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SORNA Substantial Implementation Review State of Delaware — Revised

The U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) applauds the State of Delaware for the extensive work and effort to substantially implement Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA). The SMART Office has completed its review of Delaware's SORNA substantial implementation materials and has determined Delaware has substantially implemented SORNA.

On December 14, 2018, the Delaware Department of Justice submitted a substantial implementation package that included a completed substantial implementation checklist, relevant sections of the Delaware Code, the Standard Operating Procedures of the State Bureau of Investigation (SBI) and an excerpt from the SBI's Divisional Manual; a sample notification email to law enforcement; a sample community notification flier; screenshots from the SORNA Exchange Portal, the Dru Sjodin National Sex Offender Public Website (NSOPW) and Delaware's public registry website; an email with information about the Delaware Criminal Justice Information System (DELJIS); and the relevant registration forms, including the Sex Offender Registration/Verification Form, the Sex Offender Registration/Verification Supplement and the Notification of International Travel of Sex Offender Form. In addition, email and phone correspondence with the Delaware Department of Justice, SBI and the Delaware Criminal Justice Council filled in gaps in information and procedure, which informed our review.

Our review of these materials follows the outline of the SMART Office Substantial Implementation Checklist-Revised, which contains 13 sections addressing the SORNA requirements. Under each section, we indicate whether Delaware meets the SORNA requirements of that section or deviates from the SORNA requirements in a way that does not substantially disserve SORNA's requirements. While Delaware is encouraged to work toward rectifying any deviations that do not disserve SORNA's requirements in order to achieve full implementation of SORNA, this is not required to maintain substantial implementation.

This report is an exhaustive review based on the totality of materials received from Delaware. The report details every area in which Delaware deviates, but does not substantially disserve the requirements of SORNA. We encourage Delaware to review the information below, share it with relevant stakeholders and contact the SMART Office to develop a strategy to address these remaining issues. The SMART Office will continue to provide any necessary technical assistance to help Delaware achieve full implementation. Delaware will be required to keep the SMART Office informed of its progress in addressing the remaining provisions and annually certify ongoing implementation of SORNA when applying for Edward Byrne Memorial Justice Assistance Grant funding.

I. Immediate Transfer of Information

SORNA requires that when an offender initially registers and/or updates his or her information in a jurisdiction, that the initial registration information or updated information be immediately sent to other jurisdictions where the offender has to register, as well as to the National Crime Information Center's National Sex Offender Registry (NCIC/NSOR) and the jurisdiction's public sex offender registry website.

Delaware meets all of the SORNA requirements in this section.

II. Offenses That Must Be Included in the Registry

SORNA requires certain federal, military and foreign offenses are included in a jurisdiction's registration scheme. In addition, SORNA requires that the jurisdiction capture certain sex offenses, both offenses from its jurisdiction and from other SORNA registration jurisdictions, in its registration scheme. SORNA also requires that certain adjudications of delinquency are included in a jurisdiction's registration scheme.

A. Delaware Offenses

Delaware includes most of the state offenses for which SORNA requires registration in its registration scheme. The following state offenses are not included in Delaware's registration law:

- 11 Del. Code § 781 Unlawful imprisonment in the second degree (where the victim is a minor)
- 11 Del. Code § 782 Unlawful imprisonment in the first degree (where the victim is a minor)
- 11 Del. Code § 1343 Patronizing a prostitute (where the victim is a minor)
- 11 Del. Code § 1355 Permitting prostitution (where the victim is a minor)

In addition to serving a sentence of probation or incarceration, a defendant with no prior convictions who commits certain misdemeanor offenses may be eligible for "probation before judgment" under 11 Del. Code § 4218. Although a probation before judgment delays the entry of a guilty finding onto the defendant's record, it may be considered a conviction for purposes of SORNA because it follows a guilty plea and includes a term of probation.

Delaware has two registerable offenses that make the defendant eligible for probation before judgment: Unlawful sexual contact in the third degree (11 Del. Code § 767) and Incest (where the victim is a minor) (11 Del. Code § 766). In the event that the defendant enters into a probation before judgment, registration for the underlying offense is not required unless the defendant fails to successfully complete a term of probation (such term lasting no more than a year).

Likewise, Unlawful sexual contact in the third degree and Incest (where the victim is a minor) are the only two SORNA-required registerable offenses for which an offender may

petition the sentencing court for relief from registration pursuant to 11 Del. Code § 4121(d)(6). Please refer to Section VIII for more information about Delaware’s early removal processes.

B. Offenses of Other SORNA Registration Jurisdictions

Delaware requires registration for any offense that is equivalent to a registerable Delaware offense. Pursuant to 11 Del. Code § 4121(a)(4)(c), a sex offender, for the purposes of Delaware’s registration program, is any person who is, or has been “[C]onvicted or adjudicated delinquent of any offense specified in the laws of another state, commonwealth, territory, or other jurisdiction of the United States requiring registration in that jurisdiction, or a conviction or adjudication in any foreign government, which is the same as, or equivalent to any of the offenses set forth in paragraph (a)(4)a., (a)(4)b. or (a)(4)d of this section; or convicted of any federal or military offense enumerated in 42 U.S.C. § 16911(5)(A)(iii) and (iv).”

C. Federal Offenses

Delaware meets the SORNA requirements of this subsection, with one exception: Delaware does not automatically require registration for convictions of 18 U.S.C. § 2423(d).¹

D. Military Offenses

Delaware meets the SORNA requirements of this subsection.

E. Foreign Offenses

Delaware includes foreign convictions in its registration scheme if the offense is equivalent to a registerable Delaware offense. Therefore, there are some foreign offenses that do not appear to have an equivalent offense under Delaware law and, if not, may not require registration under Delaware’s existing scheme.

F. Juveniles

Delaware meets the SORNA requirements of this subsection.

The above deviations do not substantially disserve the purposes of the SORNA requirements in this section.

III. Required Registration Information

SORNA requires the jurisdiction collect certain pieces of information from and for each offender that it registers, and requires the jurisdiction keep that registration information, in a digitized form, in its registry.

¹ According to the Delaware Department of Justice, if an offender convicted of 18 U.S.C. § 2423(d) is located in Delaware, the Delaware Attorney General’s Office may exercise its discretion to petition to have the offender registered pursuant to 11 Del. Code § 4121(d)(2)(e) because the offense is equivalent to trafficking an individual (11 Del. Code § 787(b)(1)), which is a registerable Delaware offense.

Delaware meets all of the SORNA requirements in this section.

IV. Where Registration Is Required

SORNA requires the jurisdiction register an offender if the jurisdiction is the one in which he or she is convicted or incarcerated. In addition, SORNA requires the jurisdiction register offenders who reside, work or attend school in the jurisdiction.

Delaware meets all of the SORNA requirements in this section.

V. Initial Registration: Generally

SORNA requires that when an offender is incarcerated within the jurisdiction, registration must occur before release from imprisonment for the registration offense. Similarly, when an offender is sentenced within the jurisdiction, but not incarcerated, SORNA requires registration occur within three business days of sentencing. Finally, when an offender has been convicted, sentenced or incarcerated in another jurisdiction (including federal or military court), the jurisdiction must register the offender within three business days of the offender establishing residence, employment or school attendance within the jurisdiction. SORNA also requires that, during the initial registration process, the jurisdiction inform the offender of his or her registration duties and require the offender to acknowledge in writing that he or she understands those duties.

Delaware meets all of the SORNA requirements in this section.

VI. Initial Registration: Retroactive Classes of Offenders

SORNA requires each registration jurisdiction have a procedure in place to recapture three categories of sex offenders: (1) those who are currently incarcerated or under supervision, either for the predicate sex offense or for some other crime; (2) those who are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; and (3) those who reenter the jurisdiction's criminal justice system because of a some other felony conviction (whether or not it is a sex offense).

Delaware's current registration system has been in place since March 1, 1999, and all offenders who have been sentenced since that date (or were incarcerated, on parole or on probation for a sex offense on that date) are required to register. However, Delaware deviates from SORNA's timeframe for recapture of offenders. For nonincarcerated offenders, recapture has taken place "as soon as practicable" after the enactment of the 1999 law: the state's attorney general sends notice of the offender's registration obligations by certified or registered mail to the offender's last registered address. For incarcerated offenders, Delaware law requires that prison officials collect an offender's registration information at least 45 days in advance of the offender's release, discharge or parole. The state has a system in place to notify prison officials when offenders who have been convicted of a qualifying offense are approaching release.

This deviation does not substantially disserve the purposes of the SORNA requirements in this section.

VII. Keeping the Registration Current

SORNA requires that when a registered sex offender resides in a jurisdiction, the sex offender must immediately appear in person to update his or her name, residence, employment, school attendance and termination of residence. SORNA also requires that when an offender resides in a jurisdiction, the sex offender must immediately update any changes to his or her email addresses, internet identifiers, telephone communications, vehicle information and temporary lodging information.

When an offender works in a jurisdiction, but does not reside or attend school there, SORNA requires the offender immediately appear in person to update employment-related information. When an offender attends school in a jurisdiction, but does not reside or work there, SORNA requires the offender immediately appear in person to update school-related information.

SORNA also requires when an offender intends to travel outside the United States, the offender notify the residence jurisdiction at least 21 days in advance of such travel.

In addition, SORNA requires when an offender notifies the jurisdiction of intent to relocate to another country to live, work or attend school, or intent to travel to another country, the jurisdiction must do three things: (1) immediately notify any other jurisdiction where the offender is either registered or is required to register of that updated information; (2) immediately notify the United States Marshals Service; and (3) immediately update NCIC/NSOR.

Delaware meets all of the SORNA requirements in this section.

VIII. Offense Tiering and Verification/Appearance Requirements

SORNA requires offenses be classified based on the nature of the offense of conviction and that offenders register for a duration of time, and make in-person appearances at the registering agency, based on the tier of the offense of conviction.

Delaware has three tiers of offenders. Although the tiers are defined solely by the offenses of conviction contained therein, they are called “Risk Assessment” tiers. Risk Assessment tier I registrants (tier I registrants) are required to register for 15 years and verify registration information once a year. Risk Assessment tier II registrants (tier II registrants) are required to register for 25 years and verify registration information once every 6 months. Risk Assessment tier III registrants (tier III registrants) are required to register for life and verify registration information once every 3 months.

A. Offense Tiering

The SMART Office has reviewed all statutes identified in the substantial implementation submission package and has identified Delaware's placement of these statutes within the SORNA three tier levels (see the Appendix Delaware Offense Tiering Policy Review for information about Delaware's classification of its offenders and associated registration requirements). Delaware correctly places its statutes within at least the minimum appropriate SORNA tiers, with the following exceptions:

Delaware classifies the following offenses as tier I (15-year registration). These offenses require Tier II registration (25 years) under SORNA.

- 11 Del. Code § 1100A Dealing in children
- 11 Del. Code § 1112B Promoting sexual solicitation of a child

Delaware classifies the following offenses as tier II (25-year registration). These offenses require Tier III registration (lifetime) under SORNA.

- 11 Del. Code § 768 Unlawful sexual contact in the second degree (where the victim is under 13)
- 11 Del. Code § 770 Rape in the fourth degree (where the victim is 14 or 15, or where the offense falls under subsection (a)(3))
- 11 Del. Code § 771 Rape in the third degree (where the victim is 13-15 and there is no force or the threat of force)
- 11 Del. Code § 777 Dangerous crime against a child (where there is no force or threat of force, the victim is under 13 and the "criminal sexual contact" involves "sexual contact" with the victim [as defined by 11 Del. Code 761(f)], "sexual intercourse" with the victim [as defined by 11 Del. Code 761(g)] or "sexual penetration" of the victim [as defined by 11 Del. Code 761(h)]).

Delaware's recidivism provisions deviate from SORNA's requirements. Per 11 Del. Code § 4121(d)(5), tier I offenders who commit a subsequent tier I offense will only be re-designated as tier II offender if the subsequent offense was committed within five years of the first offense.² In addition, tier II offenders who commit a subsequent tier I offense will not be redesignated as tier III offenders based on that subsequent offense.

B. Duration of Registration

SORNA requires offenders register for a duration of time based on the tier of the offense of conviction. Specifically, SORNA requires Tier I offenders register for 15 years, Tier II offenders register for 25 years and Tier III offenders register for life.

² Per 11 Del. Code § 4121(d)(4), tier II offenders who commit a subsequent tier II offense will be redesignated as tier III offenders.

In Delaware, tier I registrants are required to register for 15 years, tier II registrants are required to register for 25 years and tier III registrants are required to register for life.

C. Frequency of Registration

SORNA requires offenders make in-person appearances at the registering agency based on the tier of the offense of conviction. Specifically, SORNA requires Tier I offenders appear once a year, Tier II offenders appear every six months and Tier III offenders appear every three months.

In Delaware, tier I registrants are required to appear once a year, tier II registrants are required to appear every six months and tier III registrants are required to appear every three months.

D. Reduction of Registration Periods

SORNA creates certain requirements under which a jurisdiction can allow an offender to have a reduced registration period.

Delaware allows tier II offenders to apply for a redesignation to tier I after registering for 10 years if the offender has been convicted of one of the following offenses and the victim is not a minor:

- 11 Del. Code § 770 Rape in the fourth degree
- 11 Del. Code § 771 Rape in the fourth degree³

In addition, pursuant to 11 Del. Code § 4121(d)(6), an offender convicted of unlawful sexual contact in the third degree or incest (where the victim is a minor) may petition the sentencing court for relief from registration if the following applies:

- a. “The [t]ier II or [t]ier III offense for which the person was convicted was a misdemeanor and the victim was not a child under 13 years of age (unless the person was also less than 18 years old at the time of the crime);
- b. The person has not previously been convicted of a violent felony, or any other offense set forth in paragraph (a)(4) of this section, or of any offense specified in the laws of another state, the United States or any territory of the United States, or any offense in a foreign jurisdiction which is the same as, or equivalent to, such offenses; and
- c. The sentencing court determines by a preponderance of the evidence that such person is not likely to pose a threat to public safety if released from the obligations imposed by this section, and by § 4120 of this title.”⁴

³ Delaware allows tier III offenders to petition for redesignation as tier II offenders; however, the offender will still be required to register for life and quarterly verify registration information.

⁴ 11 Del. Code § 4121(d)(6). Note that, according to the Delaware Department of Justice, the two misdemeanors that make an offender eligible for relief under 11 Del. Code § 4121(d)(6) — Unlawful sexual contact in the third degree and Incest (where the victim is a minor) — would only result in a tier II or tier III designation if the state exercised its discretion under 11 Del. Code § 4121(d)(2)(f) to petition have the offender redesignated to tier II or tier III.

E. Clean Record Requirements

Under SORNA, a registered sex offender has a clean record if he or she has satisfied certain requirements.

Delaware meets the SORNA requirements of this subsection.

The above deviations do not substantially disserve the purposes of the SORNA requirements in this section.

IX. Public Registry Website Requirements

SORNA requires each jurisdiction maintain a public sex offender registry website and publish certain registration information on that website. SORNA also requires that certain information not be displayed on a jurisdiction's public registry website.

Delaware's public sex offender registry website deviates from SORNA in that it does not post information about tier I offenders on its public website. In addition, while the website maintains an active subset of "Wanted Offenders," there is no indication on each offender's entry that the offender is an absconder.

These deviations do not substantially disserve the purposes of the SORNA requirements in this section.

X. Community Notification

SORNA requires each jurisdiction disseminate certain initial and updated registration information to particular agencies within the jurisdiction. In addition, SORNA requires each jurisdiction also disseminate certain initial and updated registration information to the community.

Delaware meets all of the SORNA requirements in this section.

XI. Failure to Register as a Sex Offender: State Penalty

SORNA requires that each jurisdiction, other than a federally recognized Indian tribe, provide a criminal penalty that includes a maximum term of imprisonment that is greater than one year for the failure of a sex offender to comply with their registration requirements.

Delaware meets all of the SORNA requirements in this section.

XII. When a Sex Offender Fails to Appear for Registration

SORNA requires that when a jurisdiction is notified of a sex offender's intent to reside, be employed or attend school in its jurisdiction, and that offender fails to appear for registration as required, the jurisdiction receiving the notice inform the originating jurisdiction (the

jurisdiction that provided the initial notification) that the sex offender failed to appear for registration.

Delaware meets all of the SORNA requirements in this section.

XIII. When a Jurisdiction Has Information That a Sex Offender May Have Absconded

SORNA requires that when a jurisdiction has information that a sex offender may have absconded, the jurisdiction take certain actions to investigate the absconder and notify various law enforcement agencies.

Delaware meets all of the SORNA requirements in this section.

Conclusion

Delaware has performed exceptional work in substantially implementing SORNA and enhancing its sex offender registration and notification system. Thank you for a job well done. However, there remain provisions identified in this report that should be addressed in order for Delaware to fully implement SORNA.

We encourage you to contact the SMART Office once you have had the opportunity to review and discuss our findings. Please let us know if we can be of assistance in developing a strategy for addressing and adopting the remaining provisions of SORNA.

Appendix: Delaware Offense Tiering Policy Review

The SMART Office has reviewed all Delaware statutes identified in its substantial implementation submission package and has identified Delaware's placement of these statutes within the tiering policy structure created in Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA). Unless indicated in the notes herein, the SMART Office has not reviewed any statutes (or subsections) that were not included in the legislation provided by Delaware.

In reviewing the Delaware Code, the SMART Office understands that Delaware has three offense-based categories of registrants for purposes of its duration of registration and frequency of registration requirements:

1. tier I registrants, who, based on the offense of conviction, are required to register for 15 years and verify registration information once a year;
2. tier II registrants, who, based on the offense of conviction, are required to register for 25 years and verify registration information every six months; and
3. tier III registrants, who, based on the offense of conviction, are required to register for life and verify registration information every three months.

SORNA Tier I Offenses

SORNA requires Tier I offenders register for a minimum of 15 years and annually verify registration information. The following offenses listed in the Delaware Code would require, at a minimum, Tier I registration requirements under SORNA.

- 11 Del. Code § 766 Incest (where the victim is a minor)
- 11 Del. Code § 767 Unlawful sexual contact in the third degree
- 11 Del. Code § 769 Unlawful sexual contact in the first degree (where the victim is an adult)
- 11 Del. Code § 780B Unlawful sexual contact with a person in custody
- 11 Del. Code § 1111 Possession of child pornography
- 11 Del. Code § 1335(a)(6) Violation of privacy
and (a)(7)

SORNA Tier II Offenses

SORNA requires Tier II offenders register for a minimum of 25 years and semi-annually verify registration information. The following offenses listed in the Delaware Code would require, at a minimum, Tier II registration requirements under SORNA.

- 11 Del. Code § 768 Unlawful sexual contact in the second degree (where the victim is 13 or older)

- 11 Del. Code § 769 Unlawful sexual contact in the first degree (where the victim is 13-17)
- 11 Del. Code § 770 Rape in the fourth degree (where the offense falls under subsection (a)(2) and the victim is 16 or 17)
- 11 Del. Code § 774 Sexual extortion
- 11 Del. Code § 777 Dangerous crime against a child (where the victim is 13 and the “criminal sexual conduct” does not involve “sexual intercourse” with the victim [as defined by 11 Del. Code 761(f)] or “sexual penetration” of the victim [as defined by 11 Del. Code 761(g)], or where the victim is under 13 and the “criminal sexual conduct” does not involve “sexual contact” with the victim [as defined by 11 Del. Code 761(f)], “sexual intercourse” with the victim [as defined by 11 Del. Code 761(g)] or “sexual penetration” of the victim [as defined by 11 Del. Code 761(h)])
- 11 Del. Code § 778A Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree (where the victim is 13 and the conduct falls under subsection (1), or where the conduct falls under subsection (3)).
- 11 Del. Code § 780B Unlawful sexual contact with a person in custody (where the victim is 13-17)
- 11 Del. Code § 787(b)(3) or (4) Trafficking an individual, forced labor and sexual servitude (where the victim is a minor)
- 11 Del. Code § 1100A Dealing in children
- 11 Del. Code § 1109 Dealing in child pornography
- 11 Del. Code § 1112A Sexual solicitation of a child
- 11 Del. Code § 1112B Promoting sexual solicitation of a child
- 11 Del. Code § 1352(2) Promoting prostitution in the second degree
- 11 Del. Code § 1353(2) Promoting prostitution in the first degree

SORNA Tier III Offenses

SORNA requires Tier III offenders register for life and quarterly verify registration information. The following offenses listed in the Delaware Code would require, at a minimum, Tier III registration requirements under SORNA.

- 11 Del. Code § 768 Unlawful sexual contact in the second degree (where the victim is under 13)
- 11 Del. Code § 769 Unlawful sexual contact in the first degree (where the victim is under 13)
- 11 Del. Code § 770 Rape in the fourth degree (where the victim is 14 or 15, or where the offense falls under subsections (a)(1) or (a)(3))
- 11 Del. Code § 771 Rape in the third degree
- 11 Del. Code § 772 Rape in the second degree
- 11 Del. Code § 773 Rape in the first degree

- 11 Del. Code § 776 Continuous sexual abuse of a child
- 11 Del. Code § 777 Dangerous crime against a child (where the victim is under 13 and the “criminal sexual contact” involves “sexual contact” with the victim [as defined by 11 Del. Code 761(f)], “sexual intercourse” with the victim [as defined by 11 Del. Code 761(g)] or “sexual penetration” of the victim [as defined by 11 Del. Code 761(h)])
- 11 Del. Code § 778A Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree (where the victim is under 13 and the conduct falls under subsection (1))
- 11 Del. Code § 780A Sexual intercourse or penetration with a person in custody
- 11 Del. Code § 780B Unlawful sexual contact with a person in custody (where the victim is under 13)

Further Review

In reviewing the statutes Delaware cited as those that are registerable offenses under Delaware’s registration scheme, the SMART Office noted several offenses are missing from those statutes for which SORNA requires registration. Those offenses are as follows:

- 11 Del. Code § 781 Unlawful imprisonment in the second degree (where the victim is a minor)
- 11 Del. Code § 782 Unlawful imprisonment in the first degree (where the victim is a minor)
- 11 Del. Code § 1343 Patronizing a prostitute (where the victim is a minor)
- 11 Del. Code § 1351 Promoting prostitution in third degree (where the victim is a minor)
- 11 Del. Code § 1355 Permitting prostitution (where the victim is a minor)

In addition, Delaware registers the following offenses; however, without the commission of (or the attempt or conspiracy to commit) a sexual offense, registration of these offenses exceed the minimum standards of SORNA, do not require registration under SORNA but in no way disserve the purposes of the SORNA requirements:

- 11 Del. Code § 765 Indecent exposure in the first degree
- 11 Del. Code § 775 Bestiality
- 11 Del. Code § 778A Sexual abuse of a child by a person in a position of trust, authority or supervision in the second degree (where the conduct falls under subsection (2))
- 11 Del. Code § 780 Female genital mutilation
- 11 Del. Code § 1112 Prohibition from school zones
- 11 Del. Code § 1361(b) Obscenity