine the effects of on-line registries on recidivism rates.

At least half the states currently categorize sex offenders using risk-based assessment to evaluate known risk factors and screen offenders into categories based on their likelihood to re-offend. When used correctly, such risk-based assessment tools better predict the likelihood a sex offender will commit another offense, help identify specific risk factors and monitor treatment. Under SORNA, offenders are categorized based on their offense, rather than by their risk to re-offend.

Critics contend that offense-based categorization has several inherent problems, most notably that the crime for which an offender is charged may not reflect the seriousness of the underlying offense. This could lead to an underestimation of the risk of offenders who plead to a lesser offense. As a result, many lower risk offenders could potentially be erroneously classified as high risk and publicly identified while dangerous offenders with more favorable court outcomes will have fewer limits placed upon them. There is no empirical research that indicates the crime of conviction is related to the risk of recidivism, but it will be extremely expensive for states to reassess all their current sex offenders based on their offense.

### **Notable Legal Challenges**

SORNA continues to face multiple challenges in both federal and state courts.

For example, Senate Bill 10 passed by the Ohio legislature to comply with SORNA has faced numerous legal challenges since its adoption in 2007. In 2009, the Ohio Appellate Court found in *Spangler v. State* that the compliance legislation to be a violation of both the Ohio and U.S. Constitutions.

In Nevada, U.S. District Judge James Mahan has issued a permanent injunction barring the state from applying two new sex offender laws retroactively. He ruled that the laws, which the Legislature passed in 2007 to bring the state into compliance with the Adam Walsh Act, violated the U.S. Constitution under both the Due Process and Ex Post Facto clauses. In his ruling, Judge Mahan found that “the application of these laws retroactively is the equivalent of a new punishment tacked on to the original sentence—sometimes years after the fact—in violation of the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution, as well as the Contracts clauses of the U.S. and Nevada Constitutions.”<sup>8</sup>

In determining whether or not to comply with SORNA, states may find that the costs of implementation may outweigh the benefits. If states choose to comply, it is likely that these new laws will face constitutional challenges, in both state and federal court. Consequently, the national debate over proper management of sex offenders is certain to continue.

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