



November 2012

## **SORNA Substantial Implementation Review Commonwealth of Massachusetts**

The U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) would like to thank the State of Massachusetts 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 Massachusetts's SORNA substantial implementation packet and has determined that Massachusetts has not yet substantially implemented SORNA.

In July 2010, the Massachusetts Sex Offender Registry Board (SORB) submitted a substantial implementation package that included a report in which the state detailed why Massachusetts should be found to have substantially implemented SORNA. Included in this report was an explanation of the state constitutional oppositions to SORNA, as determined by Massachusetts' appellate courts. The submission package also included caselaw related to the aforementioned state oppositions, as well as a table of authority in response to the requirements of the Substantial Implementation Checklist, and Tribal Provisions. In addition, email and phone correspondence with the SORB 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. This is an exhaustive review and meant to detail every area in which the state has not met SORNA standards. We encourage you to review the information below, share it with relevant stakeholders in the state, and get back in touch with us to develop a strategy to address these issues.

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

SORNA requires that when an offender initially registers and/or updates his information in a jurisdiction, that the registration/updated information is immediately sent to other jurisdictions where the offender has to register, as well as to NSOR and the jurisdiction's public sex offender registry website. Massachusetts meets the requirement to transfer information immediately.

### **II. Terminology**

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<sup>1</sup>Email correspondence with State Police and Attorney General officials from 6/14/10 to 7/9/10.

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.

Massachusetts does not define “jurisdiction” for purposes of sex offender registration and notification; however, Massachusetts recognizes convictions (for purposes of registration in Massachusetts) from any state, U.S. territory, or tribe, as well as federal and military convictions. Massachusetts does not register offenders solely on the basis of a conviction in a foreign country. This does not meet SORNA’s requirements.

For more guidance on SORNA’s definition of “Jurisdiction”, see Section III (pages 11-12) of the National Guidelines for Sex Offender Registration and Notification (June 2008).

Massachusetts does define “sex offense” for purposes of sex offender registration and notification. This definition covers most of the offenses for which SORNA requires registration. However, the state’s “sex offense” definition does not include any conduct similar to Video Voyeurism of a Minor, nor does it include false imprisonment of a minor, or conspiracy offenses (although the state has proposed legislation to include the crime of conspiracy within the definition of a “sex offense”). This does not meet SORNA’s requirements.

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

Massachusetts does not register all of the tribal, territory, federal, military, foreign, and other-state offenses that SORNA would require Massachusetts to register. There is one class of offenders who, if not convicted by a Massachusetts court, nevertheless must register in Massachusetts: those who commit similar offenses (to the Massachusetts offenses that Massachusetts captures) in another jurisdiction. However, if an offender is convicted in another jurisdiction, and the offense is not similar to a registerable Massachusetts offense, then Massachusetts does not require the offender to register. This does not meet SORNA requirements.

#### Juvenile Adjudications

SORNA requires that certain state, local, and tribal adjudications of delinquency are included in a jurisdiction’s registration scheme. Massachusetts makes eligible for registration all juveniles who are adjudicated delinquent of a sex offense; however, the state is constitutionally excepted from registering these offenders based solely on the nature of the offense, as determined by the Massachusetts Supreme Judicial Court’s interpretation of the Massachusetts Constitution.<sup>2</sup> See Section 4, “Tiering of Offenses,” just below.

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<sup>2</sup> Section 125(B) of SORNA allows for a jurisdiction to be excepted from implementing a provision of SORNA if the highest court of that jurisdiction has ruled that implementation of that provision would place the jurisdiction in conflict of its Constitution.

## **IV. Tiering of Offenses**

Massachusetts is excepted from classifying its offenders solely on the basis of the offense, for purposes of registration requirements, as determined by the Massachusetts Supreme Judicial Court's interpretation of the Massachusetts Constitution.<sup>3</sup> However, the state does classify some of its offenders, for purposes of duration of registration, based on the nature of the offense: an offender who is convicted of any two offenses in the category of "sex offense involving a child," as defined by G.L. c.6 § 178C, or who is convicted of a "sexually violent offense," as defined by G.L. c.6 § 178C (including a sexually violent predator, as defined by the same section), has a lifetime registration requirement, with no possibility of early termination. For purposes of this report, we will call these offenses the "automatic lifetime offenses." Please see Appendices A and B for more information on these offenses. Although they are automatically subject to a lifetime registration requirement, offenders who commit these automatic lifetime offenses are still placed, based on a risk assessment, into a numerical level that will dictate the offender's other registration and notification requirements.<sup>4</sup> Please see footnote 3 for more specific information on those levels.

## **V. Required Registration Information**

SORNA requires sex offender registration information in 20 primary categories. Massachusetts correctly captures information under all of these categories, with some exceptions.

The SORB does not collect photographs, fingerprints, or palm prints of Level 1 offenders; however, this information is collected by law enforcement in the course of the offender's arrest and processing, and the SORB has access to it.

In its registry, the SORB has provided the offender's Probation Central File number (PCF number). With this number, individuals who access the registry can access various criminal history information, including the date of any and all arrests and convictions of the offender, as well as the status of parole, probation, and supervised release. In addition, while the registry does not contain outstanding arrest warrants, the registry does indicate whether the offender is in violation of his duty to register. Such violation information is also made available to any probation or law enforcement officer who has access to the registry, and a law enforcement officer can arrest an offender without a warrant if the officer has reason to believe that the offender is in violation of his duty to register.

Massachusetts does not collect the name of the offender's employer, unless that employer is an institution of higher learning. In addition, the state does not collect information about migrant/transient workers.

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<sup>3</sup> In a series of decisions, the Massachusetts Supreme Judicial Court has determined that, in order to meet an offender's procedural due process requirements, the offender, if he so chooses, can have a hearing before being subjected to registration and notification requirements. At this hearing, the SORB must prove by a preponderance of the evidence that the offender currently poses a risk of reoffense. Depending on the level of risk proven, the offender may be required to register. Per legislation that was passed after those decisions, the offender, if required to register as a result of the hearing, may be classified as a Level 1, 2 or 3 offender. This level dictates many of the offender's requirements with regard to registration and notification, as seen in Appendix B.

<sup>4</sup> The exception to this is Sexually Violent Predators, who, pursuant to G.L. c. 6 § 178K (c)(vii), are automatically Level 3 offenders.

SORNA requires that, unless an offender's appearance has not changed drastically, that an updated digitized photograph be collected at least once a year for SORNA Tier I offenders, twice a year for SORNA Tier II offenders, and quarterly for SORNA Tier III offenders. Generally speaking, Massachusetts takes pictures of its Level 2 and 3 offenders at the time of original registration and once a year thereafter unless the offender is homeless. Currently, a homeless offender, living in a shelter, is required to register information every 45 days. As of November 4, 2010, all Level 2 or 3 homeless offenders will be required to register every 30 days. When they report to the local police departments every 30 days, the police will determine whether a new picture is warranted (as they now do when an offender appears every 45 days).

Massachusetts does collect phone numbers from offenders, but only voluntarily. However, if the sex offender is on GPS monitoring, the offender will have a cellular or land line telephone number that is collected by the Massachusetts Department of Probation.

If an offender has no permanent residence, Massachusetts might collect information on where the offender "habitually lives." Specifically, Massachusetts requires all homeless offenders to register every 30 days, and if the offender lives in a shelter, the state collects that information.

Massachusetts does not collect school information if the school is a secondary school.

SORNA requires that, when an offender will be absent from his residence for seven days or more, the jurisdiction collect information on where the offender will be temporarily lodged. When an offender has a secondary address at which he or she spends four days a month, or 14 days in a one-year period, Massachusetts requires the offender to register that address. Other than that, however, Massachusetts does not require an offender to provide temporary lodging information.

Massachusetts collects vehicle information from offenders on a voluntary basis. However, offenders are prohibited by law from operating a school bus or from gaining a permit to lawfully operate an ice cream truck if they have been convicted of a registerable sex offense as defined under the state sex offender registry law. As to the school bus, the state's Registry of Motor Vehicles downloads to the SORB a list of all of the state's school bus drivers and school bus driving applicants twice a month, and twice a month the SORB runs that list against the registry.

In addition, Massachusetts does not collect professional licensing information, digitized copies of passports or immigration documents, the text of the registration offense, or any kind of internet identifiers from offenders, all of which SORNA requires.

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, with a few exceptions. If an offender is convicted or adjudicated delinquent of a sex offense but is not sentenced to confinement for 90 days or more to be served immediately, the offender has to register within two calendar days of being notified by the court of the duty to register or within two calendar days of being released from

confinement, whichever is later. In addition, an offender who does not reside in Massachusetts and who has enrolled in a school in Massachusetts need only register within 10 days of attending that school.

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

SORNA's requirements 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).<sup>5</sup>

Massachusetts meets SORNA requirements with respect to the retroactive registration of offenders, to some extent. The state has subjected every offender convicted or adjudicated of a sex offense since 1981, and everyone released on or after August 1, 1981 from incarceration or supervision following a sex offense conviction, to the state's registration and notification requirements.

However, Massachusetts does not recapture offenders who have been relieved of their registration requirements but who have reentered the jurisdiction's criminal justice system because of a conviction for some other crime.

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

SORNA requires that when an offender resides in a jurisdiction, that sex offender must immediately appear in-person to update his or her name, residence, employment, school attendance, and termination of residence. When an offender works in a jurisdiction, but does not reside or attend school there, SORNA requires that 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 that the offender immediately appear in-person to update school-related information.

Massachusetts is not meeting all of the aforementioned requirements. The state only requires Level 2 and 3 offenders to appear in person to update registration information; Level 1 offenders need only update this information in writing.

SORNA also requires that when an offender resides in a jurisdiction, that sex offender must immediately update any changes to his or her email addresses, instant message addresses, any other designations used in internet communications, postings, or telephone communications, vehicle information, and temporary lodging information. However, offenders who reside in Massachusetts are not immediately updating any of this information, except telephone and vehicle information on a voluntary basis.

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<sup>5</sup> Under SORNA's proposed Supplemental Guidelines, a jurisdiction has discretion to only re-capture offenders who re-enter the jurisdiction's justice system for a felony.

Massachusetts does not notify the required agencies and governments when an offender resides in Massachusetts and indicates to the state that he/she intends to begin residence, school, or employment outside of the United States.

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

Massachusetts does not meet the SORNA requirements related to frequency of in-person appearances. Generally speaking, Level 1 offenders are not required to appear in-person, and Level 2 and 3 offenders need only appear once a year. As mentioned above, Level 2 and 3 homeless offenders are required to appear in person every 30 days, and sexually violent predators must appear in person every 45 days.<sup>6</sup>

### Reduction of Registration Periods

Massachusetts does not meet SORNA's requirements for reduction of registration periods. Generally speaking, with the exception of offenders who are registered based on one of the automatic lifetime offenses, a sex offender's duty to register ends 20 years after the offender has been convicted as an adult, adjudicated delinquent as a juvenile, or has been released from all custody or supervision, whichever occurs last; however, under G.L. c. 6 § 178G, an offender may apply to the SORB to terminate the registration obligation after 10 years upon proof, by clear and convincing evidence, that the person has not committed a sex offense in the 10 years since conviction, adjudication, or release from custody (whichever occurs last), and is not likely to pose a danger to others.

An offender who is registered based on one of the automatic lifetime offenses is not eligible for a reduction in his registration period.<sup>7</sup>

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<sup>6</sup> Level 1 homeless offenders are required to verify their registration information every 30 days with the Sex Offender Registry Board in writing.

<sup>7</sup> Per G.L. c. 6, § 178C: As used in sections 178C to 178P, inclusive, the following words shall have the following meanings:—...

“Sexually violent offense”, indecent assault and battery on a child under 14 under section 13B of chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the law of another state, the United States or a military, territorial or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

“Sexually violent predator”, a person who has been convicted of a sexually violent offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sexually violent offense, or a person released from incarceration, parole, probation supervision or commitment under chapter 123A or custody with the department of youth services for such a conviction or adjudication, whichever last occurs, on or after August 1, 1981, and who suffers from a mental abnormality or personality disorder that makes such person likely to engage in predatory sexually violent offenses.

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

## **XI. Registry Website Requirements**

Massachusetts does not fully meet SORNA requirements with regard to its public registry website. Massachusetts excludes from its public website all of its Level 1 and 2 offenders. The website is not currently searchable by geographic radius; however, there is an agency within Massachusetts, the Office of Geographic Information, that performs geocoding, and could provide this service to the SORB, which would allow the SORB to make the public registry website searchable by geographic radius.<sup>8</sup> The public registry website does not contain instructions on how to seek correction of information that an individual contends is erroneous. In addition, the site does not contain information on school address, nor does it contain vehicle information. Finally, although the website does contain the official section name of the offense for which the offender has been convicted, the state does not yet have the numerical heading of the statute.<sup>9</sup> The SMART Office understands that Massachusetts is in the process of revising its public website to include a hyperlink to the text of the registration offense on each offender's flyer.

Although information on Level 2 offenders is not on the public website, an adult who appears in person at the local police station, who can make a reasonable showing that he requires the registry information in question for the protection of himself or a child in his care or custody, can identify a specific individual by name or personal identifying information, or can inquire whether any offenders reside, work, or attend school within the same city or town on a specific street or at a specific address, and get registration information about such offenders. Likewise, an adult who makes the same showing at the local police station may obtain Level 3 registration information. Additionally, a request for registration information of a Level 2 or 3 offender may be requested from the Board.

Information about Level 1 offenders is not accessible to the public.

## **XII. Community Notification**

### Law Enforcement Community Notification

Meets SORNA requirements, with some exceptions. Massachusetts only notifies other jurisdictions in which the change of residence, employment, or student status occurs; however, it does not automatically notify each jurisdiction where the offender resides, is an employee, or is a student. In other words, for example, if an offender resides in Massachusetts, and notifies Massachusetts that he is going to move or begin school or work in New York, then Massachusetts will notify New York. However, if the offender resides in Massachusetts, works

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<sup>8</sup> The SORB just learned of this possibility in the fall of 2010, when completing its technical needs assessment for the SMART Office and the Institute for Intergovernmental Research.

<sup>9</sup> As Massachusetts only registers an out-of-state offense that is similar to a Massachusetts registerable offense, the name of the offense that appears on the public registry website for an out-of-state offense is the name of the registerable Massachusetts offense that the out-of-state offense is similar to.

in New York, and notifies Massachusetts that he is going to change his residence address to another location within Massachusetts, then Massachusetts will not notify New York of that change.

In addition, the SORB does not actively notify prosecutor's, probation or National Child Protection Act agencies when an offender initially registers or updates his registration information, although all such agencies can access this information.

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

### General Community Notification

As mentioned above, only Level 3 offenders appear on the registry's public website. In addition, under G.L. c. 6, § 178K(2)(c), local police departments must institute a plan for notifying private citizens who are likely to encounter the offender, as well as organizations in the community, of each Level 3 sex offender. In addition, a neighboring police district may inform the residents in its municipality of a Level 3 offender that those residents are likely to encounter, and shall disseminate registration information as it deems reasonably necessary to do so, pursuant to G.L. c. 6, §§ 178I and 178 J.

### **XIII. Failure to Register**

Meets SORNA requirements, with the exception of homeless offenders, for whom a first offense is a maximum of 30 days in jail, per G.L. c. 6, § 178C.

### **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.

### **Massachusetts Indian Tribes**

#### State contact with SORNA tribes

Massachusetts has two Indian tribes, one of which has elected to function as a SORNA registration jurisdiction: the Aquinnah Wampanoag. The other tribe, the Mashpee Wampanoag, has elected to delegate its registration and notification functions back to the state. Massachusetts has had several meetings with various officials from the Aquinnah Wampanoag, and representatives from the SORB have offered to coordinate meetings with various Massachusetts agency representatives and the tribe to assist the tribe with its efforts toward accessing the technological assistance necessary for it to substantially implement SORNA. The SORB has had some communication with the Mashpee Wampanoag tribe; however, the state has been waiting for some time to hear back from the Mashpee Wampanoag tribe regarding the tribe's availability for a meeting.

### Point of Contact for the State

Massachusetts has indicated in writing that the Sex Offender Registry Board is the official Point of Contact for the Massachusetts Indian tribes with regards to SORNA implementation. Specifically, the General Counsel of the SORB will be the designated Point of Contact. Currently, that General Counsel is Beatriz Van Meek.

### Information Sharing arrangements, to include: DNA, Fingerprints, Criminal History, and Corrections Information

The state's Criminal History Systems Board is in the process of determining whether the Aquinnah Wampanoag tribe would qualify for access to offender information through CJIS. If CJIS access is allowed for the tribe, the state's Executive Office of Technology and Information Services ("OTIS") will need to determine the best method of providing the tribe with CJIS access. Specifically, the state is considering leveraging the Open Cape Initiative, which, because of recent funding, plans to construct a 350-mile fiber optic network, wireless microwave network and regional data center which will connect over 60 anchor institutions on Cape Cod, Martha's Vineyard, and Nantucket, which is where both tribes are located.

## **Conclusion**

Massachusetts has put forth much work and effort in adopting SORNA and enhancing its sex offender registration and notification system. However, there are several provisions identified in this report that will need to be addressed in order for Massachusetts 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.