



## **SORNA Substantial Implementation Review State of Delaware**

The U.S. Department of Justice, Office of Justice Program, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) would like to thank the State of Delaware for the extensive work that has gone into its 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 sex offender registration and notification system and has found the State of Delaware to have substantially implemented SORNA.

In March 2010, the Delaware Department of Justice submitted a “substantial compliance review” package that included a completed SMART Substantial Implementation Checklist, relevant state statutes, a State Bureau of Identification sex offender registration/verification manual and standard operating procedures, screenshots of Delaware’s sex offender public website, a description of DELJIS, registration forms, and designation letters. In addition, email correspondence with the Delaware Attorney General’s Office personnel filled in gaps in information and procedure, which informed our review.<sup>1</sup>

Our review of these materials follows the outline of the SMART Office Substantial Implementation Checklist—Revised. We have highlighted those areas that are not in conformity with the SORNA guidelines and areas where correspondence augmented materials submitted. This is an exhaustive review and meant to detail every area in which the state has not met SORNA provisions. The SMART Office encourages the State of Delaware to continue to work towards meeting all of the provisions of SORNA and to notify SMART office personnel as these outstanding provisions are met or if there are other changes to Delaware’s sex offender registration and notification system.

### **I. Immediate Transfer of Information**

Meets SORNA requirements.

### **II. Terminology**

SORNA provides a definition of “Jurisdiction” that 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 42 U.S.C. §16927.

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<sup>1</sup> Email correspondence with Susan Schmidhauser, Office of the Attorney General, Department of Justice on April 19, 2010 (see attached memo).

11 Del. C. § 4120(e)(1) includes “Any person convicted of any offense in the laws of another state, commonwealth, territory, or other jurisdiction of the United States...” Per correspondence with the Delaware Attorney General’s Office, “other jurisdiction of the United States” includes as territories the District of Columbia and Indian tribes that elect to function as registration jurisdictions (see attached memo, April 19, 2010). This meets SORNA requirements.

### **III. Offenses that Must Be Included in the Registry**

Meets SORNA requirements.

### **IV. Tiering of Offenses**

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 attached “Delaware Offense Tiering Review” for a detailed analysis regarding this subsection of the review). Delaware correctly places its statutes within the appropriate SORNA tiers, with the following exceptions:

- 11 Del. C. § 771. Rape 3rd degree listed as Tier II offense, unless victim under 12 or use of force/threat then it is a Tier III. This does not meet SORNA requirements; involves a sexual act (intercourse/penetration) with a victim under 16, which is a Tier III offense under SORNA.
- 11 Del. C. § 779. Dangerous Crime Against a Child listed as Tier II offense (unless victim under 12 or use of force/threat then it is a Tier III). This does not meet SORNA requirements; involves a sexual act (intercourse/penetration) with a victim under 14, which is a Tier III offense under SORNA, regardless of force/threat.
- Delaware includes 18 U.S.C. §1591 (sex trafficking of children) as a Tier I offense, per SMART Office Substantial Implementation Checklist error. This should be included as a Tier II offense in Delaware’s registration scheme.

Additionally, Delaware’s inclusion of “recidivist” does not meet SORNA requirements. Per 11 Del. C. § 4121(d)(5), Tier I offenders who commit a subsequent Tier I offense will be re-designated as Tier II, only if the subsequent offense was committed within 5 years. There is no time limit for recidivism in SORNA; SORNA defines a recidivist in this category as a prior Tier I sex offender with a current sex offense punishable by more than one year imprisonment.

For more guidance on SORNA classes of offenders, see 42 USC § 16911 and Section V (pages 21-25) of the National Guidelines.

### **V. Required Registration Information**

SORNA requires sex offender registration information in 20 primary categories. Delaware correctly captures information under all of these categories, with one exception: Delaware State Bureau of Identification Standard Operating Procedures manual (p. 32) indicates that photographs are taken at 6 month intervals (unless appearance has changed) for Tier III

offenders. This procedure does not meet SORNA requirements; SORNA requires photographs to be taken at quarterly intervals for Tier III offenders.

For more guidance on specific items of required registration information, see 42 USC §16914 and Section VI (pages 26-33) of the National Guidelines.

## **VI. Where Registration is Required**

Meets SORNA requirements

## **VII. Initial Registration: Generally**

Meets SORNA requirements

## **VIII. Initial Registration: Retroactive Classes of Offenders**

SORNA took effect when the law was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment. The National Guidelines (pages 7-8) further clarify the retroactive provision of SORNA to apply to sex offenders who are 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 reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense).

Delaware addresses the retroactive provisions of SORNA through 11 Del. C. § 4122(a): "Section 4121 of this title shall be retroactively applicable to any person convicted of a registering offense." However, this statutory language is unclear regarding its application to those offenders who are in the justice system for an offense other than a sex offense. Per correspondence with the Delaware Attorney General's Office, a new software program was developed to notify state prisons when someone is due to be released who previously committed a sex offense that would require them to register (see attached memo, April 19, 2010). This procedure meets SORNA requirements.

Additionally, under 11 Del. C. § 4122(b) and (c) those sex offenders who are subject to retroactive application are "re-designated" into a "Risk Assessment Tier" and allowed to petition the Board of Parole for review of this re-designation. Given SORNA's conviction-based tiering structure, a re-designation to a tier other than the one required by the sex offense committed does not meet the requirements of SORNA.

For more guidance on the registration of the retroactive class of offenders, see Part IX (pages 45-47) of the National Guidelines.

## **IX. Keeping the Registration Current**

Meets SORNA requirements

## **X. Verification/Appearance Requirements**

Delaware meets the SORNA requirements related to frequency and duration of in-person appearances, as well as the requirements for in-person regular appearances.

However, 11 Del. C. § 4121(d)(6) allows for reduction in registration that does not conform to SORNA requirements. 11 Del. C. § 4121(d)(6) includes a process for certain offenders to petition the sentencing court for relief of duty to register, if:

- a. The Tier II or Tier 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); and
- 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.

Per correspondence with the Delaware Attorney General's Office, 121(d)(6) applies ONLY to those Tier II or Tier III offenders who are on the registry for misdemeanors. There are no misdemeanor offenses that result in Tier II or Tier III designation. The only way a misdemeanant would be considered Tier II or Tier III is if the offender is a repeat misdemeanant offender. For instance, if an offender is convicted repeatedly of Unlawful Sexual Contact 3<sup>rd</sup>, which is a Tier I offense, the State could have that offender redesignated to Tier II. The redesignation would not be automatic. However, the Delaware State Police and the Attorney General's Office are not aware of any sex offender who has been relieved from their duty to register (see attached memo, April 19, 2010).

Also, the SMART Office had some concerns about Delaware's process for allowing registered sex offenders to seek reduction of registration under 11 Del. C. § 4121(e)(2). However, upon further discussions with, and clarification from, the Delaware Attorney General's Office (see attached memo, April 19, 2010), it appears that the reductions allowed minimally impact the duration of reporting requirements for Tier II and not affect the lifetime registration requirement for III sex offenders. Therefore, the SMART Office has determined that this process does not substantially disserve the intent of SORNA.

For more guidance on the reduction of the registration period, see Part XII (pages 56-58) of the National Guidelines.

## **XI. Registry Website Requirements**

Meets SORNA requirements

## **XII. Community Notification**

### Law Enforcement Notification

SORNA requires that jurisdictions immediately notify specific agencies of the initial registration or the changes to an offender's registration information, and make the updated information available to these agencies. Delaware properly notifies the FBI's National Sex Offender Registry, appropriate law enforcement and supervision agencies, other registration jurisdictions of initial registrations and changes in information.

However, Delaware does not properly notify the fourth group of required recipients, National Child Protections Act (NCPA) agencies. It appears that these entities can request the information from the State Bureau of Identification, which also runs the state sex offender registry, but immediate notification is not provided. This process does not meet SORNA requirements.

For more guidance on these notification requirements, please refer to Part VII (pages 38-40) of the National Guidelines.

### General Community Notification

Meets SORNA requirements.

## **XIII. Failure to Register**

Meets SORNA requirements.

## **XIV. When a Sex Offender Fails to Appear for Registration**

Meets SORNA requirements.

## **XV. When a Jurisdiction has Information that a Sex Offender may have Absconded**

Meets SORNA requirements.

## **Conclusion**

Delaware has put forth exceptional work and effort in adopting SORNA and enhancing its sex offender registration and notification system. The SMART Office has found the State of Delaware to have substantially implemented SORNA. However, there are several provisions identified in this report that will need to 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 and have developed a strategy for addressing and fully adopting the remaining provisions of SORNA.

## Delaware State Statutes

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 structure created in Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA). It should be noted that SORNA requires all attempts, conspiracies, and solicitations to mirror requirements of the actual offense. 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. It is possible that other offenses will need to be included in Delaware's sex offender registry to substantially implement SORNA. For more guidance on SORNA classes of offenders, see 42 USC § 16911 and Section V (pages 21-25) of the National Guidelines for Sex Offender Registration and Notification (June 2008).

In reviewing Delaware Code, the SMART Office understands that Delaware has three categories of registrants, which accurately conform to the tiering structure in SORNA:

1. Risk Assessment Tier I registrants, required to register for 15 years and annually verify registration information;
2. Risk Assessment Tier II registrants, required to register for 25 years and biannually verify registration information; and
3. Risk Assessment Tier III registrants, required to register for life and quarterly verify registration information.

### Tier I Offenses

With respect to Tier I under SORNA, a specific itemization of statutes is not provided. Rather, Tier I is a residual/catch-all tier for crimes not included under tiers II or III. Delaware includes the following offenses in Risk Assessment Tier I:

#### **§ 4121(d)(3) Any sex offender not otherwise designated Tier II or III**

Meets SORNA requirements.

#### **§ 766 Incest**

Placement of this statute in Tier I meets SORNA's requirements.

#### **§ 767 Unlawful Sexual Contact 3<sup>rd</sup> degree**

Placement of this statute in Tier I meets SORNA's requirements.

#### **§ 1335 Violation of Privacy**

Placement of this statute in Tier I meets SORNA's requirements. However, if the victim is over the age of 17, § 1335 is not a registerable offense under SORNA.

**§ 765 Indecent Exposure 1<sup>st</sup> degree**

Placement of this statute in Tier I exceeds SORNA's requirements. § 765 is not a registerable offense under SORNA.

**§ 780 Female Genital Mutilation**

Placement of this statute in Tier I exceeds SORNA's requirements. § 780 is not a registerable offense under SORNA.

**§ 1100 Dealing in Children**

Placement of this statute in Tier I exceeds SORNA's requirements. § 1100 is not a registerable offense under SORNA.

**Tier II Offenses**

**§ 4121(d)(5) Recidivist (Tier I) within 5 years of previous Tier I conviction**

Delaware's provision of "recidivist" for Tier II registration does not meet SORNA requirements. There is no time limit for a recidivist in SORNA; SORNA defines a recidivist in this category as a prior Tier I sex offender with a current sex offense punishable by more than one year imprisonment.

**§ 779 Dangerous Crime Against a Child (unless use of force/threat)**

Placement in Tier II does not meet SORNA requirements. § 779 involves a sexual act (intercourse/penetration) with a victim under the age of 14. Offenses involving a sexual act with a minor are considered Tier III offense under SORNA.

**§ 771 Rape 3<sup>rd</sup> degree (unless victim under 12 or use of force/threat)**

Placement in Tier II does not meet SORNA requirements. § 771 involves a sexual act (intercourse/penetration) with a victim under the age of 16. Offenses involving a sexual act with a minor are considered Tier III offense under SORNA.

**§ 768 Unlawful Sexual Contact 2<sup>nd</sup> degree**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 770 Rape 4<sup>th</sup> degree**

Placement of this statute in Tier II meets SORNA requirements. Per correspondence with DE officials, Rape 4<sup>th</sup> is a "statutory rape" charge. § 770 involves a sexual act

(intercourse/penetration) with a victim under 16 where the person committing the sexual act is no more than 4 years older than the victim.

**§ [Former] 773 Unlawful Sexual Intercourse 3<sup>rd</sup> degree**

Placement of this statute in Tier II meets SORNA's requirements.

**§ [Former] 770 Unlawful Sexual Penetration 3<sup>rd</sup> degree**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 776 Sexual Extortion (unless use of force or threat of)**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 1109 Unlawfully Dealing in Child Pornography**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 1112A Sexual Solicitation of a Child**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 787 Trafficking in Persons (sexual servitude of a minor age 13-17, unless use of force of threat of)**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 1353 Promoting Prostitution 1<sup>st</sup> degree**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 1352 Promoting Prostitution 2<sup>nd</sup> degree**

Placement of this statute in Tier II meets SORNA's requirements.

**§ 1111 Possession of Child Pornography**

Placement of this statute in Tier II exceeds SORNA's requirements. Possession of child pornography is a Tier I offense under SORNA.

**§ 1361 Obscenity. Providing Obscene Materials to a Person Under the age of 18**

Placement of this statute in Tier II exceeds SORNA's requirements. § 1361 is not a registerable offense under SORNA.



**§ 777 Bestiality**

Placement of this statute in Tier II exceeds SORNA's requirements. § 777 is not a registerable offense under SORNA.

**Tier III Offenses**

**§ 4121(d)(4) Recidivist (Tier II or III)**

Meets SORNA requirements.

**§ 783A Kidnapping 1<sup>st</sup> degree (non-parental)**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 783 Kidnapping 2<sup>nd</sup> degree (non-parental)**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 779 Dangerous Crime Against a Child (use of force or threat of)**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 778 Continuous Sexual Abuse of a Child**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 773 Rape 1<sup>st</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 772 Rape 2<sup>nd</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 771 Rape 3<sup>rd</sup> degree (victim under 13, or use of force/threat/no consent)**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 769 Unlawful Sexual Contact 1<sup>st</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ [Former] 775 Unlawful Sexual Intercourse 1<sup>st</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ [Former] 774 Unlawful Sexual Intercourse 2<sup>nd</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ [Former] 772 Unlawful Sexual Penetration 1<sup>st</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ [Former] 771 Unlawful Sexual Penetration 2<sup>nd</sup> degree**

Placement of this statute in Tier III meets SORNA's requirements.

**§ 1108 Sexual Exploitation of a Child**

Placement of this statute in Tier III exceeds SORNA's requirements. § 1108 would be considered a Tier II offense under SORNA.

**§ 787 Trafficking in Persons (victim under 13 or sexual servitude of minor through force or threat of)**

Placement of this statute in Tier III exceeds SORNA's requirements. § 787 would be considered a Tier II offense under SORNA.

**§ 776 Sexual Extortion (use of force or threat of)**

Placement of this statute in Tier III exceeds SORNA's requirements. § 776 would be considered a Tier II offense under SORNA.

**Further Review**

The SMART office has not further reviewed the Delaware Code for additional statutes which might also require registration and are not currently included in Delaware's sex offender registry scheme. Broadly speaking, Delaware is encouraged to find any and all of the following categories of violations of the criminal law as contained in Delaware criminal code so as to determine the propriety of requiring registration (to the extent that they are not already included). The following offenses will require registration under SORNA:

1. Any criminal offense that has an element involving a sexual act or sexual contact with another, regardless of the age of the victim;
2. Any offense involving the non-parental kidnapping of a minor;
3. Any offense involving the non-parental false imprisonment of a minor;
4. Any offense involving solicitation to engage a minor in sexual conduct;
5. Any offense involving use of a minor in a sexual performance;
6. Any offense involving solicitation of a minor to practice prostitution;

7. Any offense involving video voyeurism of a minor;
8. Any offense involving possession, production, or distribution of child pornography;
9. Any offense involving criminal sexual conduct involving a minor; or
10. Any offense involving the use of the internet to engage a minor in criminal sexual conduct.

Delaware is in a better position than the SMART office to review its criminal laws for any additional offenses which might warrant inclusion. The SMART office is happy to review any proposed additional tiering decisions.