

October 13, 2020

U.S. Department of Justice
Office of Legal Policy
Regulations Docket Clerk
Docket Number OAG 157
<http://www.regulations.gov>

Regarding the proposed rule changes to the Sex Offender Registration and Notification Act (SORNA), as outlined in the Federal Register, Volume 85, Number 157.

The following comments are respectfully submitted by the Association for the Treatment of Sexual Abusers, an association representing more than 3,000 researchers, clinicians, law enforcement and corrections officials, attorneys and members of the judiciary, victim rights advocates, and other professionals whose goal is to end sexual abuse through sound research, effective practice, informed policy, and comprehensive prevention. Comments are organized by section, with a concluding summary.

Section 72.1, Purpose of SORNA:

- Notes that the Attorney General has the authority to specify SORNA requirements and their applicability.

Comment: This section relies on the Congressional delegation of authority to the Attorney General to issue guidelines and regulations to interpret and implement SORNA. This statement appears to grant the Attorney General unlimited authority to make changes to the law, to set registration requirements, and to determine to whom those requirements apply, without further Congressional oversight or review. This allows changes without accountability, and creates a system that could result in different Attorneys General making significant changes in future administrations outside of Congressional oversight. This undermines stability in the law, which harms jurisdictions' abilities to plan and registrants' abilities to conform to potentially ever-changing regulations and requirements.

Recommendation: ATSA recommends that a review and approval process for changes to SORNA include a system of oversight that does not allow any one individual to act unilaterally.

- Establishes a floor for sex offender registration requirements and specifies that states may prescribe requirements, with which sex offenders must comply, that are more extensive or stringent than those prescribed by SORNA.

Comment: This statement does nothing to encourage states to adopt consistent laws based on science and evidence-informed best practices. Rather, by establishing SORNA as a floor and allowing harsher local regulations without guidance as to consistency or evidence-based effectiveness, SORNA continues to enable a mixed pattern of varied and ineffective laws across jurisdictions. In today's mobile society, this unnecessarily burdens registrants and their families, who must learn and comply with different regulations across jurisdictions, and does virtually nothing to promote public safety.

Recommendation: ATSA recommends that SORNA regulations serve as examples of best practices rather than as a floor, and that SORNA include a statement encouraging jurisdictions to develop and implement consistent and evidence-based regulations.

Section 72.2, Definitions of SORNA:

- Clarifies that terms used in Section 72 have the same meanings as in SORNA.

Comment and recommendation: No comments or recommendations on this section.

Section 72.3 on Applicability of SORNA:

- Reaffirms that SORNA’s requirements apply to all sex offenders regardless of when they were convicted, including those whose convictions predate SORNA’s enactment.

Comment: This section cites Smith v Doe (2003), United States v Felts (2012), and Reynolds v United States (2012), which upheld sex offender registration requirements against ex post facto challenges, and relies on the Congressional delegation of authority to the Attorney General to issue guidelines and regulations to interpret and implement SORNA.

Specific wording changes include the statement that **(i) all sex offenders must comply with all requirements of SORNA, regardless of when they were convicted; (ii) this is so regardless of whether a registration jurisdiction has substantially implemented SORNA or any particular SORNA requirement; and (iii) this is so regardless of whether a particular requirement or class of sex offenders is mentioned in examples in the rules or guidelines issued by the Attorney General.** As a result, “sex offenders can be held liable for violating any requirement stated in this rule, regardless of when they were convicted, and regardless of whether the jurisdiction in which the violation occurs has adopted the requirement in its own law.”

Given that SORNA applies retroactively, this likely will cause people who have not been on the registry for years or at all to now be required to register. This can cause harm to registrants and their families (e.g., being subject to housing and job loss, bullying, and vigilantism) without a justifiable offsetting public safety benefit. In addition, regardless of court rulings, retroactively applying SORNA to a crime clearly violates ex-post facto protections in the Constitution.

Retroactive application of laws also negatively affects legal representatives’ ability to adequately represent clients in a legal landscape in which regulations and rulings in existence at the time a crime was committed may change at any time in the future to retroactively apply to those crimes.

Recommendation: ATSA considers any violation of Constitutional ex post facto protections to be fundamentally flawed and requests all retroactive application of SORNA be eliminated from rule.

- Relieves registrants of the duty to comply with registration requirements for violations where their legal obligations were not made known to the offenders by authorities or where circumstances were beyond the offenders’ control. In the latter situation, offenders are required

to fulfill their obligations as soon as “the circumstance preventing his compliance with the SORNA registration requirement no longer exists.”

Comment: The examples of such “circumstances” all revolve around jurisdictions’ laws and activities, and do not address natural disasters. Allowances for failing to comply do not include emergency situations such as public health and major weather events. Further, it is not clear who has the burden of proof to show that circumstances did or did not prevent registration compliance.

Recommendation: ATSA recommends SORNA expand the language about possible causes of registration violations from narrow legal technicalities and jurisdictional actions to include public health emergencies and other natural disasters (e.g., fires, floods, major earthquakes, and hurricanes). ATSA also recommends that the burden of proof when there is a disagreement over whether circumstances prevented a registrant from complying with SORNA regulations be on the jurisdiction.

- Clarifies that SORNA’s registration duties for sex offenders are not conditional on whether a jurisdiction has adopted SORNA’s requirements in their own registration laws or policies. Individuals who have sexually offended are not relieved of the duty to register merely because state law does not track federal registration requirements.

Comment and recommendation: No comments or recommendations on this item.

Section 72.4 on where offenders must register:

- Requires sex offenders to register and keep the registration current in each jurisdiction in which the sex offender resides, is an employee, or is a student, and requires the registrant to initially register in the jurisdiction in which the offender was convicted if that jurisdiction differs from the jurisdiction of residence.

Comment: There do not appear to be any changes to this section of SORNA. This section draws attention, however, to the confusing mosaic of current registration laws in different jurisdictions. The range of registration requirements across jurisdictions places an undue burden on individuals who may regularly travel or who need to move for school or work. This language also does not specifically address the “how” of registration and misses the opportunity to recommend that new technology may be needed in emergency situations or simply as a cost-effective alternative to in-person registration.

Recommendation: ATSA recommends that SORNA develop evidence-based regulations and encourage all jurisdictions to implement consistent regulations in alignment with SORNA. ATSA also recommends that SORNA include language enabling the use of technology in place of in-person check-ins, with the goals of streamlining registration processes for jurisdictions and registrants, making registration processes more cost-effective, and providing alternatives during times of public health or natural disasters.

Section 72.5 on how long offenders must register:

- Classifies sex offenders into three “tiers,” based on the nature and seriousness of their sex offenses and their histories of recidivism. The tier in which a sex offender falls affects how long the offender must continue to register under SORNA. The required registration periods are generally 15 years for a tier I sex offender, 25 years for a tier II sex offender, and life for a tier III sex offender.
- Clarifies that registration under SORNA begins upon release or within three days of sentencing if the offender is not sentenced to prison.
- Provides an exception to registration “when the sex offender is in custody or civilly committed.”
- Notes that registration reductions may be possible for offenders who maintain a “clean record” (i.e., no further conviction of any felony or any sex offense, successful completion of the supervision period, and successful completion of a certified sex offender treatment program).
- Allows but does not require jurisdictions to require “sex offenders to carry out their processes for registering and updating registrations during subsequent confinement.”

Comment: There do not appear to be any significant changes to this section. However, a key weakness of SORNA on display in this section is the classification system based on crime type and supervision status rather than individual risk factors. Offense-based classification systems are not effective at identification of risk, increasing the likelihood that higher risk individuals may be misclassified as lower risk and lower risk individuals misclassified as higher risk. In addition, actual recidivism statistics are not reflected in the length of registration required.

Recommendation: ATSA recommends SORNA adopt a more cost-effective and public-safety-centered approach, which would include evaluating individuals upon sentencing to secure custody or community supervision, and every three years thereafter while under supervision, to determine their individual risk to reoffend, with an automatic release from registration at age 65 unless an assessment finds them to be a continuing and significant danger.

ATSA also recommends SORNA develop clear avenues and criteria for relief from registration that recognize the importance of treatment and supervision interventions for reducing recidivism risk, facilitating desistance, and strengthening protective factors.

Section 72.6 on the information registrants must provide:

- Requires sex offenders to provide (i) name, birth date, and Social Security number; (ii) remote communication identifiers (including email addresses and telephone numbers); (iii) information about places of residence, nonresidential lodging, employment, and school attendance; (iv) international travel; (v) passports and immigration documents; (vi) vehicle information; and (vii) professional licenses. Registrants also must provide any other information required by the Attorney General.

Specific wording changes appear to include:

- A registrant must **provide residence address information or other residence location information if the sex offender lacks a residence address.**

- A registrant must **provide information about temporary lodging while away from his residence for seven or more days.**
- A registrant must **provide other employment location information for sex offenders who work but do not have fixed places of employment—e.g., a long-haul trucker whose “workplace” is roads and highways throughout the country, a self-employed handyman who works out of his home and does repair or home improvement work at other people's homes, or a person who frequents sites that contractors visit to obtain day labor and works for any contractor who hires him on a given day.**
- A registrant must **provide information concerning all licensing of the offender that authorizes him to engage in an occupation or carry out a trade or business.**
- **In addition, registration information requirements for travelers now aligns with International Megan’s Law requirements.**

Comment: While this information may be useful to law enforcement agencies, unintended negative consequences for registrants and their families can arise if some of this information is made public. Providing birth dates and social security numbers can open the registrant to identity theft victimization. Publicizing home and work addresses can lead to vigilantism and victimization of the registrant and family members. There is limited, if any, public safety benefit to making registrant information public for all but the highest risk offenders. In addition, the variety of registration requirements across jurisdictions places an undue burden on registrants who must travel or move for work.

Recommendation: ATSA recommends that registrant information be made available exclusively for law enforcement purposes and be exempted from public information acts for all but the highest risk offenders. Further, ATSA recommends that SORNA encourages jurisdictions to develop, implement, and align evidence-based registration policies.

Section 72.7 on how offenders must register and maintain registration :

- Requires registrants to keep their registrations current in the jurisdictions in which they reside, work, or attend school. This includes permanent relocations within and beyond the original jurisdiction, temporary relocations or visits within and beyond the original jurisdiction, and U.S. and international travel.
- Requires (i) initial registration before release from imprisonment, or within three business days after sentencing if the sex offender is not imprisoned; (ii) periodic in-person appearances to verify and update the registration information; (iii) reporting of changes in name, residence, employment, or school attendance; (iv) reporting of intended departure or termination of residence, employment, or school attendance in a jurisdiction; (v) reporting of changes relating to remote communication identifiers, temporary lodging information, and vehicle information; (vi) reporting of international travel; and (vii) compliance with a jurisdiction’s rules if a sex offender has not complied with the normal time and manner specifications for carrying out a SORNA requirement.
- Notes that the Attorney General has the authority to interpret and implement SORNA including the adoption of specifications regarding the time and manner in which registration requirements must be carried out.

Specific wording changes state that **the new section requires sex offenders to comply with the Attorney General's directions regarding the time and manner for providing and updating all registration information required by SORNA.** In addition to empowering the Attorney General to specify the time and manner for reporting particular types of registration information, this provision enables the Attorney General to specify the time and manner for registration. This is so because registration on the part of a sex offender consists of providing required registration information to the registration jurisdiction for inclusion in the sex offender registry. Given that the Attorney General has the authority under section 20914(c) to specify the time and manner for a sex offender's provision of each required type of registration information, it follows that the Attorney General has the authority under section 20914(c) to specify the time and manner for a sex offender's provision of the required types of information collectively, which constitutes registration under SORNA.

Comment: It is clear from the wording throughout this section that the requirements for face-to-face registration updates are meant to be intimidating. This section makes no acknowledgment that the use of modern technology could save law enforcement time and money by allowing electronic virtual in-person updates. No allowance is made for pandemics, weather disasters, or other natural emergencies. Overall, registration requirements as outlined in this section are unnecessarily onerous and will vary from jurisdiction to jurisdiction.

Recommendation: ATSA recommends that SORNA allow exceptions in the event of natural disasters such as severe weather, fires, earthquakes, and pandemics. ATSA also recommends that SORNA seek to reduce redundancy and conflict by recommending jurisdictions work to align their registration requirements to address the realistic needs of a mobile society. Ideally, any recommended requirements would be based on the most current research and information on best practices.

Section 72.8 on criminal liability for violations:

- States that registration violations must occur knowingly for there to be criminal liability.

Comment: This section provides an affirmative defense for uncontrollable circumstances. As examples of what those circumstances are, this section generally focuses on jurisdictions not providing information to registrants.

Recommendation: ATSA recommends that the concept of an affirmative defense be strengthened by clarifying that the burden of proof is on the jurisdiction, not the registrant, as each jurisdiction varies in its requirements and effectiveness at providing accurate registration information. ATSA also recommends that SORNA specify examples of uncontrollable events beyond legal issues to include natural disasters such as severe weather, fires, and pandemics.

GENERAL COMMENTS:

SORNA bases registration length on crime committed, not individual risk factors. Since criminal charges and convictions are frequently the result of legal bargaining, such an approach does not accurately reflect the risk factors that may increase a registrant's risk for reoffense. A new approach 1) based on

individually assessed risks and needs, 2) with reevaluations of risk every three years, and 3) aligning with evidence that recidivism reduces to virtually zero after age 65, would be more effective at protecting public safety and more cost-effective for jurisdictions to implement.

SORNA offers no definitions or guidance on what constitutes an uncontrollable circumstance, but suggests in the text that such circumstances occur when a jurisdiction does not provide adequate or timely information. General guidance about easing in-person registration requirements in emergencies would be useful.

SORNA does not address the use of modern technology as a safe and cost-effective way to replace most in-person registration reporting requirements. Promoting new communication channels as they are developed would ease the burden on jurisdictions and registrants alike.

SORNA does not address research showing the general lack of public safety benefit of making registration information public. To prevent the likelihood of crimes against registrants, it would help to clarify that registration information is for law enforcement purposes only, is not subject to public records requests, and is not to be made available to the public except in cases where the registrant presents an extremely high risk to reoffend based on validated assessment tools used by trained and certified professionals.

SORNA does not address registry age restrictions. Research clearly shows that placing minors on registries does little to protect the public or prevent sexual abuse, while instead causing harm to minors and their families. It would be better to clarify that minors should not be placed on registries or to state that their information is not available to the public.

SORNA overall focuses on extended punishment and oversight, rather than rehabilitation. A greater policy emphasis on reducing time on a registry based on reductions in risk would reward positive behaviors and changes while continuing to promote public safety.

Much of the justification for SORNA relies on court cases and does not reflect science. SORNA's public safety goals would be better served by basing registration requirements and recommendations on science and evidence-informed best practices, and updating the statutes as new information emerges.

Finally, data show that most sex offenses are committed by people who are offending for the first time and are not on registries. The foundational reason for SORNA's existence is flawed. Money spent on SORNA would be better used to strengthen prevention programs and address the treatment needs of individuals at risk to offend.

The Association for the Treatment of Sexual Abusers applauds the goal of reducing sexual violence and improving public safety, and stands ready to lend our expertise to assist with evidence-based revisions of SORNA.

For additional detailed analysis and recommendations for evidence-based registration reforms, see:

- <https://www.atsa.com/policy-papers/adultsorn>
- <https://www.atsa.com/policy-papers/youthregistrationnotification>

###

Comments due by October 13, 2020. Comments may be mailed to Regulations Docket Clerk, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Room 4234, Washington, DC 20530. To ensure proper handling, please reference Docket No. OAG 157 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at <http://www.regulations.gov>. Mailed comments must be postmarked by October 13, 2020. Electronic comments must be received by midnight EST October 13, 2020.