

tracking sex offenders following their release into the community. If a sexually violent crime occurs or a child is molested, information available to law enforcement through the registration program about sex offenders who may have been present in the area may help to identify the perpetrator and solve the crime. If a particular released sex offender is implicated in such a crime, knowledge of the sex offender's whereabouts through the registration system may help law enforcement in making a prompt apprehension. The registration program may also have salutary effects in relation to the likelihood of registrants committing more sex offenses. Registered sex offenders will perceive that the authorities' knowledge of their identities, locations, and past offenses reduces the chances that they can avoid detection and apprehension if they reoffend, and this perception may help to discourage them from doing so.

Registration also provides the informational base for the other key aspect of the programs—notification—which involves making information about released sex offenders more broadly available to the public. The means of public notification currently include sex offender Web sites in all States, the District of Columbia, and some territories, and may involve other forms of notice as well. The availability of such information helps members of the public to take common sense measures for the protection of themselves and their families, such as declining the offer of a convicted child molester to watch their children or head a youth group, or reporting to the authorities approaches to children or other suspicious activities by such a sex offender. Here as well, the effect is salutary in relation to the sex offenders themselves, since knowledge by those around them of their sex offense histories reduces the likelihood that they will be presented with opportunities to reoffend.

While sex offender registration and notification in the United States are generally carried out through programs operated by the individual States and other non-federal jurisdictions, their effectiveness depends on also having effective arrangements for tracking of registrants as they move among jurisdictions and some national baseline of registration and notification standards. In a federal union like the United States with a mobile population, sex offender registration could not be effective if registered sex offenders could simply disappear from the purview of the registration authorities by moving from one jurisdiction to

another, or if registration and notification requirements could be evaded by moving from a jurisdiction with an effective program to a nearby jurisdiction that required little or nothing in terms of registration and notification.

Hence, there have been national standards for sex offender registration in the United States since the enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act (42 U.S.C. 14071) in 1994. The national standards from their inception have addressed such matters as the offenses for which registration should be required, updating and periodic verification of registration information, the duration of registration, public notification, and continued registration and tracking of sex offenders when they relocate from one jurisdiction to another.

Following the enactment of the Wetterling Act in 1994, that Act was amended a number of times, in part reflecting and in part promoting trends in the development of the State registration and notification programs. Ultimately, Congress concluded that the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards—the SORNA reforms, whose implementation these Guidelines concern—that would close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs. Important areas of reform under the SORNA standards include:

- Extending the jurisdictions in which registration is required beyond the 50 States, the District of Columbia, and the principal U.S. territories, to include Indian tribal jurisdictions.
- Extending the classes of sex offenders and sex offenses for which registration is required.
- Consistently requiring that sex offenders in the covered classes register and keep the registration current in the jurisdictions in which they reside, work, or go to school.
- Requiring more extensive registration information.
- Adding to the national standards periodic in-person appearances by registrants to verify and update the registration information.
- Broadening the availability of information concerning registered sex offenders to the public, through posting on sex offender Web sites and by other means.
- Adopting reforms affecting the required duration of registration.

In addition, SORNA strengthens the federal superstructure elements that leverage and support the sex offender registration and notification programs of the registration jurisdictions. These strengthened elements are: (i) Stepped-up federal investigation and prosecution efforts to assist jurisdictions in enforcing sex offender registration requirements; (ii) new statutory provisions for the national database and national Web site (i.e., the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Web site) that effectively compile information obtained under the registration programs of the States and other jurisdictions and make it readily available to law enforcement or the public on a nationwide basis; (iii) development by the federal government of software tools, which the States and other registration jurisdictions will be able to use to facilitate the operation of their registration and notification programs in conformity with the SORNA standards; and (iv) establishment of the SMART Office to administer the national standards for sex offender registration and notification and to assist registration jurisdictions in their implementation.

Through the cooperative effort of the 50 States, the District of Columbia, the U.S. territories, and Indian tribal governments with the responsible federal agencies, the SORNA goal of an effective and comprehensive national system of registration and notification programs can be realized, with great benefit to the ultimate objective of “protect[ing] the public from sex offenders and offenders against children.” SORNA section 102. These Guidelines provide the blueprint for that effort.

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II. General Principles

Before turning to the specific SORNA standards and requirements discussed in the remainder of these Guidelines, certain general points should be noted concerning the interpretation and application of the Act and these Guidelines:

A. Terminology

These Guidelines use key terms with the meanings defined in SORNA. In particular, the term “jurisdiction” is consistently used with the meaning set forth in SORNA section 111(10). As defined in that provision, it refers to the 50 States, the District of Columbia, the five principal U.S. territories—i.e., the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana

Islands, and the United States Virgin Islands—and Indian tribes that elect to function as registration jurisdictions under SORNA section 127. (For more concerning covered jurisdictions, see Part III of these Guidelines.) Thus, when these Guidelines refer to “jurisdictions” implementing the SORNA registration and notification requirements, the reference is to implementation of these requirements by the jurisdictions specified in SORNA section 111(10). Likewise, the term “sex offense” is not used to refer to any and all crimes of a sexual nature, but rather to those covered by the definition of “sex offense” appearing in SORNA section 111(5), and the term “sex offender” has the meaning stated in SORNA section 111(1). (For more concerning covered sex offenses and offenders, see Part IV of these Guidelines.)

SORNA itself includes a number of references relating to implementation by jurisdictions of the requirements of “this title.” Section 125 provides a mandatory 10% reduction in certain federal justice assistance funding for jurisdictions that fail, as determined by the Attorney General, to substantially implement “this title” within the time frame specified in section 124, and section 126 authorizes a Sex Offender Management Assistance grant program to help offset the costs of implementing “this title.” In the context of these provisions, the references to “this title” function as a shorthand for the SORNA sex offender registration and notification standards. They do not mean that funding under these provisions is affected by a jurisdiction’s implementation or non-implementation of reforms unrelated to sex offender registration and notification that appear in later portions of title I of the Adam Walsh Act Child Protection and Safety Act of 2006 (particularly, subtitle C of that title).

Section 125(d) of SORNA states that the provisions of SORNA “that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.” Statements in these Guidelines that SORNA requires jurisdictions to adopt certain measures should be understood accordingly in their application to the States. Since the SORNA requirements relating to sex offender registration and notification are, in relation to the States, only partial funding eligibility conditions, creation of these requirements is within the constitutional authority of the federal government.

B. Minimum National Standards

SORNA establishes a national baseline for sex offender registration and notification programs. In other words, the Act generally constitutes a set of minimum national standards and sets a floor, not a ceiling, for jurisdictions’ programs. Hence, for example, a jurisdiction may have a system that requires registration by broader classes of convicted sex offenders than those identified in SORNA, or that requires, in addition, registration by certain classes of non-convicts (such as persons acquitted on the ground of insanity of sexually violent crimes or child molestation offenses, or persons released following civil commitment as sexually dangerous persons). A jurisdiction may require verification of the registered address or other registration information by sex offenders with greater frequency than SORNA requires, or by other means in addition to those required by SORNA (e.g., through the use of mailed address verification forms, in addition to in-person appearances). A jurisdiction may require sex offenders to register for longer periods than those required by the SORNA standards. A jurisdiction may require that changes in registration information be reported by registrants on a more stringent basis than the SORNA minimum standards—e.g., requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move. A jurisdiction may extend Web site posting to broader classes of registrants than SORNA requires and may post more information concerning registrants than SORNA and these Guidelines require.

Such measures, which encompass the SORNA baseline of sex offender registration and notification requirements but go beyond them, generally have no negative implication concerning jurisdictions’ implementation of or compliance with SORNA. This is so because the general purpose of SORNA is to protect the public from sex offenders and offenders against children through effective sex offender registration and notification, and it is not intended to preclude or limit jurisdictions’ discretion to adopt more extensive or additional registration and notification requirements to that end. There are exceptions to this general rule, however. For example, SORNA section 118(b) requires that certain limited types of information, such as victim identity and registrants’ Social Security numbers, be excluded from jurisdictions’ publicly accessible sex offender Web sites, as discussed in Part

VII of these Guidelines. In most other respects, jurisdictions’ discretion to go further than the SORNA minimum is not limited.

C. Retroactivity

The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction’s implementation of a conforming registration program. Rather, SORNA’s requirements apply to all sex offenders, including those whose convictions predate the enactment of the Act. The Attorney General has so provided in 28 CFR part 72, pursuant to the authority under SORNA section 113(d) to “specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction.” As noted in the rulemaking document for the cited regulations, the application of the SORNA standards to sex offenders whose convictions predate SORNA creates no *ex post facto* problem “because the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements. See *Smith v. Doe*, 538 U.S. 84 (2003).” 72 FR 8894, 8896 (Feb. 28, 2007).

As a practical matter, jurisdictions may not be able to identify all sex offenders who fall within the SORNA registration categories, where the predicate convictions predate the enactment of SORNA or the jurisdiction’s implementation of the SORNA standards in its registration program, particularly where such sex offenders have left the justice system and merged into the general population long ago. But many sex offenders with such convictions will remain in (or reenter) the system because:

- They are incarcerated or under supervision, either for the predicate sex offense or for some other crime;
 - They are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction’s law; or
 - They hereafter reenter the jurisdiction’s justice system because of conviction for some other crime (whether or not a sex offense).
- Sex offenders in these three classes are within the cognizance of the

jurisdiction, and the jurisdiction will often have independent reasons to review their criminal histories for penal, correctional, or registration/notification purposes. Accordingly, a jurisdiction will be deemed to have substantially implemented the SORNA standards with respect to sex offenders whose predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction's program if it registers these sex offenders, when they fall within any of the three classes described above, in conformity with the SORNA standards. (For more about the registration of sex offenders in these classes, see the discussion under "retroactive classes" in Part IX of these Guidelines.)

The required retroactive application of the SORNA requirements will also be limited in some cases by the limits on the required duration of registration. As discussed in Part XII of these Guidelines, SORNA requires minimum registration periods of varying length for sex offenders in different categories, defined by criteria relating to the nature of their sex offenses and their history of recidivism. This means that a sex offender with a pre-SORNA conviction may have been in the community for a greater amount of time than the registration period required by SORNA. For example, SORNA section 115 requires registration for 25 years for a sex offender whose offense satisfies the "tier II" criteria of section 111(3). A sex offender who was released from imprisonment for such an offense in 1980 is already more than 25 years out from the time of release. In such cases, a jurisdiction may credit the sex offender with the time elapsed from his or her release (or the time elapsed from sentencing, in case of a non-incarcerative sentence), and does not have to require the sex offender to register on the basis of the conviction, even if the criteria for retroactive application of the SORNA standards under this Part are otherwise satisfied.

As with other requirements under SORNA and these Guidelines, the foregoing discussion identifies only the minimum required for SORNA compliance. Jurisdictions are free to require registration for broader classes of sex offenders with convictions that predate SORNA or the jurisdiction's implementation of the SORNA standards in its program.

D. Automation—Electronic Databases and Software

Several features of SORNA contemplate, or will require as a practical matter, the use of current

electronic and cyber technology to track seamlessly sex offenders who move from one jurisdiction to another, ensure that information concerning registrants is immediately made available to all interested jurisdictions, and make information concerning sex offenders immediately available to the public as appropriate. These include provisions for immediate information sharing among jurisdictions under SORNA section 113(c); a requirement in section 119(b) that the Attorney General ensure "that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions"; and requirements in section 121(b) that sex offender registration information and updates thereto be provided immediately to various public and private entities and individuals. (For more about these information sharing requirements and associated time frames, see Parts VII.B and X of these Guidelines.)

Carrying out the SORNA information sharing requirements accordingly will entail maintenance by jurisdictions of their registries in the form of electronic databases, whose included information can be electronically transmitted to other jurisdictions and entities. This point is further discussed in connection with the specific SORNA standards, particularly in Parts VI, VII, and X of these Guidelines.

Section 123 of SORNA directs the Attorney General, in consultation with the jurisdictions, to develop and support registry management and Web site software. The purposes of the software include facilitating the immediate exchange of sex offender information among jurisdictions, public access through the Internet to sex offender information and other forms of community notification, and compliance in other respects with the SORNA requirements. As required by section 123, the Department of Justice will develop and make available to the jurisdictions software tools for the operation of their sex offender registration and notification programs, which will, as far as possible, be designed to automate these processes and enable the jurisdictions to implement SORNA's requirements by utilizing the software.

E. Implementation

Section 124 of SORNA sets a general time frame of three years for implementation, running from the date of enactment of SORNA, i.e., from July 27, 2006. The Attorney General is authorized to provide up to two one-year extensions of this deadline. Failure to comply within the applicable time

frame would result in a 10% reduction of Federal justice assistance funding under 42 U.S.C. 3750 *et seq.* ("Byrne Justice Assistance Grant" funding). See SORNA section 125(a). Funding withheld from jurisdictions because of noncompliance would be reallocated to other jurisdictions that are in compliance, or could be reallocated to the noncompliant jurisdiction to be used solely for the purpose of SORNA implementation.

While SORNA sets minimum standards for jurisdictions' registration and notification programs, it does not require that its standards be implemented by statute. Hence, in assessing compliance with SORNA, the totality of a jurisdiction's rules governing the operation of its registration and notification program will be considered, including administrative policies and procedures as well as statutes.

The SMART Office will be responsible for determining whether a jurisdiction has substantially implemented the SORNA requirements. The affected jurisdictions are encouraged to submit information to the SMART Office concerning existing and proposed sex offender registration and notification provisions with as much lead time as possible, so the SMART Office can assess the adequacy of existing or proposed measures to implement the SORNA requirements and work with the submitting jurisdictions to overcome any shortfalls or problems. At the latest, submissions establishing compliance with the SORNA requirements should be made to the SMART Office at least three months before the deadline date of July 27, 2009—i.e., by April 27, 2009—so that the matter can be determined before the Byrne Grant funding reduction required by SORNA section 125 for noncompliant jurisdictions takes effect. If it is anticipated that a submitting jurisdiction may need an extension of time as described in SORNA section 124(b), the submission to the SMART Office—which should be made by April 27, 2009, as noted—should include a description of the jurisdiction's implementation efforts and an explanation why an extension is needed.

SORNA section 125 refers to "substantial" implementation of SORNA. The standard of "substantial implementation" is satisfied with respect to an element of the SORNA requirements if a jurisdiction carries out the requirements of SORNA as interpreted and explained in these Guidelines. Hence, the standard is satisfied if a jurisdiction implements

measures that these Guidelines identify as sufficient to implement (or “substantially” implement) the SORNA requirements.

The “substantial” compliance standard also contemplates that there is some latitude to approve a jurisdiction’s implementation efforts, even if they do not exactly follow in all respects the specifications of SORNA or these Guidelines. For example, section 116 of SORNA requires periodic in-person appearances by sex offenders to verify their registration information. In some cases this will be impossible, such as the case of a sex offender who is hospitalized and unconscious as a result of an injury at the time of a scheduled appearance. In other cases, the appearance may not be literally impossible, but there may be reasons to allow some relaxation of the requirement. For example, a sex offender may unexpectedly need to deal with a family emergency at the time of a scheduled appearance, where failure to make the appearance will mean not verifying the registration information within the exact time frame specified by SORNA section 116. A jurisdiction may wish to authorize rescheduling of the appearance in such cases. Doing so would not necessarily undermine substantially the objectives of the SORNA verification requirements, so long as the jurisdiction’s rules or procedures require that the sex offender notify the official responsible for monitoring the sex offender of the difficulty, and that the appearance promptly be carried out once the interfering circumstance is resolved.

In general, the SMART Office will consider on a case-by-case basis whether jurisdictions’ rules or procedures that do not exactly follow the provisions of SORNA or these Guidelines “substantially” implement SORNA, assessing whether the departure from a SORNA requirement will or will not substantially disserve the objectives of the requirement. If a jurisdiction is relying on the authorization to approve measures that “substantially” implement SORNA as the basis for an element or elements in its system that depart in some respect from the exact requirements of SORNA or these Guidelines, the jurisdiction’s submission to the SMART Office should identify these elements and explain why the departure from the SORNA requirements should not be considered a failure to substantially implement SORNA.

Beyond the general standard of substantial implementation, SORNA section 125(b) includes special provisions for cases in which the

highest court of a jurisdiction has held that the jurisdiction’s constitution is in some respect in conflict with the SORNA requirements. If a jurisdiction believes that it faces such a situation, it should inform the SMART Office. The SMART Office will then work with the jurisdiction to see whether the problem can be overcome, as the statute provides. If it is not possible to overcome the problem, then the SMART Office may approve the jurisdiction’s adoption of reasonable alternative measures that are consistent with the purposes of SORNA.

Section 125 of SORNA, as discussed above, provides for a funding reduction for jurisdictions that do not substantially implement SORNA within the applicable time frame. Section 126 of SORNA authorizes positive funding assistance—the Sex Offender Management Assistance (“SOMA”) grant program—to all registration jurisdictions to help offset the costs of SORNA implementation, with enhanced payments authorized for jurisdictions that effect such implementation within one or two years of SORNA’s enactment. Congress has not appropriated funding for the SOMA program at the time of the issuance of these Guidelines. If funding for this program is forthcoming in the future, additional guidance will be provided concerning application for grants under the program.

III. Covered Jurisdictions

Section 112(a) of SORNA states that “[e]ach jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this title,” and section 124 provides specific deadlines for “jurisdictions” to carry out the SORNA implementation. Related definitions appear in section 111(9) and (10). Section 111(9) provides that “sex offender registry” means a registry of sex offenders and a notification program.

Section 111(10) provides that “jurisdiction” refers to:

- The 50 States;
- The District of Columbia;
- The five principal U.S. territories—the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands; and
- Indian tribes to the extent provided in section 127.

Some of the provisions in SORNA are formulated as directions to sex offenders, including those appearing in sections 113(a)–(b), 113(c) (first sentence), 114(a), 115(a), and 116. Other SORNA provisions are cast as directions to jurisdictions or their officials, such as

those appearing in sections 113(c) (second sentence), 113(e), 114(b), 117(a), 118, 121(b), and 122. To meet the requirement under sections 112 and 124 that covered jurisdictions must implement SORNA in their registration and notification programs, each jurisdiction must incorporate in the laws and rules governing its registration and notification program the requirements that SORNA imposes on sex offenders, as well as those that are addressed directly to jurisdictions and their officials.

While the “jurisdictions” assigned sex offender registration and notification responsibilities by SORNA are the 50 States, the District of Columbia, the principal territories, and Indian tribes (to the extent provided in section 127), as described above, this does not limit the ability of these jurisdictions to carry out these functions through their political subdivisions. For example, a jurisdiction may assign responsibility for initially registering sex offenders upon their release from imprisonment to correctional personnel who are employees of the jurisdiction’s government, but the responsibility for continued tracking and registration of sex offenders thereafter may be assigned to personnel of local police departments, sheriffs’ offices, or supervision agencies who are municipal employees. Moreover, in carrying out their registration and notification functions, jurisdictions are free to utilize (and to allow their agencies and political subdivisions to utilize) entities and individuals who may not be governmental agencies or employees in a narrow sense, such as contractors, volunteers, and community-based organizations that are capable of discharging these functions. SORNA does not limit jurisdictions’ discretion concerning such matters. Rather, so long as a jurisdiction’s laws and rules provide consistently for the discharge of the required registration and notification functions by some responsible individuals or entities, the specifics concerning such assignments of responsibility are matters within the jurisdiction’s discretion. References in these Guidelines should be understood accordingly, so that (for example) a reference to an “official” carrying out a registration function does not mean that the function must be carried out by a government employee, but rather is simply a way of referring to whatever individual is assigned responsibility for the function.

With respect to Indian tribes, SORNA recognizes that tribes may vary in their capacities and preferences regarding the discharge of sex offender registration

and notification functions, and accordingly section 127 of SORNA has special provisions governing the treatment of Indian tribes as registration jurisdictions or the delegation of registration and notification functions to the States. Specifically, section 127(a)(1) generally affords federally recognized Indian tribes a choice between electing to carry out the sex offender registration and notification functions specified in SORNA in relation to sex offenders subject to its jurisdiction, or delegating those functions to a State or States within which the tribe is located. (Delegation to the State or States is automatic for a tribe subject to state law enforcement jurisdiction under 18 U.S.C. 1162, however—see the discussion of section 127(a)(2) below.) The choice by a tribe whether to become a SORNA registration jurisdiction or to delegate registration and notification functions to a State or States must be made within one year of SORNA's enactment on July 27, 2006.

If a tribe elects to become a SORNA registration jurisdiction, its functions and responsibilities regarding sex offender registration and notification are the same as those of a State. Duplication of registration and notification functions by tribes and States is not required, however, and such tribes may enter into cooperative agreements with the States for the discharge of these functions, as discussed below in connection with section 127(b). If a tribe elects to delegate to a State, then the State is fully responsible for carrying out the SORNA registration and notification functions, and the delegation includes an undertaking by the tribe to "provide access to its territory and such other cooperation and assistance as may be needed to enable [the State] to carry out and enforce the requirements of [SORNA]." SORNA section 127(a)(1)(B).

The election to become a SORNA registration jurisdiction, or to delegate to a State or States, must be made by resolution or other enactment of the tribal council or comparable governmental body. Hence, the decision must be made by a tribal governmental entity—"the tribal council or comparable governmental body"—that has the legal authority to make binding legislative decisions for the tribe. The tribal government should promptly notify the SMART Office of its decision and forward the text of the resolution or other enactment to the SMART Office by a reliable means of transmission—preferably by the decision deadline of July 27, 2007, or if that is not feasible, as soon thereafter as possible.

To satisfy the requirements of SORNA section 127(a)(1), the resolution or

enactment must be adopted on or prior to July 27, 2007, and must state a decision by the tribal council (or comparable governmental body) to do one of the following:

- Carry out the SORNA requirements relating to sex offender registration and notification as a jurisdiction subject to those requirements; or
- Delegate the tribe's functions relating to sex offender registration and notification under SORNA to the State or States within which the territory of the tribe is located and provide access to its territory and such other cooperation and assistance as may be needed to enable the State or States to carry out and enforce the SORNA requirements.

Additional suggested elements for inclusion in the tribal resolution (or other enactment) include the following:

- Authorization of an appropriate tribal official or officials to negotiate or enter into cooperative agreements with state or local governments, if the tribe elects to become a SORNA registration jurisdiction, and if it is expected that the SORNA requirements will be carried out wholly or in part through such agreements.
- A direction to tribal officials and agencies to provide such cooperation and assistance as the State or States may need to carry out and enforce the SORNA requirements, if the tribe elects to delegate the SORNA functions to a State or States.
- A date or timing notation that shows the resolution was adopted on or prior to July 27, 2007.
- A direction that the SMART Office of the U.S. Department of Justice be notified of the tribe's election and that the resolution or enactment be transmitted to the SMART Office.

Subsection (a)(2) of SORNA section 127 specifies three circumstances in which registration and notification functions are deemed to be delegated to the State or States in which a tribe is located, even if the tribe does not make an affirmative decision to delegate:

- Under subparagraph (A) of subsection (a)(2), these functions are always delegated to the State if the tribe is subject to the law enforcement jurisdiction of the State under 18 U.S.C. 1162. (If a tribe's land is in part subject to state law enforcement jurisdiction under 18 U.S.C. 1162 and in part outside of the areas subject to 18 U.S.C. 1162, then: (i) Sex offender registration and notification functions are automatically delegated to the relevant State in the portion of the tribal land subject to 18 U.S.C. 1162, and (ii) the tribe has a choice between functioning

as a registration jurisdiction or delegating registration and notification functions to the State in the portion of its land that is not subject to 18 U.S.C. 1162.)

- Under subparagraph (B) of subsection (a)(2), these functions are delegated to the State or States if the tribe does not make an affirmative election to function as a registration jurisdiction within one year of the enactment of SORNA—i.e., within one year of July 27, 2006—or rescinds a previous election to function as a registration jurisdiction.
- Under subparagraph (C) of subsection (a)(2), these functions are delegated to the State or States if the Attorney General determines that the tribe has not substantially implemented the requirements of SORNA and is not likely to become capable of doing so within a reasonable amount of time.

If a tribe does elect under section 127 to become a SORNA registration jurisdiction, section 127(b) specifies that this does not mean that the tribe must duplicate registration and notification functions that are fully carried out by the State or States within which the tribe is located, and subsection (b) further authorizes the tribes and the States to make cooperative arrangements for the discharge of some or all of these functions. For example, SORNA section 118 requires jurisdictions to make information concerning their sex offenders available to the public through the Internet. If a tribe did not want to maintain a separate sex offender Web site for this purpose, it would not need to do so, as long as a cooperative agreement was made with the State to have information concerning the tribe's registrants posted on the State's sex offender Web site. Likewise, a tribe that elects to be a SORNA registration jurisdiction remains free to make cooperative agreements under which the State (or a political subdivision thereof) will handle registration of the tribe's sex offenders—such as initially registering these sex offenders, conducting periodic appearances of the sex offenders to verify the registration information, and receiving reports by the sex offenders concerning changes in the registration information—to the extent and in a manner mutually agreeable to the tribe and the State. In general, the use of cooperative agreements affords tribes flexibility in deciding which functions under SORNA they would seek to have state authorities perform, and which they wish to control or discharge directly. For example, the State could carry out certain registration functions, but the tribe could retain jurisdiction over the arrest within its territory of sex

offenders who fail to register, update registrations, or make required verification appearances, if a cooperative agreement between the tribe and the State so provided.

IV. Covered Sex Offenses and Sex Offenders

SORNA refers to the persons required to register under its standards as “sex offenders,” and section 111(1) of SORNA defines “sex offender” in the relevant sense to mean “an individual who was convicted of a sex offense.” “Sex offense” is in turn defined in section 111(5) and related provisions. The term encompasses a broad range of offenses of a sexual nature under the law of any jurisdiction—including offenses under federal, military, state, territorial, local, tribal, and foreign law, but with some qualification regarding foreign convictions as discussed below.

A. Convictions Generally

A “sex offender” defined in SORNA section 111(1) is a person who was “convicted” of a sex offense. Hence, whether an individual has a sex offense “conviction” determines whether he or she is within the minimum categories for which the SORNA standards require registration.

The convictions for which SORNA requires registration include convictions for sex offenses by any United States jurisdiction, including convictions for sex offenses under federal, military, state, territorial, or local law. Indian tribal court convictions for sex offenses are generally to be given the same effect as convictions by other United States jurisdictions. It is recognized, however, that Indian tribal court proceedings may differ from those in other United States jurisdictions in that the former do not uniformly guarantee the same rights to counsel that are guaranteed in the latter. Accordingly, a jurisdiction may choose not to require registration based on a tribal court conviction resulting from proceedings in which: (i) The defendant was denied the right to the assistance of counsel, and (ii) the defendant would have had a right to the assistance of counsel under the United States Constitution in comparable state proceedings. A jurisdiction will not be deemed to have failed to substantially implement SORNA based on its adoption of such an exception.

Since the SORNA registration requirements are predicated on convictions, registration (or continued registration) is normally not required under the SORNA standards if the predicate conviction is reversed, vacated, or set aside, or if the person is pardoned for the offense on the ground

of innocence. This does not mean, however, that nominal changes or terminological variations that do not relieve a conviction of substantive effect negate the SORNA requirements. For example, the need to require registration would not be avoided by a jurisdiction’s having a procedure under which the convictions of sex offenders in certain categories (e.g., young adult sex offenders who satisfy certain criteria) are referred to as something other than “convictions,” or under which the convictions of such sex offenders may nominally be “vacated” or “set aside,” but the sex offender is nevertheless required to serve what amounts to a criminal sentence for the offense. Rather, an adult sex offender is “convicted” for SORNA purposes if the sex offender remains subject to penal consequences based on the conviction, however it may be styled. Likewise, the sealing of a criminal record or other action that limits the publicity or availability of a conviction, but does not deprive it of continuing legal validity, does not change its status as a “conviction” for purposes of SORNA.

“Convictions” for SORNA purposes include convictions of juveniles who are prosecuted as adults. It does not include juvenile delinquency adjudications, except under the circumstances specified in SORNA section 111(8). Section 111(8) provides that delinquency adjudications count as convictions “only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offense.”

Hence, SORNA does not require registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes or child molestation offenses. Considering the definition of the federal “aggravated sexual abuse” offense referenced in section 111(8), offenses under a jurisdiction’s laws “comparable to” that offense are those that cover:

- Engaging in a sexual act with another by force or the threat of serious violence (see 18 U.S.C. 2241(a));
- Engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim (see 18 U.S.C. 2241(b)); or
- Engaging in a sexual act with a child under the age of 12 (see 18 U.S.C.

2241(c)). “Sexual act” for this purpose should be understood to include any of the following: (i) Oral-genital or oral-anal contact, (ii) any degree of genital or anal penetration, and (iii) direct genital touching of a child under the age of 16. This follows from the definition of sexual act in 18 U.S.C. 2246(2), which applies to the 18 U.S.C. 2241 “aggravated sexual abuse” offense.

As with other aspects of SORNA, the foregoing defines minimum standards. Hence, the inclusions and exclusions in the definition of “conviction” for purposes of SORNA do not constrain jurisdictions from requiring registration by additional individuals—e.g., more broadly defined categories of juveniles adjudicated delinquent for sex offenses—if they are so inclined.

B. Foreign Convictions

Section 111(5)(B) of SORNA instructs that registration need not be required on the basis of a foreign conviction if the conviction “was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established [by the Attorney General].” The following standards are adopted pursuant to section 111(5)(B):

- Sex offense convictions under the laws of Canada, Great Britain, Australia, and New Zealand are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process, and registration must be required for such convictions on the same footing as domestic convictions.

- Sex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process if the U.S. State Department, in its Country Reports on Human Rights Practices, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred. Registration must be required on the basis of such convictions on the same footing as domestic convictions.

- With respect to sex offense convictions in foreign countries that do not satisfy the criteria stated above, a jurisdiction is not required to register the convicted person if the jurisdiction determines—through whatever process or procedure it may choose to adopt—that the conviction does not constitute a reliable indication of factual guilt because of the lack of an impartial tribunal, because of denial of the right to respond to the evidence against the person or to present exculpatory evidence, or because of denial of the right to the assistance of counsel.

The foregoing standards do not mean that jurisdictions must incorporate these particular criteria or procedures into their registration systems, if they wish to register foreign sex offense convicts with fewer qualifications or no qualifications. Rather, the stated criteria define the minimum categories of foreign convicts for whom registration is required for compliance with SORNA, and as is generally the case under SORNA, jurisdictions are free to require registration more broadly than the SORNA minimum.

C. Sex Offenses Generally

The general definition of sex offenses for which registration is required under the SORNA standards appears in section 111(5)(A). The clauses in the definition cover the following categories of offenses:

- **Sexual Act And Sexual Contact Offenses** (section 111(5)(A)(i)): The first clause in the definition covers “a criminal offense that has an element involving a sexual act or sexual contact with another.” (“Criminal offense” in the relevant sense refers to offenses under any body of criminal law, including state, local, tribal, foreign, military, and other offenses, as provided in section 111(6).) The offenses covered by this clause should be understood to include all sexual offenses whose elements involve: (i) Any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person’s body, either directly or through the clothing. Cf. 18 U.S.C. 2246(2)–(3) (federal law definitions of sexual act and sexual contact).
- **Specified Offenses Against Minors** (section 111(5)(A)(ii)): The second clause in the definition covers “a criminal offense that is a specified offense against a minor.” The statute provides a detailed definition of “specified offense against a minor” in section 111(7), which is discussed separately below.
- **Specified Federal Offenses** (section 111(5)(A)(iii)): The third clause covers most sexual offenses under federal law. The covered chapters and offense provisions in the federal criminal code are explicitly identified by citation.
- **Specified Military Offenses** (section 111(5)(A)(iv)): The fourth clause covers sex offenses under the Uniform Code of Military Justice, as specified by the Secretary of Defense.
- **Attempts And Conspiracies** (section 111(5)(A)(v)): The final clause in the definition covers attempts and conspiracies to commit offenses that are otherwise covered by the definition of “sex offenses.” This includes both

offenses prosecuted under general attempt or conspiracy provisions, where the object offense falls under the SORNA “sex offense” definition, and particular offenses that are defined as, or in substance amount to, attempts or conspiracies to commit offenses that are otherwise covered. For example, in the latter category, a jurisdiction may define an offense of “assault with intent to commit rape.” Whether or not the word “attempt” is used in the definition of the offense, this is in substance an offense that covers certain attempts to commit rapes and hence is covered under the final clause of the SORNA definition.

SORNA section 111(5)(C) qualifies the foregoing definition of “sex offense” to exclude “[a]n offense involving consensual sexual conduct * * * if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than four years older than the victim.” The general exclusion with respect to consensual sexual offenses involving adult victims means, for example, that a jurisdiction does not have to require registration based on prostitution offenses that consist of the offender paying or receiving payment from an adult for a sexual act between them (unless the victim is under the custodial authority of the offender). The exclusion for certain cases involving child victims based on victim age and age difference means that a jurisdiction may not have to require registration in some cases based on convictions under provisions that prohibit sexual acts or contact (even if consensual) with underage persons. For example, under the laws of some jurisdictions, an 18-year-old may be criminally liable for engaging in consensual sex with a 15-year-old. The jurisdiction would not have to require registration in such a case to comply with the SORNA standards, since the victim was at least 13 and the offender was not more than four years older.

D. Specified Offenses Against Minors

The offenses for which registration is required under the SORNA standards include any “specified offense against a minor” as defined in section 111(7). The SORNA section 111(7) definition of specified offense against a minor covers any offense against a minor—i.e., a person under the age of 18, as provided in section 111(14)—that involves any of the following:

- **Kidnapping or False Imprisonment of a Minor** (section 111(7)(A)–(B)): These clauses cover “[a]n offense

(unless committed by a parent or guardian) involving kidnapping [of a minor]” and “[a]n offense (unless committed by a parent or guardian) involving false imprisonment [of a minor].” The relevant offenses are those whose gravamen is abduction or unlawful restraint of a person, which go by different names in different jurisdictions, such as “kidnapping,” “criminal restraint,” or “false imprisonment.” Jurisdictions can implement the offense coverage requirement of these clauses by requiring registration for persons convicted of offenses of this type (however designated) whose victims were below the age of 18. It is left to jurisdictions’ discretion under these clauses whether registration should be required for such offenses in cases where the offender is a parent or guardian of the victim.

- **Solicitation of a Minor to Engage in Sexual Conduct** (section 111(7)(C)): This clause covers “[s]olicitation [of a minor] to engage in sexual conduct.” “Solicitation” under this clause and other SORNA provisions that use the term should be understood broadly to include any direction, request, enticement, persuasion, or encouragement of a minor to engage in sexual conduct. “Sexual conduct” should be understood to refer to any sexual activity involving physical contact. (See the discussion later in this list of “criminal sexual conduct” under section 111(7)(H).) Hence, jurisdictions can implement the offense coverage requirement under this clause by requiring registration, in cases where the victim was below the age of 18, based on:

- Any conviction for an offense involving solicitation of the victim under a general attempt or solicitation provision, where the elements of the object offense include sexual activity involving physical contact, and
- Any conviction for an offense involving solicitation of the victim under any provision defining a particular crime whose elements include soliciting or attempting to engage in sexual activity involving physical contact.

- **Use of a Minor in a Sexual Performance** (section 111(7)(D)): This clause covers offenses involving “[u]se [of a minor] in a sexual performance.” That includes both live performances and using minors in the production of pornography, and has some overlap with section 111(7)(G), which expressly covers child pornography offenses.
- **Solicitation of a Minor to Practice Prostitution** (section 111(7)(E)): This

clause covers offenses involving “[s]olicitation [of a minor] to practice prostitution.” Jurisdictions can implement the offense coverage requirement under this clause by requiring registration, in cases where the victim was below the age of 18, based on:

- Any conviction for an offense involving solicitation of the victim under a general attempt or solicitation provision, where the object offense is a prostitution offense, and

- Any conviction for an offense involving solicitation of the victim under any provision defining a particular crime whose elements include soliciting or attempting to get a person to engage in prostitution.

- **Video Voyeurism Involving a Minor** (section 111(7)(F)): This clause covers “[v]ideo voyeurism as described in section 1801 of title 18, United States Code [against a minor].” The cited federal offense in essence covers capturing the image of a private area of another person’s body, where the victim has a reasonable expectation of privacy against such conduct. Jurisdictions can implement the offense coverage requirement under this clause by requiring registration for offenses of this type, in cases where the victim was below the age of 18.

- **Possession, Production, or Distribution of Child Pornography** (section 111(7)(G)): This clause covers “possession, production, or distribution of child pornography.” Jurisdictions can implement the offense coverage requirement under this clause by requiring registration for offenses whose gravamen is creating or participating in the creation of sexually explicit visual depictions of persons below the age of 18, making such depictions available to others, or having or receiving such depictions.

- **Criminal Sexual Conduct Involving a Minor and Related Internet Activities** (section 111(7)(H)): This clause covers “[c]riminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.” The definition has two parts:

- The “criminal sexual conduct involving a minor” language in this definition covers sexual offenses whose elements involve physical contact with the victim—such as provisions defining crimes of “rape,” “sexual assault,” “sexual abuse,” or “incest”—in cases where the victim was below 18 at the time of the offense. In addition, it covers offenses whose elements involve using other persons in prostitution—such as provisions defining crimes of “pandering,” “procuring,” or “pimping”—in cases where the victim

was below 18 at the time of the offense. Coverage is not limited to cases where the victim’s age is an element of the offense, such as prosecution for specially defined child molestation or child prostitution offenses. Jurisdictions can implement the offense coverage requirement under the “criminal sexual conduct involving a minor” language of this clause by requiring registration for “criminal sexual conduct” offenses as described above whenever the victim was in fact below the age of 18 at the time of the offense. (Section 111(7)(C) and (E) separately require coverage of offenses involving solicitation of a minor to engage in sexual conduct or to practice prostitution, but registration must be required for offenses involving sexual conduct with a minor or the use of a minor in prostitution in light of section 111(7)(H), whether or not the offense involves “solicitation” of the victim.)

- Jurisdictions can implement the “use of the Internet to facilitate or attempt such conduct” part of this definition by requiring registration for offenses that involve use of the Internet in furtherance of criminal sexual conduct involving a minor as defined above, such as attempting to lure minors through Internet communications for the purpose of sexual activity.

- **Conduct By Its Nature A Sex Offense Against a Minor** (section 111(7)(I)): The final clause covers “[a]ny conduct that by its nature is a sex offense against a minor.” It is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons. Jurisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.

E. Protected Witnesses

The requirement that jurisdictions substantially implement SORNA does not preclude their taking measures needed to protect the security of individuals who have been provided new identities and relocated under the federal witness security program (see 18 U.S.C. 3521 *et seq.*) or under other comparable witness security programs operated by non-federal jurisdictions. A jurisdiction may conclude that it is necessary to exclude an individual afforded protection in such a program from its sex offender registry or from public notification for security reasons, though the individual otherwise

satisfies the criteria for registration and notification under SORNA.

Alternatively, the jurisdiction may choose not to waive registration but may identify the registrant in the registration system records only by his or her new identity or data, if such modifications can be so devised that they are not transparent and do not permit the registrant’s original identity or participation in a witness security program to be inferred. Jurisdictions are permitted and encouraged to make provision in their laws and procedures to accommodate consideration of the security of such individuals and to honor requests from the United States Marshals Service and other agencies responsible for witness protection in order to ensure that their original identities are not compromised.

With respect to witnesses afforded federal protection, 18 U.S.C. 3521(b)(1)(H) specifically authorizes the Attorney General to “protect the confidentiality of the identity and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons.” U.S. Department of Justice Witness Security Program officials accordingly determine on a case-by-case basis whether such witnesses will be required to register, and if registration occurs, whether it will utilize new identities, modified data, or other special conditions or procedures that are warranted to avoid jeopardizing the safety of the protected witnesses.

V. Classes of Sex Offenders

Section 111(2)–(4) of SORNA defines three “tiers” of sex offenders. The tier classifications have implications in three areas: (i) Under section 115, the required duration of registration depends primarily on the tier; (ii) under section 116, the required frequency of in-person appearances by sex offenders to verify registration information depends on the tier; (iii) under section 118(c)(1), information about tier I sex offenders convicted of offenses other than specified offenses against a minor may be exempted from Web site disclosure.

The use of the “tier” classifications in SORNA relates to substance, not form or terminology. Thus, to implement the SORNA requirements, jurisdictions do not have to label their sex offenders as “tier I,” “tier II,” and “tier III,” and do not have to adopt any other particular approach to labeling or categorization of sex offenders. Rather, the SORNA

