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SORNA Substantial Implementation Review State of West Virginia

The U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) would like to acknowledge the State of West Virginia for the 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 West Virginia's SORNA substantial implementation packet and has found the State of West Virginia to have not substantially implemented SORNA.

In April 2016, the West Virginia Division of Justice and Community Services submitted a substantial implementation package that included a completed Substantial Implementation Checklist-Revised, current West Virginia statutes and all West Virginia criminal offenses which require registration. Additional correspondence with the West Virginia State Patrol helped clarify some of the state's registration procedures.

Our review of these materials follows the outline of the SMART Office Substantial Implementation Checklist-Revised, and contains 14 sections addressing the SORNA requirements. Under each section, we indicate whether West Virginia meets the SORNA requirements of that section or deviates from the requirements in some way. In instances of deviation, we specify where the departure(s) from a particular requirement does not substantially disserve the purposes of that requirement. West Virginia is encouraged to focus on the deviations that substantially disserve SORNA's requirements and to work toward rectifying those deviations in order to achieve substantial implementation of SORNA. To achieve full implementation of SORNA, West Virginia should also work toward rectifying the deviations that do not substantially disserve the purposes of SORNA.

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 remaining issues.

I. Immediate Transfer of Information

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

West Virginia notifies law enforcement agencies within the state and in other states within five days, and updates its public sex offender registry website and FBI databases when an offender initially registers and/or updates information electronically within 15 days (See 81-14-15.6 and 81-14-15.7).¹ West Virginia does not notify US territories, the District of Columbia, and tribal jurisdictions of any necessary registration information.

West Virginia does not meet the SORNA requirements in this section.

II. Offenses that Must Be Included in the Registry

SORNA requires that 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.

West Virginia requires registration when any person is convicted of a listed sex offense, or a conviction under a statutory provision of another state, the United States Code or the Uniform Code of Military Justice which requires proof of the same essential elements as a West Virginia offense.

A. West Virginia Offenses

While West Virginia captures most of the offenses required by SORNA, there is no substantially equivalent crime to video voyeurism of a minor. Furthermore, West Virginia requires registration for an attempt, but not conspiracy to commit a sex offense.

B. Federal Offenses

West Virginia requires offenders to register if they committed offenses requiring registration under federal law, if the offense has the same essential elements as a West Virginia offense. However, while this scheme will include many of the federal offenses requiring registration, West Virginia does not require registration for the following federal offenses:

- 18 U.S.C. §1801 (Video Voyeurism of a Minor)
- 18 U.S.C. §2245 (Offenses Resulting in Death)
- 18 U.S.C. §2251A (Selling or Buying of Children)
- 18 U.S.C. §2252B (Misleading Domain Names on the Internet)
- 18 U.S.C. §2252C (Misleading Words or Digital Images on the Internet)
- 18 U.S.C. §2260 (Production of Sexually Explicit Depictions of a Minor for Import in to the United States)
- 18 U.S.C. §2424 (Failure to File Factual Statement about an Alien Individual)

¹ West Virginia §15-12-5 (6) indicates that the Federal Bureau of Investigation is informed about registration updates within five business days.

C. Military Offenses

West Virginia requires offenders to register if they committed offenses requiring registration under military law, if the offense has the same essential elements as a West Virginia offense. West Virginia will register most of the military offenses required by SORNA. Nevertheless, there are some UCMJ Offenses (such as Conduct Unbecoming) that are not comparable to those registerable under West Virginia law and, therefore, would not be registered under West Virginia's existing scheme.

D. Foreign Offenses

West Virginia does not require registration for offenses committed in foreign countries.

E. Juveniles

West Virginia does not require registration of juveniles adjudicated delinquent for any sex offense.

Because West Virginia does not register juveniles in accordance with SORNA requirements, West Virginia does not meet the SORNA requirements of this section.

III. Tiering of Offenses

SORNA requires that offenses be classified based on the nature of the offense of conviction. The SMART Office has reviewed all statutes identified in West Virginia's materials and has identified West Virginia's placement of these statutes within the SORNA three tier levels (see attached "West Virginia Offense Tiering Review" for a detailed analysis regarding this subsection of the review). West Virginia's current registration and notification scheme includes two categories of registrants: 10 years or lifetime registration (for further information about duration of registration and frequency of reporting to law enforcement, see Section IX of this report).

The following West Virginia offenses presently require 10 year registration with annual in-person verification (unless they meet the lifetime registrant criteria, as detailed in Section IX of this report); to meet SORNA requirements these offenses would, at minimum, require 15 year registration with annual in-person verification:

- § 1379(a). Sexual abuse of a vulnerable adult
- § 2405(a)(1)(D). Kidnapping with intent to commit sexual assault (victim who is an adult)
- § 2601. Lewd and lascivious conduct (victim who is an adult)
- § 2605(b) or (c). Voyeurism (victim who is a minor)
- § 2827. Possession of child pornography

The following West Virginia offenses also presently require 10 year registration with annual in-person verification (unless they meet the lifetime registrant criteria, as detailed in Section IX of this report); to meet SORNA requirements these offenses would, at minimum, require 25 year registration with twice-annual in-person verification:

- § 2601. Lewd and lascivious conduct (victim age 16-17)
- § 2602. Lewd and lascivious conduct with a child (victim age 13-15)
- § 2632(a)(6). Procurement or solicitation (victim who is a minor)
- § 2635. Slave traffic (victim who is a minor)
- § 2652. Sex trafficking of children or sex trafficking by force, fraud, or coercion
- § 2652(a)(1)(4). Human trafficking
- § 2653(a)(4). Aggravated human trafficking
- § 2822. Use of a child in a sexual performance
- § 2823. Consenting to a sexual performance
- § 2824. Promoting a recording of sexual conduct
- § 2828. Luring a child
- § 3258. Sexual exploitation of a minor (victim age 16-17)

The following West Virginia offenses also presently require 10 year or lifetime registration, with annual in-person verification (unless they meet the lifetime registrant criteria, as detailed in Section IX of this report); to meet SORNA requirements, these offenses would, at minimum, require lifetime registration with quarterly in-person verification:

- § 1379(b). Sexual abuse of a vulnerable adult
- § 2405(a)(1)(D). Kidnapping (victim who is a minor)
- § 2602. Lewd and lascivious conduct with a child (victim under age 13)
- § 3258. Sexual exploitation of a minor (victim under age 16)

West Virginia does not meet the SORNA requirements of this section.

IV. Required Registration Information

SORNA requires that the jurisdiction collect certain pieces of information from and for each offender that it registers, and requires that the jurisdiction keep that registration information, in a digitized form, in its registry. West Virginia deviates from SORNA requirements in that law enforcement does not collect and keep the following information in its registry:

- Criminal history information:
 - Date of all arrests
 - Date of all convictions
 - Status of parole, probation or supervised release
 - Outstanding arrest warrants
- DNA sample (collected and submitted to CODIS)

- Driver’s license or ID card
- Employment information: transient/day labor information
- Passports and immigration documents
- Professional licensing information
- Social Security Number: purported number
- Temporary lodging information
- Vehicle information:
 - Registration number or identifier
 - Aircraft information
 - Permanent or frequent location where all vehicles are kept

Because West Virginia does not collect the necessary information from registrants, most notably DNA samples, West Virginia does not meet the SORNA requirements of this section.

V. Where Registration is Required

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

While West Virginia requires registration in most of the jurisdictions that SORNA requires, sex offenders are not required to register in the jurisdiction in which they are convicted; rather, they are only required to register in jurisdictions in which they reside, work, or attend school.

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

VI. 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 that 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 registration duties and require the offender to acknowledge in writing that he understands those duties.

In West Virginia, when a sex offender is incarceration in a jurisdiction, registration does not occur prior to release; rather, sex offenders must read and sign a notice of registration responsibilities and then register in the county of residence upon release (within three days). Sex

offenders who move to, or establish employment or school attendance in, West Virginia from another state have up to 10 days to report for registration.

West Virginia does not meet the SORNA requirements in this section.

VII. Initial Registration: Retroactive Classes of Offenders

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

West Virginia's registration and notification law applies both retroactively and prospectively, and registration is required for offenders recaptured for any felony offense.

West Virginia meets the SORNA requirements in this section.

VIII. 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. 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, 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 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.

SORNA also requires that when an offender resides in a jurisdiction but indicates to the state that he/she intends to travel outside the United States, that the offender notify the residence jurisdiction at least 21 days in advance of such travel. In addition, SORNA requires that when an offender notifies the jurisdiction of his intent to relocate to another country to live, work or attend school, or of his intent to travel to another country, the jurisdiction must do three things: immediately notify any other jurisdiction where the offender is either registered, or is required to register, of that updated information; immediately notify the United States Marshals Service, and immediately update NCIC/NSOR.

West Virginia's statutes and policies meet some of the SORNA requirements in this section, with exceptions. While West Virginia requires offenders to report to law enforcement any changes in registration information, including name, address, employment, and school information, offenders are required to report within 10 days. Furthermore, West Virginia does not require offenders to report changes to temporary lodging information.

West Virginia does not require registered sex offenders to provide 21 day advance notice of international travel, but does notify the United States Marshals Service (USMS), other jurisdictions where the sex offender may be registered, and updates NCIC/NSOR within 10 days of notice.

Because West Virginia does not require offenders to update information in-person to law enforcement within three days, or provide 21 day advance notice of international travel, West Virginia does not meet the SORNA requirements of this section.

IX. Verification/Appearance Requirements

A. Duration of Registration

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

West Virginia's registration and notification scheme deviates from SORNA requirements in that sex offenders are required to either register for 10 years or for life.

Ten year registration is required only if all of the following conditions are met:

- One conviction (one offense and one victim);
- Non-violent sex offense; and
- Victim was an adult

Lifetime registration is required under the following conditions:

- Convicted of 1st or 2nd Degree Sexual Assault or 1st Degree Sexual Abuse
- Convicted (or found not guilty by reason of mental illness, mental retardation, or addiction) of a registerable offense that involved multiple victims or multiple offenses
- Convicted (or found not guilty by reason of mental illness, mental retardation, or addiction) of a registerable offense and the victim was a minor
- Conviction (or found not guilty by reason of mental illness, mental retardation, or addiction) of a second or subsequent registerable sex offense
- Determined by the Circuit Court to be a Sexually Violent Predator²

² The sex offender was convicted of a sexually violent offense (1st or 2nd Degree Sexual Assault or 1st Degree Sexual Abuse) and suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory violent offenses, as determined by the Sex Offender Registration Advisory Board and assigned by the sentencing court.

B. Frequency of Registration

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

West Virginia requires that all registered sex offenders must annually update information with law enforcement; quarterly registration is required only if the offender is determined to be a sexually violent predator.

West Virginia does not meet the SORNA requirements of this section.

X. **Public Registry Website Requirements**

SORNA requires that 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. West Virginia's public registry website requirements deviate from SORNA requirements in that only sex offenders who are required to register for life (see Section IX, above) are posted on the public registry website. Furthermore, the website does not provide links to safety and education resources, is not searchable by geographic radius, and does not display the following information required by SORNA:

- Employer address
- School address
- Vehicle(s) information, including license plate number(s) and vehicle description(s)

Additionally, West Virginia allows the public to search for sex offenders' Internet identifiers, which is not permissible by SORNA requirements.

West Virginia does not meet the SORNA requirements of this section.

XI. **Community Notification**

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

West Virginia monitors the SORNA Exchange Portal for inter-jurisdictional changes of residence, employment or student status from other jurisdictions, and notifies the appropriate agencies of registration updates. However, West Virginia does not provide an automated system to notify the public about initial registration or any changes in a sex offender's registration information.

West Virginia does not meet the SORNA requirements in this section.

XII. 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.

While lifetime registrants are subject to imprisonment for more than one year for failing to register, ten year registrants who fail to update or provide a change in any required information are guilty of a misdemeanor and are either fined \$250 - \$10,000 or confined in jail for up to one year, or both.

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

XIII. When a Sex Offender Fails to Appear for Registration

SORNA requires that when a jurisdiction is notified that a sex offender intends to reside, be employed, or attend school in its jurisdiction, and that offender fails to appear for registration as required, that the jurisdiction receiving that notice inform the originating jurisdiction (the jurisdiction that provided the initial notification) that the sex offender failed to appear for registration.

West Virginia meets the SORNA requirements in this section.

XIV. 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, that the jurisdiction take certain actions to investigate the absconder and notify various law enforcement agencies.

West Virginia meets the SORNA requirements in this section.

Conclusion

We encourage West Virginia to continue to work towards meeting the provisions of SORNA. However, there are many provisions identified in this report that should be addressed in order for West Virginia to substantially implement SORNA. Please contact the SMART Office with any questions or concerns once you have had the opportunity to review and discuss our findings.

Appendix: West Virginia Offense Tiering Review

The SMART Office has reviewed all West Virginia statutes identified in its substantial implementation submission package and has identified West Virginia'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 West Virginia. It is possible that other offenses will need to be included in West Virginia'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 West Virginia Code of Criminal Procedure, the SMART Office understands that West Virginia has essentially two categories of registrants:

1. Ten year registration, required only if all of the following conditions are met:
 - One conviction (one offense and one victim)
 - Conviction for a non-violent sex offense
 - Victim was an adult

2. Lifetime registration, required under the following conditions:
 - Convicted of 1st or 2nd degree sexual assault or 1st degree sexual abuse
 - Convicted (or found not guilty by reason of mental illness, mental retardation, or addiction) of a registerable offense that involved multiple victims or multiple offenses
 - Convicted (or found not guilty by reason of mental illness, mental retardation, or addiction) of a registerable offense and the victim was a minor
 - Conviction (or found not guilty by reason of mental illness, mental retardation, or addiction) of a second or subsequent registerable sex offense
 - Determined by the Circuit Court to be a Sexually Violent Predator

Tier I Offenses

SORNA requires a minimum duration of 15 years for all Tier I offenses and a one-year interval for in-person registration verification. In order to meet these minimum requirements, West Virginia must ensure that the registration duration is 15 years for State offenses equivalent to Tier I offense under SORNA, as well as continue to require annual in-person verification of registration information. The following offense listed in West Virginia Code would require, at minimum, Tier I registration requirement:

- § 61-8-6 Detention of person in place of prostitution
- § 61-8B-7 1st degree sexual abuse (victim over 18)
- § 61-8B-8 2nd degree sexual abuse (misdemeanor)
- § 61-8B-9 3rd degree sexual abuse (misdemeanor)

- § 61 -8B-10 Imposition of sexual intercourse or sexual intrusion on incarcerated persons (adult victim)
- § 61-8C-3 Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct (possession)
- § 61-8D-6 Sending, distributing, exhibiting, possessing, displaying or transporting material by a parent, guardian or custodian, depicting a child engaged in sexually explicit conduct (possession)

Tier II Offenses

SORNA requires a minimum duration of 25 years for all Tier II offenses and a 6-month interval for in-person registration verification. West Virginia currently does not utilize this tier in their registration scheme. However, the following offenses listed in West Virginia Code would require, at minimum, Tier II registration requirements:

- § 61-3C-14b Soliciting, etc. a minor via computer
- § 61-8-7 Procuring for house of prostitution
- § 61-8A-4 Use of obscene matter with intent to seduce a minor
- § 61-8A-5 Employment or use of a minor to produce obscene matter or assist in doing sexually explicit conduct
- § 61-8B-7 1st degree sexual abuse (victim 13 - 17)
- § 61-8C-2 Use of minors in filming sexually explicit conduct
- § 61-8C-3 Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct (distribution)
- § 61-8D-5(a) Sexual abuse by parent, guardian or custodian (involving sexual exploitation or sexual contact, victim 13-17)
- § 61-8D-5(b, c) Sexual abuse by parent, guardian or custodian
- § 61-8D-6 Sending, distributing, exhibiting, possessing, displaying or transporting material by a parent, guardian or custodian, depicting a child engaged in sexually explicit conduct (distribution)

Tier III Offenses

SORNA requires lifetime registration for all Tier III offenses and a 90-day interval for in-person registration verification. The following offenses listed in West Virginia Code would require Tier III registration requirements:

- § 61-8-12, 13 Incest (minor victim)
- § 61-8B-3 1st degree sexual assault
- § 61-8B-4 2nd degree sexual assault
- § 61-8B-5 3rd degree sexual assault
- § 61-8B-7 1st degree sexual abuse (victim under 13)
- § 61 -8B-10 Imposition of sexual intercourse or sexual intrusion on incarcerated persons (minor victim)

- § 61-8D-5(a) Sexual abuse by parent, guardian or custodian (victim under 13; involving sexual intercourse or sexual intrusion with a minor victim)

Further Review

In reviewing the statutes that West Virginia cited as those that are registerable offenses under West Virginia's registration scheme, the SMART office did notice offenses that do not require registration under SORNA:

- § 61-8-12, 13 Incest (between adults)
- § 61-8A-2 Distribution and display to minor of obscene matter
- § 61-8C-3a Child erotica