

SORNA 2022: A Guide for Practitioners to New Federal SORNA Regulations Effective January 7, 2022

The Sex Offense Litigation and Policy Resource Center (SOLPRC)
at Mitchell Hamline School of Law

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Prepared by the Sex Offense Litigation and Policy Resource Center (SOLPRC) at Mitchell
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I. Introduction

On December 8, 2021, the Department of Justice (“DOJ”) published regulations regarding the implementation of the Sex Offender Registration and Notification Act (“SORNA”).² These new regulations, entitled “Registration Requirements Under the Sex Offender Registration and Notification Act” and referred to herein as the “Rule”, became effective on January 7, 2022. The Rule is the latest in a series of DOJ pronouncements on Federal SORNA³ and is notable for its emphasis on the responsibility of individuals with prior sex offense convictions to ensure compliance with Federal SORNA even where relevant state registration schemes maintain different requirements. This document seeks to alert legal practitioners to the Rule and its context to enable effective representation for impacted persons. We invite attorneys working on registry

¹ The Sex Offense Litigation and Policy Resource Center website, providing more information about SOLPRC’s work, can be accessed at <https://mitchellhamline.edu/sex-offense-litigation-policy/>. Thanks to William Dobbs, Ira Ellman, Daniel Hansmeier, Wayne Logan, Doug Olson, Sarah Baumgartel, and Lindsay Dreyer (Mitchell Hamline School of Law class of 2022) for their help developing this guide.

² The final Rule published on December 8, 2021, can be accessed at the Federal Register through the following link: <https://www.federalregister.gov/documents/2021/12/08/2021-26420/registration-requirements-under-the-sex-offender-registration-and-notification-act>. The proposed version of the rule, originally published on August 13, 2020, can be accessed on the Federal Register at the following link: <https://www.federalregister.gov/documents/2020/08/13/2020-15804/registration-requirements-under-the-sex-offender-registration-and-notification-act>.

³ Prior guidelines from the DOJ include [The National Guidelines for Sex Offender Registration and Notification, 73 Fed Reg. 38029](#) (effective July 2, 2008); [Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630](#) (effective Jan. 11, 2011); and [Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50558](#) (effective Aug. 1, 2016).

issues to reach out to us with any feedback, legal updates, or suggested areas of development to help us keep this guide accurate and up to date.⁴

Federal SORNA has two separate components. One set of provisions sets standards for registration laws that states must comply with to be eligible to receive federal funds. Those provisions impose no obligations on individual registrants; they apply only to states and many states do not fully comply with them (and thus forego some federal funding). A separate set of statutory provisions, however, creates federal registration obligations for individuals, who in principle violate federal criminal law if they do not comply with them, even if they have complied with the registration laws of their state. The Rule interprets and expands upon these federal provisions applicable to individuals.

The federal government does not maintain its own registration system, and individuals cannot comply with the federal requirements by providing information directly to the federal government. The federal government instead relies on the registration systems established under state laws to collect required information. This creates potential problems for registrants who live in states whose laws do not require registrants to provide the same information required under the federal law, or which do not require registrants to provide information as quickly or as frequently as does the federal law. Such discrepancies between state laws and the federal law are not uncommon. Nor does the federal government maintain any system for notifying those whose registration obligation is based on a state conviction of their federal registration obligations. As a result, the federal statute creates potential traps for registrants who unwittingly fail to comply with these additional federal requirements.⁵

The Rule could have eased the confusion by making it clear that the federal government will not prosecute individuals for violations of federal requirements not mirrored in their state law, or who had no notice of this additional federal requirement. Instead the Rule raises concerns by putting the burden on the registrant to show their state refused to allow them to provide information its laws do not require, or that their violation of federal requirements was not knowing.⁶

⁴ The Sex Offense Litigation and Policy Resource Center can be reached at solprc@mitchellhamline.edu.

⁵ As discussed further *infra*, the federal statute provides registrants with an affirmative defense in the event of a federal prosecution when it is not possible for them to comply because state authorities would not accept their registration. The statute also generally requires the government to prove that a violation of the federal registration requirement is “knowing.”

⁶ Under current law, the federal government must prove that a registration violation was “knowing” to sustain a conviction for a failure to comply with SORNA’s requirements. As a practical matter, however, if the DOJ relies on inadequate forms of notice such as routine acknowledgment forms and boilerplate language as evidence that a violation was “knowing” registrants may be forced to show that they lacked knowledge to defend against liability. *See infra* fn. 31.

Commenters to a draft of the Rule argued that these provisions impermissibly deviate from SORNA's text by converting individual registrants into SORNA's compliance officers.⁷ Those critiques were ultimately dismissed by the DOJ in its adoption of the Rule.

Despite broad statutory authority to prosecute all violations of the federal registration rules, historically, federal prosecutions of individuals who complied with all state registration rules were possible in principle but rare in practice. Even so, the Rule's failure to make historic enforcement policy explicit, or limit enforcement efforts against individuals for violations of federal requirements not mirrored in their state law, means that decisions as to whether to prosecute in such cases remain within the discretion of local U.S. Attorneys. It remains to be seen how that discretion will be exercised. Here we attempt to provide a guide to relevant changes to SORNA policy and implementation that could now follow.

This guide provides a brief overview of SORNA, highlights key takeaways from the Rule, and includes an annotated version of the Rule's text, appearing in Appendix A, and a list of questions to assist practitioners representing potential registrants, appearing in Appendix B. The guide and the attached appendices were compiled to assist attorneys serving clients who may be obligated to comply with Federal SORNA, but this guide is by no means comprehensive. Please let us know of anything we have missed or misconstrued, and of any important developments that might be helpful to others, and please help us keep this guide updated as these issues evolve.⁸

II. Background

SORNA, title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 34 U.S.C. § 20901 *et seq.*, was enacted on July 27, 2006, to reinforce and expand the nation's sex offense registration programs which track those convicted of qualifying sex offenses.⁹ SORNA includes requirements regarding who must register, for how long, and what information must be provided to authorities.¹⁰ SORNA was amended by three subsequent pieces of legislation: (1) the Keeping the Internet Devoid of Predators Act (KIDS Act)¹¹ addressing online safety by collecting internet identifiers in the registration process; (2) the Military Sex Offender Reporting

⁷ Letter from Daniel T. Hansmeier, Appellate Chief of the Kansas Federal Defender, to David J. Karp, Senior Counsel of the Office of Legal Policy U.S. Department of Justice (Oct. 13, 2020), https://downloads.regulations.gov/DOJ-OAG-2020-0003-0684/attachment_1.pdf.

⁸ The Sex Offense Litigation and Policy Resource Center can be reached at solprc@mitchellhamline.edu.

⁹ SMART Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Current Law: SORNA*, <https://smart.ojp.gov/sorna/current-law> (last visited Jan. 18, 2022).

¹⁰ *Id.*

¹¹ Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, <https://www.govinfo.gov/content/pkg/PLAW-110publ400/pdf/PLAW-110publ400.pdf>.

Act¹² requiring the Department of Defense to submit information regarding court martial sex offense convictions; and (3) International Megan’s Law¹³ which required offenders to provide advance notice of international travel. SORNA grants the Attorney General the authority to interpret or implement SORNA’s requirements, but not to create new requirements beyond SORNA’s scope or modify SORNA’s existing requirements.¹⁴

Although SORNA is a federal law, it places the burden of collecting “sex offender”¹⁵ information and maintaining registries on state governments¹⁶ and, historically, left the bulk of SORNA enforcement to states.¹⁷ As a result, Federal SORNA’s implementation is inextricably intertwined with state and local practices. According to the Attorney General, states and other non-federal jurisdictions “are expected to incorporate [SORNA’s minimum national standards] in their sex offender notification and registration programs.”¹⁸ States that fail to comply with SORNA are subject to a reduction in federal funding.¹⁹ (Compliant states can exceed the national standards, of course.²⁰) Although all states in the U.S. maintain sex offense registration systems in some form, only eighteen states have substantially implemented Federal SORNA’s requirements.²¹ Some

¹² Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22,

<https://www.govinfo.gov/content/pkg/PLAW-114publ22/pdf/PLAW-114publ22.pdf>.

¹³ International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119,

<https://www.govinfo.gov/content/pkg/PLAW-114publ119/pdf/PLAW-114publ119.pdf>.

¹⁴ 34 U.S.C. § 20912(b).

¹⁵ SOLPRC does not endorse the use of the term “sex offender,” which is used in this document to a limited extent because Congress and the Attorney General continue to use that term in the relevant laws and regulations this document seeks to summarize and interpret. The use of labels such as “sex offender” inaccurately imply that a past offense is a permanent behavior and character trait. In the context of SORNA, a far more accurate term would be “individuals with prior sex offense convictions.” Although individuals subject to federal SORNA might have once offended and served a sentence for that offense, they are not necessarily current offenders of any law.

¹⁶ See 34 U.S.C. § 20912(a) (“Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.”).

¹⁷ *Carr v. United States*, 560 U.S. 438, 452 (2010).

¹⁸ *Id.* at 69856.

¹⁹ *Id.* at 69857.

²⁰ See Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69856, 69863 (2021) (“SORNA’s requirements generally constitute a floor rather than a ceiling for state registration programs.”).

²¹ See *Jurisdictions That Have Substantially Implemented SORNA*, SMART Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, <https://smart.ojp.gov/sorna/substantially-implemented> (created May 13, 2020).

resist full implementation because they reject the particular federal policies; other resist because the cost of full compliance exceeds the financial penalty for noncompliance.

The DOJ's new Rule states that in addition to providing minimum national standards for sex offense notification and registration to be incorporated by states, SORNA imposes registration obligations directly on "sex offenders" as a matter of federal law under 18 U.S.C. § 2250. Although individual liability under SORNA is not new, its emphasis in the new Federal Rule is notable and may signal an expansion of federal prosecutions for a failure to comply with SORNA's dictates, even where an individual is not in violation of comparable state requirements.

SORNA defines "sex offender" as "an individual who was convicted of a sex offense."²² A sex offense is defined under 34 U.S.C. §§ 20911 (5) and (7) to include committing, or any attempt or conspiracy to commit, the following criminal offenses: (i) an offense that has an element involving a sexual act or sexual contact with another, (ii) a specified offense against a minor including, among others, kidnapping, false imprisonment, solicitation, and possession of child pornography,²³ (iii) a specified Federal or military offense including, among others, sex trafficking and habitual domestic assault.²⁴

²² 34 U.S.C. § 20911.

²³ The full list of specified offenses against a minor in 34 U.S.C. § 20911 (7) appears as follows:

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

- (A) An offense (unless committed by a parent or guardian) involving kidnapping.
- (B) An offense (unless committed by a parent or guardian) involving false imprisonment.
- (C) Solicitation to engage in sexual conduct.
- (D) Use in a sexual performance.
- (E) Solicitation to practice prostitution.
- (F) Video voyeurism as described in section 1801 of Title 18.
- (G) Possession, production, or distribution of child pornography.
- (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
- (I) Any conduct that by its nature is a sex offense against a minor.

²⁴ As to Federal offenses, the statute defines as a sex offense "a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18". 34 U.S.C. § 20911 (5). As to Military offenses the statute lists "a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)". 34 U.S.C. §§ 20911 (5).

Prior to the adoption of the Rule by the Department of Justice, 28 CFR Part 72 entitled “Sex Offender Registration and Notification” was comprised of only three parts: 72.1 (Purpose); 72.2 (Definitions); and 72.3 (Applicability of SORNA) and SORNA’s requirements were delineated more fully in Guidelines issued by the Attorney General.²⁵ The Rule adopted by the Department of Justice in December of 2021 expands 28 CFR Part 72 from three sections into eight, described in more detail below and in Appendix A. The Department of Justice states that this expansion “provides a concise and comprehensive statement of what sex offenders must do to comply with SORNA’s requirements” reflecting in part express requirements of SORNA and in part the Attorney General’s authority to interpret and implement SORNA’s requirements.²⁶ The Attorney General further states that the Rule is “not innovative in terms of policy” and makes no change in what registration jurisdictions need to do to substantially implement SORNA.²⁷

Despite the Attorney General’s statements disclaiming additional burdens, if states accept individual registration information required by Federal SORNA, but not under state law, the collection of that information will cost states money to process. Notably, states are not required to accept information required by Federal SORNA. States can avoid confusion, preserve resources, and simplify compliance for required registrants by clarifying by statute what information will be accepted from required registrants in their jurisdiction.

III. Key Takeaways

A few takeaways from the DOJ’s recent Rule are highlighted below for attorneys serving clients subject to Federal SORNA. Although this list is not exhaustive, and not all these takeaways are changes in policy, they highlight potential shifts in the DOJ’s SORNA implementation strategy.

a. *Rule emphasizes individual liability under SORNA*

Individuals may be prosecuted for a failure to comply with SORNA’s requirements under 18 U.S.C. § 2250 where that failure was *knowing*, and the individual was subject to federal jurisdiction. See 28 CFR Part 72.8. Under 18 U.S.C. § 2250(a) the punishment for such a failure to comply can be up to 10 years in prison.

²⁵ Prior guidelines from the DOJ include [The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38029](#) (effective July 2, 2008); [Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630](#) (effective Jan. 11, 2011); and [Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50552](#) (effective Aug. 1, 2016).

²⁶ See Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69856, 69857 (2021).

²⁷ *Id.*

The recently adopted Rule makes plain that a failure to comply with registration requirements could be both a federal offense and a state offense resulting in prosecution.²⁸ Further, because noncompliant states do not match Federal SORNA’s exact registration requirements, if an individual is subject to federal jurisdiction under 18 U.S.C. § 2250, they could be held liable for failing to comply with Federal SORNA while fully complying with state law.²⁹

The Attorney General’s comments accompanying the Rule emphasize that the DOJ has the authority to engage in direct enforcement against individuals. Although the DOJ has had this authority since SORNA’s inception, under 18 U.S.C. § 2250, this may signal a shift in the Department’s past practices regarding individual prosecutions, which often focused on those who could be seen as having absconded from the jurisdiction in which they had been required to register.³⁰

Critically, despite the Rule’s emphasis on individual liability, the Rule includes a scienter requirement for holding an individual liable for a federal registration violation.³¹ In other words, under federal law, individuals convicted of a prior sex offense must have known of their obligation to register to be held criminally responsible for a failure to do so. The Attorney General states, “sex offenders are not held liable under 18 U.S.C. [§] 2250 for violating registration requirements of which they are unaware.”³² In prosecutions for a failure to comply with registration requirements under 18 U.S.C. § 2250, it will be the government’s burden to show that the offense was “knowingly” committed.³³ It remains to be seen how, and whether, the federal government will notify individuals in non-compliant states of their separate federal registration requirements under SORNA after the issuance of this Rule.³⁴ Notably, the Attorney General has signaled that

²⁸ See *id.* at 69859 (“SORNA’s requirements exist independently of state law requirements.”) (citing 18 U.S.C. § 2250 and recent Sixth Circuit holding *Willman v. Attorney General*, 972 F.3d 819 (6th Cir. 2020) in support of that proposition).

²⁹ See [Willman v. Att’y Gen., 972 F.3d 819 \(6th Cir. 2020\)](#) (holding that federal SORNA imposes independent registration obligations on Plaintiff irrespective of state law).

³⁰ A practicing defense attorney has reported that, in their experience, federal prosecutions often involve individuals who are homeless, unstable, and/or mentally ill. In situations where individuals lack stable housing SORNA’s already opaque reporting requirements become nearly impossible to follow. Aside from the requirement that a violation be “knowing,” SORNA and the Rule do little to protect such vulnerable individuals from prosecution.

³¹ See 86 Fed. Reg. at 69859, 69868 (citing 18 U.S.C. § 2250).

³² 86 Fed. Reg. at 69859. Note that this scienter requirement is not mirrored in all states, some of which hold individuals strictly liable for violations of state registration requirements whether or not that violation was knowing.

³³ See 86 Fed. Reg. at 69859.

³⁴ Although the Attorney General acknowledges the government’s burden to show that the offense was knowingly committed, they state that “this does not require knowledge that the requirement is imposed by SORNA.” The Attorney General further notes that state requirements

prosecutors may attempt to rely on routine acknowledgement forms signed in the registration process to establish that a violation was knowing.³⁵ Because Federal SORNA and state registration requirements often differ, it is unclear how routine acknowledgement forms used in the state registration process will provide adequate notice of Federal SORNA’s distinct requirements.

The Attorney General also highlights an affirmative defense to noncompliance which might be available to registrants if they are prosecuted for failing to comply with Federal SORNA.³⁶ The Attorney General notes that a failure to comply may be excused where compliance is prevented by circumstances beyond a registrant’s control, such as a state’s failure to carry out a necessary complementary role.³⁷ This affirmative defense is discussed further, *infra*, under “Ability to Comply.”

In the event that the federal government begins to prosecute individuals who are compliant with state law, they may open themselves up to a series of meritorious legal challenges. These may include, (1) that the Rule is inconsistent with SORNA’s text and purpose;³⁸ (2) that SORNA’s delegation to the Attorney General violates the nondelegation doctrine;³⁹ (3) that a prosecution under the Rule violates the 10th Amendment;⁴⁰ and/or (4) that the Rule violates the anti-commandeering doctrine by compelling state officials to collect all information required by Federal SORNA.⁴¹

b. Federal Jurisdiction extends broadly to those who cross state lines

Federal jurisdiction extends to “sex offenders” convicted under federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the

and the acknowledgment forms obtained from individuals with prior sex offense convictions in registration “often provide a means of establishing their knowledge of the registration requirements in later prosecutions for violations.” See 86 Fed. Reg. at 69882 (emphasis added).

³⁵ *Id.*

³⁶ See *id.* at 69859; see also 18 U.S.C. § 2250(c).

³⁷ See 86 Fed. Reg. at 69859; see also 18 U.S.C. § 2250(c).

³⁸ Letter from Daniel T. Hansmeier, Appellate Chief of the Kansas Federal Defender, to David J. Karp, Senior Counsel of the Office of Legal Policy U.S. Department of Justice (Oct. 13, 2020), https://downloads.regulations.gov/DOJ-OAG-2020-0003-0684/attachment_1.pdf.

³⁹ *Id.* at 8.

⁴⁰ As held in *Bond v. United States*, “an individual may assert injury from governmental action taken in excess of the authority that federalism defines.” 564 U.S. 211, 219 (2011) (*Bond I*); see also *Bond v. United States*, 572 U.S. 884 (2014) (*Bond II*) (holding that statute imposing criminal penalties for possessing and using a chemical weapon, and implementing chemical weapons treaty, did not reach the unremarkable local offense of amateur attempt by jilted wife to injure her husband's lover).

⁴¹ *Printz v. United States*, 521 U.S. 898 (1997).

law of any territory or possession of the United States, and extends to those who engage in interstate or international travel, or enter, leave, or reside in Indian country. See 28 CFR Part 72.8.

Federal jurisdiction is a term of art referring to the legal scope of the federal government's powers. Without federal jurisdiction, an individual cannot be prosecuted in federal court. As described above, federal jurisdiction for the purposes of SORNA's enforcement, delineated in 18 U.S.C. § 2250(a)(2), is extremely broad. In particular, federal jurisdiction in this context extends to individuals convicted solely of a state offense, if they have engaged in interstate travel. The Attorney General's preamble clarifies that no "nexus" is required between the interstate travel and the charged SORNA violation "beyond the temporal sequencing implied by [18 U.S.C. § 2250(a)'s] language and structure" citing *Carr v. United States*, 560 U.S. 438, 446 (2010).⁴²

In *Carr v. United States*, the Supreme Court interpreted the statutory text of 18 U.S.C. § 2250(a), finding that the statute did not provide jurisdiction based on interstate travel pre-dating a requirement to register. 560 U.S. at 447. Instead, the Court concluded that "[o]nce a person becomes subject to SORNA's registration requirements, which can occur only after the statute's effective date, that person can be convicted under § 2250 if [they] thereafter travel[] and then fail[] to register." *Id.* As a result, federal jurisdiction under Section 2250(a) can only be provided by interstate travel occurring after SORNA's enactment on July 27, 2006, and more specifically, after an individual registrant becomes subject to SORNA's requirements (but for the federal jurisdiction provisions).

c. SORNA's requirements apply retroactively, even in states that have found retroactive application of state registration statutes to be unconstitutional

SORNA will be applied consistently to all "sex offenders" including those convicted of a sex offense before SORNA's enactment and those who reside in a state or jurisdiction that has not fully implemented SORNA. See 28 CFR Part 72.3.

The Attorney General asserts that SORNA will be applied consistently to individuals convicted of sex offenses before and after SORNA's enactment on July 27, 2006.⁴³ In the preamble to the Rule, the Attorney General dismisses comments concerning the retroactive application of SORNA, noting that in 2003, the United States Supreme Court upheld the retroactive application of Alaska's state sex offense registration requirements against an Ex Post Facto challenge in *Smith v. Doe*, 538 U.S. 84 (2003).

⁴² 86 Fed. Reg. at 69859.

⁴³ See *id.* at 69857.

Recently, however, as registry requirements have grown increasingly demanding, the legal landscape of retroactive application has become more complex. In a Sixth Circuit case in 2016, *Doe v. Snyder*, the Court held that Michigan’s sex offense registration law was punitive and could not be applied retroactively. 834 F.3d 696 (6th Cir. 2016). In so holding, the Sixth Circuit distinguished Alaska’s registry scheme, evaluated in *Smith v. Doe*, by noting specific provisions in Michigan’s law, such as residency and location restrictions, tier classifications, in-person verification requirements, and public disclosure of otherwise non-public information that rendered the statute punitive. *Id.* at 701–03. Thereafter, when the State petitioned the United States Supreme Court for certiorari, the Court invited the Acting United States Solicitor General to brief the issue. Notably, the Solicitor General “acknowledged the correctness of the decision in light of what it termed the ‘distinctive features’ of Michigan’s law.”⁴⁴ Ultimately, the Supreme Court declined to hear *Doe v. Snyder*, denying certiorari in 2017. Despite similarities between Federal SORNA and Michigan’s sex offense registration act found to be punitive in *Doe v. Snyder*, the Attorney General did not address the Sixth Circuit’s 2016 holding in the preamble to the Rule.⁴⁵

In keeping with the Sixth Circuit’s recent holding, a number of state supreme courts have similarly held that retroactive application of their state sex offense registration and notification laws violates their respective state constitutions.⁴⁶ The Attorney General has indicated that court

⁴⁴ Wayne A. Logan, *Challenging the Punitiveness of “New Generation” Sorn Laws*, 21 New Crim. L. Rev. 426, 429-30 (2018).

⁴⁵ A key issue emphasized by the Sixth Circuit in *Doe v. Snyder* was the problematic nature of residency restrictions imposed on registrants under Michigan’s law. *Id.* at n. 19. Although Michigan’s law and Federal SORNA have a number of similarities, Federal SORNA does not impose residency restrictions.

⁴⁶ *Doe v. State*, 189 P.3d 999 (Alaska 2008) (holding that Alaska’s Sex Offender Registration Act (ASORA) was so punitive in purpose or effect as to overcome legislature’s civil intent, and thus application of the ASORA as to sex offender who was convicted before ASORA was enacted violated ex post facto clause of state constitution.); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (holding that the Indiana’s Sex Offense Registration Statute, as applied to the plaintiff who was convicted prior to enactment of the statute, violates the prohibition against ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (holding that retroactive application of Maine’s 1999 Sex Offense Registration and Notification Act violated state and federal ex post facto prohibitions by increasing registration duty of certain offenders from 15 years to their entire lifetimes and imposing a quarterly in-person verification requirement, without affording an opportunity for relief from those duties at discretion of sentencing court.); *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013) (holding that requiring individual convicted prior to the enactment of Maryland’s sex offense registration statute to register violated state constitutional prohibition against ex post facto laws.); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (holding that amendments to Ohio’s sex offense registration statutes, imposing new registration requirements for those convicted of sex offenses, violated

decisions finding state registration laws to be unconstitutional do not affect the validity of requirements under SORNA.⁴⁷ However, at least one state that held its law barred the retroactive application of registration requirements subsequently also held that “notwithstanding the registration obligations placed directly on individuals by SORNA, circuit courts have the authority to direct the State to remove sex offender registration information from [the state] sex offender registry when [its] inclusion [violates state law]. *Dep’t of Pub. Safety v. Doe*, 439 Md. 201, 206, 94 A.3d 791, 794 (2014), thus creating an impossibility defense to any SORNA prosecution.

In other words, even if individuals are not required to register under state law, they may be required to provide information to state authorities to comply with federal law, unless their state specifically bars its collection.⁴⁸ At this time, it appears few states do. As a result, individuals convicted of pre-SORNA sex offenses and residing in states that do not require retroactive registration may be surprised to find themselves required to register under federal law despite the absence of any similar state requirements in the jurisdictions where they live, work, or go to school.⁴⁹ (As stated above, it is unclear how adequate notice of Federal SORNA’s distinctive requirements may be provided in such circumstances).

In such situations, the Attorney General states:

Notwithstanding the absence of a parallel state law, the registration authorities in the state may be willing to register the sex offender because Federal law (*i.e.*, SORNA) requires him to register. *Cf. Doe v. Keathley*, 290 S.W.3d 719 (Mo. 2009)

state constitutional prohibition on retroactive laws as applied to defendant who committed his qualifying offense prior to enactment of amendments, since amendments made sex offense statute punitive); *Starkey v. Okla. Dep’t of Corr.*, 305 P.3d 1004 (Okla. 2013) (holding that Oklahoma’s Sex Offender Registration Act (SORA) was punitive, rather than regulatory, law and therefore application of amendments to SORA to retroactively extend offender’s registration period violated the ex post facto clause of the state constitution); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) (holding that retroactive application of Pennsylvania’s Sex Offender Registration and Notification Act to defendant violated state and federal ex post facto clauses).

⁴⁷ See 86 Fed. Reg. at 69858 (citing *Willman v. Att’y Gen.*, 972 F.3d 819, 824–27 (6th Cir. 2020)).

⁴⁸ As discussed above, the Federal government does not directly engage in the collection of registration information. Instead, it relies on state and local jurisdictions to collect the information required under SORNA and report violations. See 34 U.S.C. § 20912(a) (“Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.”).

⁴⁹ “A sex offender must register, and keep the registration current, **in each jurisdiction in which the offender resides, is an employee, or is a student.** For initial registration purposes only, a sex offender must also register in the jurisdiction in which convicted if that jurisdiction is different from the jurisdiction of residence.” 28 CFR Part 72.4 (emphasis added).

(state constitutional prohibition of retrospective laws does not preclude registration based on SORNA).⁵⁰

Critically, “if the state registration authorities are willing to register the sex offender, [they are] not relieved of the duty to register merely because state law does not track the Federal law registration requirement.” *Id.*⁵¹ Registrants should keep records of any attempts to offer information required by SORNA to state or local authorities.

d. In the event of a prosecution, registrants have an affirmative defense where they were not able to comply with SORNA because of circumstances beyond their control

Where a state’s registration system does not allow a “sex offender” to comply with federal registration requirements, that individual should follow the requirements of a state or jurisdiction in which they are required to register. *See* 28 CFR Part 72.7(g). In such a case, where an individual is unable to comply with SORNA’s requirements because of circumstances beyond their control, that individual has an affirmative defense to individual liability under 18 U.S.C. § 2250(c).

Examples provided alongside section 72.7(g) clarify that a registrant will not be held responsible for a jurisdiction’s limitations placed on the time and manner of reporting.

A registration jurisdiction’s law or practice that precludes registration of a sex offender, as described above, is a circumstance that the sex offender cannot control and to which [they] did not contribute, so [they] cannot be held liable for failure to register with that jurisdiction as SORNA requires.⁵²

Despite this clarification, the Rule cautions that in a prosecution under 18 U.S.C. § 2250 for a failure to comply with SORNA, a sex offender would still need to establish as an affirmative defense an inability to comply because of circumstances beyond their control as provided in 18 U.S.C. § 2250(c) and Part 72.8(a)(2).

Should the Attorney General seek to strictly enforce the Rule’s time and manner requirements against individuals in states that are not in full compliance with SORNA, there may be tension between the Rule’s instruction that registrants can simply follow state requirements—in Part 72(g)(1)—and the Attorney General’s assertion that registrants would still be obligated to

⁵⁰ 86 Fed. Reg. at 69868.

⁵¹ Even if a registrant’s home state will not register him, or collect some information required by SORNA (because state law creates no such registration obligations), those required to register in other states in which they work or go to school, or to which they regularly travel, may have no impossibility similar defense against the SORNA registration requirement in those states.

⁵² 86 Fed. Reg. at 69869.

demonstrate as an affirmative defense that they were unable to comply in the event they were charged under 18 U.S.C. § 2250—in Part 72(g)(2). To avoid issues, registrants would be well advised to keep detailed records of any instructions from state actors (to the extent such instructions are not already documented in the public record) as to the time and manner or substance of reporting that differ from those in the DOJ’s adopted Rule.

e. Registrants traveling internationally may be excused from meeting 21-day notice deadline in cases of unanticipated emergency

Registrants are required to report international travel at least 21 days in advance of departure. *See* 28 CFR Part 72.7(f). However, where 21 days of advance notice is not possible due to an unanticipated emergency, the Attorney General has clarified that 18 U.S.C. § 2250(c) would excuse a failure to meet the 21-day requirement.

International Megan's Law, enacted in 2016, added international travel reporting requirements to SORNA’s registration scheme. The DOJ’s recent rule has incorporated those reporting requirements into 28 CFR Part 72(f).

Under International Megan's Law, registrants are required to report intended international travel at least 21 days in advance. The Attorney General recognized, however, that unanticipated travel may be necessary on occasion and stated that in cases where a registrant “does not anticipate a trip abroad that far in advance . . . 18 U.S.C. 2250(c) would excuse a sex offender’s failure to report the travel 21 days in advance.”⁵³ The Attorney General makes specific reference to “family or work emergenc[ies]”⁵⁴ This text is useful and provides some protection to registrants who are unable to report 21 days prior, however, it is not clear what exactly would constitute an “emergency” sufficient to excuse a reporting delay. As a result, any emergencies causing a reporting delay should be documented carefully and travel should be reported as soon as possible prior to departure.

IV. Conclusion

In sum, the DOJ’s recent Rule signals a shift in SORNA policy from state-based implementation to a focus on individual liability. Although the Rule reportedly does not create new policy, it emphasizes the federal government’s broad power to enforce SORNA through individuals, even where states have chosen not to fully comply with SORNA.

As noted by the Supreme Court, “federal sex-offender registration laws have, from their inception, expressly relied on state-level enforcement.” *Carr v. United States*, 560 U.S. 438, 452 (2010). In fact, when Congress initially set national standards for state sex-offender registration programs in 1994, Congress did not include any federal criminal liability. *Id.* The Supreme Court

⁵³ *Id.* at 69883

⁵⁴ *Id.*

concluded that this “basic allocation of enforcement responsibilities” was preserved with SORNA’s enactment. *Id.* at 453. Even so, now that many states have rejected retroactive application of registry provisions, the federal government appears to have changed tack, emphasizing individual responsibility to comply with SORNA regardless of state implementation.

In this new and evolving landscape, required registrants and practitioners alike should proceed with caution to ensure that individuals do not inadvertently become vulnerable to federal prosecution. SOLPRC will endeavor to update this guide with additional information and sources as more information emerges regarding the DOJ’s new Rule, legal challenges to the Rule, and the Federal government’s enforcement of the Rule. To assist us in this effort, [please share any updates or additional information with us at solprc@mitchellhamline.edu.](mailto:solprc@mitchellhamline.edu)

APPENDIX A

ANNOTATED TEXT OF 28 CFR Part 72

SEX OFFENDER REGISTRATION AND NOTIFICATION

Text of 28 CFR Part 72	Annotations
<p>72.1 – Purpose (a) This part specifies the registration requirements of the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 et seq., and the scope of those requirements' application. <u>The Attorney General has the authority to specify the requirements of SORNA and their applicability as provided in this part pursuant to provisions of SORNA, including 34 U.S.C. 20912(b), 20913(d), and 20914(a)(8), (c).</u> (b) This part does not preempt or limit any obligations of or requirements relating to sex offenders under other Federal laws, rules, or policies, or under the laws, rules, or policies of registration jurisdictions or other entities. <u>States and other governmental entities may prescribe registration requirements and other requirements, with which sex offenders must comply, that are more extensive or stringent than those prescribed by SORNA.</u></p>	<p>- Emphasis added to part 72.1 - 72.1(b) - Note that Rule does not limit any obligations under state laws.</p>
<p>72.2 – Definitions All terms used in this part have the same meaning as in SORNA.</p>	
<p>72.3 – Applicability of the Sex Offender Registration and Notification Act The requirements of SORNA apply to all sex offenders. <u>All sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred (including if the conviction occurred before the enactment of that Act), regardless of whether a jurisdiction in which registration is required has substantially implemented that Act's requirements or has implemented any particular requirement of that Act, and regardless of whether any particular requirement or class of sex offenders is mentioned in examples in this regulation or in other regulations or guidelines issued by the Attorney General.</u></p>	<p>- Emphasis added to part 72.3 - 72.3 - The Attorney General stated that the addition of the underlined sentence was intended to clarify that <u>all</u> of SORNA's requirements are applicable to <u>all</u> sex offenders, foreclosing future court decisions like that in <i>United States v. DeJarnette</i>, 741 F.3d 971 (9th Cir. 2013) which concluded that the Attorney General did</p>

<p>Example 1 to § 72.3. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2009. The sex offender is subject to the requirements of SORNA and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.</p> <p>Example 2 to § 72.3. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under SORNA to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.</p>	<p>not validly specify that SORNA requirements applied to all offenders already subject to sex offender registration under a pre-SORNA registration scheme. <i>See</i> 86 FR at 69869.</p>
<p>72.4 – Where Sex Offenders Must Register</p> <p>A sex offender must register, and keep the registration current, <u>in each jurisdiction in which the offender resides, is an employee, or is a student.</u> For initial registration purposes only, a sex offender must also register in the jurisdiction in which convicted if that jurisdiction is different from the jurisdiction of residence.</p>	<p>- Emphasis added to part 72.4</p> <p>- 72.4 - The Attorney General clarified that “§§ 72.4 and 72.7(c) do not require a sex offender to register or appear in a jurisdiction in which he has a telework or telelearning connection but no physical presence. <i>See</i> 73 FR at 38062. Nor do they require a sex offender to register in a jurisdiction in which he has some work-related presence but in which he does not regularly work or have a fixed place of employment. <i>See id.</i>” <i>See</i> 86 FR 69866.</p>
<p>72.5 – How Long Sex Offenders Must Register</p> <p>(a) <i>Duration.</i> A sex offender has a continuing obligation to register and keep the registration current (except when the sex offender is in custody or civilly committed) for the following periods of time:</p>	<p>- Emphasis added to part 72.5</p>

<p>(1) <u>15 years, if the offender is a tier I sex offender;</u></p> <p>(2) <u>25 years, if the offender is a tier II sex offender;</u> and</p> <p>(3) <u>The life of the offender, if the offender is a tier III sex offender.</u></p> <p>(b) <i>Commencement.</i> The registration period begins to run:</p> <p>(1) When a sex offender is released from imprisonment following conviction for the offense giving rise to the registration requirement, including in cases in which the term of imprisonment is based wholly or in part on the sex offender's conviction for another offense; or</p> <p>(2) If the sex offender is not sentenced to imprisonment, when the sex offender is sentenced for the offense giving rise to the registration requirement.</p> <p>(c) <i>Reduction.</i> If a tier I sex offender has maintained for 10 years a clean record, as described in 34 U.S.C. 20915(b)(1), the period for which the sex offender must register and keep the registration current under paragraph (a) of this section is reduced by 5 years. If a tier III sex offender required to register on the basis of a juvenile delinquency adjudication has maintained a clean record, as described in 34 U.S.C. 20915(b)(1), for 25 years, the period for which the sex offender must register and keep the registration current under paragraph (a) of this section is reduced to the period for which the clean record has been maintained.</p>	<p>- 72.5(a) - These tier requirements, explained more fully in SORNA's text, may be different than state tier requirements which could lead to confusion for registrants.</p>
<p>72.6 – Information Sex Offenders Must Provide</p> <p>Sex offenders must provide the following information for inclusion in the sex offender registries of the jurisdictions in which they are required to register:</p>	<p>- Emphasis added to part 72.6</p>

(a) *Name, date of birth, and Social Security number.* (1) The name of the sex offender, including any alias used by the sex offender.

(2) The sex offender's date of birth and any date that the sex offender uses as his purported date of birth.

(3) The Social Security number of the sex offender and any number that the sex offender uses as his purported Social Security number.

(b) *Remote communication identifiers.* All designations the sex offender uses for purposes of routing or self-identification in internet or telephonic communications or postings, including email addresses and telephone numbers.

(c) *Residence, temporary lodging, employment, and school attendance.* (1) The address of each residence at which the sex offender resides or will reside or, if the sex offender has no present or expected residence address, other information describing where the sex offender resides or will reside with whatever definiteness is possible under the circumstances.

(2) Information about any place in which the sex offender is staying when away from his residence for seven or more days, including the identity of the place and the period of time the sex offender is staying there.

(3) The name and address of any place where the sex offender is or will be an employee or, if the sex offender is or will be employed but with no fixed place of employment, other information describing where the sex offender works or will work with whatever definiteness is possible under the circumstances.

(4) The name and address of any place where the sex offender is a student or will be a student.

(d) *International travel.* Information relating to intended travel outside the United States, including any anticipated itinerary, dates and places of departure from, arrival in, or return to

-72.6(b) - The term “remote communication identifiers” has been criticized as a violation of First Amendment protections. *See ACSOL Files SORNA Regulations Complaint with DOJ's Inspector General*, Alliance of Constitutional Sex Offense Laws, <https://all4consolaws.org/2022/01/acsol-files-sorna-regulations-complaint-with-doj-inspector-general/>, Jan. 12, 2022.

<p>the United States and each country visited, carrier and flight numbers for air travel, destination country or countries and address or other contact information therein, and means and purpose of travel.</p> <p>(e) <i>Passports and immigration documents.</i> Information about each passport the sex offender has and, if the sex offender is an alien, information about any document or documents establishing the sex offender's immigration status, including passport or immigration document type and number.</p> <p>(f) <i>Vehicle information.</i> The license plate number and a description of any vehicle owned or operated by the sex offender, including watercraft and aircraft in addition to land vehicles. If a vehicle has no license plate but has some other type of registration number or identifier, then the registration number or identifier must be provided. Information must also be provided as to where any vehicle owned or operated by the sex offender is habitually parked, docked, or otherwise kept.</p> <p>(g) <i>Professional licenses.</i> Information concerning all licensing of the sex offender that authorizes the sex offender to engage in an occupation or carry out a trade or business.</p>	<p>- 72.6(g) is “an exercise of the Attorney General's authority under 34 U.S.C. 20914(a)(8) to require sex offenders to provide other information, beyond that expressly described in the statute.”</p>
<p>72.7 – How Sex Offenders Must Register and Keep the Registration Current</p> <p>(a) <i>Initial registration</i> —(1) <i>In general.</i> Except as provided in paragraph (a)(2) of this section, a sex offender must register before release from imprisonment following conviction for the offense giving rise to the registration requirement, or, if the sex offender is not sentenced to imprisonment, within three business days after being sentenced for that offense.</p> <p>(2) <i>Special rules for certain cases.</i> The following special requirements apply:</p>	<p>- Emphasis added to part 72.7</p>

(i) *Federal and military offenders.* A sex offender who is released from Federal or military custody, or who is convicted for a Federal or military sex offense but not sentenced to imprisonment, must register within three business days of entering or remaining in a jurisdiction to reside following the release or sentencing.

(ii) *Foreign convictions.* A sex offender required to register on the basis of a conviction in a foreign country must register within three business days of entering any jurisdiction in the United States to reside, work, or attend school.

(b) *Periodic in-person verification.* A sex offender must appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which the offender is required to register. In carrying out the required verification of information in each registry, the sex offender must correct any information that has changed or is otherwise inaccurate and must report any new registration information. A sex offender must appear in person for these purposes not less frequently than—

(1) Each year, if the offender is a tier I sex offender;

(2) Every six months, if the offender is a tier II sex offender; and

(3) Every three months, if the offender is a tier III sex offender.

(c) *Reporting of initiation and changes concerning name, residence, employment, and school attendance.* A sex offender who enters a jurisdiction to reside, or who resides in a jurisdiction and changes his name or his place of residence in the jurisdiction, must appear in person in that jurisdiction and register or update the registration within three business days. A sex offender who commences employment or school attendance in a jurisdiction, or who changes employer, school attended, or place of employment or school attendance in a jurisdiction, must appear in person in that jurisdiction and register or update the registration within three business days.

- 72.7(b) - In-person verification greatly increases the burden on state and local authorities and was critiqued as evidence that Michigan's statute was punitive in *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

(d) *Reporting of departure and termination concerning residence, employment, and school attendance.* (1) A sex offender residing in a jurisdiction must inform that jurisdiction (by whatever means the jurisdiction allows) if the sex offender will be commencing residence, employment, or school attendance in another jurisdiction or outside of the United States. The sex offender must so inform the jurisdiction in which he is residing prior to any termination of residence in that jurisdiction and prior to commencing residence, employment, or school attendance in the other jurisdiction or outside of the United States.

(2) A sex offender who will be terminating residence, employment, or school attendance in a jurisdiction must so inform that jurisdiction (by whatever means the jurisdiction allows) prior to the termination of residence, employment, or school attendance in the jurisdiction.

(e) *Reporting of changes in information relating to remote communication identifiers, temporary lodging, and vehicles.* A sex offender must report within three business days to his residence jurisdiction (by whatever means the jurisdiction allows) any change in remote communication identifier information, as described in § 72.6(b), temporary lodging information, as described in § 72.6(c)(2), and any change in vehicle information, as described in § 72.6(f).

(f) *Reporting of international travel.* A sex offender must report intended travel outside the United States, including the information described in § 72.6(d), to his residence jurisdiction (by whatever means the jurisdiction allows). The sex offender must report the travel information to the jurisdiction at least 21 days in advance of the intended travel and, if the sex offender is terminating his residence in the jurisdiction, prior to his termination of residence in the jurisdiction.

(g) *Compliance with jurisdictions' requirements for registering and keeping the registration current.* (1) A sex offender who does not comply with a requirement of SORNA in conformity with the time and manner specifications of paragraphs (a) through (f) of this section must comply with the requirement in conformity with any applicable time and manner specifications of a jurisdiction in which the offender is required to register.

- 72.7(d) –to the extent this provision’s departure notification requirement goes beyond SORNA’s text, the attorney general asserts that this is “an exercise of the Attorney General’s authority under 34 U.S.C. 20914(a)(8) to require sex offenders to provide other information, beyond that expressly described in the statute.”

- 72.7(e) - Comments on the proposed rule argued that the phrase “remote communication identifiers” is impermissibly vague. The Attorney General’s preamble responded that the specification of covered remote communication identifiers in § 72.6(b) is similar to a statutory definition in 34 U.S.C. 20916(e)(2) and sufficiently definite.

- 72.7(e) – the requirement to report the listed information within 3 business days is “an exercise of the Attorney General’s authority under 34 U.S.C. 20914(a)(8) to require sex offenders to provide other information, beyond that expressly described in the statute.”

- 72.7(f) - A registrant can provide less notice than 21 days in the event of a family or work emergency that requires travel. *See* 86 FR at 69883.

Example 1 to paragraph (g)(1). A sex offender convicted in a state does not initially register before release from imprisonment, as required by 34 U.S.C. 20913(b)(1) and paragraph (a)(1) of this section, because the state has no procedure for pre-release registration of sex offenders. Instead, the state informs sex offenders that they must go to a local police station within seven days of release to register. The sex offender must comply with the state's requirements for initial registration, i.e., the offender must report to the police station to register within seven days of release.

Example 2 to paragraph (g)(1). A sex offender does not register when he is released from custody, or does not register upon entering a jurisdiction to reside as required by 34 U.S.C. 20913(c) and paragraph (c) of this section, because the jurisdiction, at the time, does not register sex offenders based on the offense for which he was convicted. The jurisdiction later sends the sex offender a notice advising that it has extended its registration requirements to include sex offenders like him and directing him to report to a specified agency within 90 days to register. The sex offender must report to the agency to register within the specified timeframe.

Example 3 to paragraph (g)(1). A sex offender registers as required when released from imprisonment or upon entering a jurisdiction to reside, but the jurisdiction has no procedure for sex offenders to appear periodically in person to update and verify the registration information as required by 34 U.S.C. 20918 and paragraph (b) of this section. The jurisdiction later sends the sex offender a notice advising that it has adopted a periodic verification requirement and directing the sex offender to appear at a designated time and place for an initial update meeting. The sex offender must appear and update the registration as directed.

Example 4 to paragraph (g)(1). A sex offender does not report his email address to the jurisdiction in which he resides when he initially registers, or within three business days of a change as required by paragraph (e) of this section, because email addresses are not among the information the jurisdiction accepts for inclusion in its registry. The jurisdiction later notifies the sex offender that it has extended the registration information it collects to include

-72.7(f) – the 21 day requirement is an exercise of the authority of the Attorney General under 34 U.S.C. 20914(c).

- 72.7(g) - Where a registrant is unable to comply with SORNA because of state action or inaction they will have an affirmative defense to individual liability under 18 U.S.C. 2250(c) but should carefully document all attempts to comply. See 28 CFR Part 72.7 (a)—(f).

<p>email addresses and directs him to send a reply within a specified time that provides his current email address. The sex offender must comply with this direction.</p> <p>(2) <u>In a prosecution under 18 U.S.C. 2250, paragraph (g)(1) of this section does not in any case relieve a sex offender of the need to establish as an affirmative defense an inability to comply with SORNA because of circumstances beyond his control as provided in 18 U.S.C. 2250(c) and § 72.8(a)(2).</u></p>	
<p>72.8 – Liability for Violations</p> <p>(a) <i>Criminal liability</i> —(1) <i>Offense.</i> (i) A sex offender may be liable to criminal penalties under 18 U.S.C. 2250(a) if the sex offender—</p> <p>(A) Is required to register under SORNA;</p> <p>(B) <u>(1) Is a sex offender as defined for the purposes of SORNA by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or</u></p> <p>(2) <u>Travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country;</u> and</p> <p>(C) <u>Knowingly fails to register or update a registration as required by SORNA.</u></p> <p>(ii) A sex offender may be liable to criminal penalties under 18 U.S.C. 2250(b) if the sex offender—</p> <p>(A) Is required to register under SORNA;</p>	<p>- Emphasis added to part 72.8</p> <p>- 72.8(a)(1)(i)(B)(2) - Only travel after SORNA’s enactment on July 27, 2006, and more specifically, after an individual registrant becomes subject to SORNA’s requirements, can provide Federal jurisdiction under Section 2250(a). <i>See Carr v. United States</i>, 560 U.S. 438, 447 (2010). Attorney General has clarified that travel need not share a</p>

(B) Knowingly fails to provide information required by SORNA relating to intended travel in foreign commerce; and

(C) Engages or attempts to engage in the intended travel in foreign commerce.

(iii) As a condition of liability under 18 U.S.C. 2250(a)-(b) for failing to comply with a requirement of SORNA, a sex offender must have been aware of the requirement he is charged with violating, but need not have been aware that the requirement is imposed by SORNA.

(2) *Defense.* A sex offender may have an affirmative defense to liability, as provided in 18 U.S.C. 2250(c), if uncontrollable circumstances prevented the sex offender from complying with SORNA, where the sex offender did not contribute to the creation of those circumstances in reckless disregard of the requirement to comply and complied as soon as the circumstances preventing compliance ceased to exist.

Example 1 to paragraph (a)(2). A sex offender changes residence from one jurisdiction to another, bringing into play SORNA's requirement to register in each jurisdiction where the sex offender resides and SORNA's requirement to appear in person and report changes of residence within three business days. See 34 U.S.C. 20913(a), (c). The sex offender attempts to comply with these requirements by contacting the local sheriff's office, which is responsible for sex offender registration in the destination jurisdiction. The sheriff's office advises that it cannot schedule an appointment for him to register within three business days but that he should come by in a week. The sex offender would have a defense to liability if he appeared at the sheriff's office at the appointed time and registered as required. The sex offender's temporary inability to register and inability to report the change of residence within three business days in the new residence jurisdiction was due to a circumstance beyond his control—the sheriff office's refusal to meet with him until a week had passed—and he complied with the requirement to register as soon as the circumstance preventing compliance ceased to exist.

“nexus” with SORNA violation to provide jurisdiction.

- Note scienter requirement that failure to register be “knowing” throughout 72.8.

- 72.8(a)(2) - This affirmative defense may be difficult to prove and impacted persons should extensively document any attempts to comply with SORNA through the registration regimes of non-compliant jurisdictions.

Example 2 to paragraph (a)(2). A sex offender cannot register in a state in which he resides because its registration authorities will not register offenders on the basis of the offense for which the sex offender was convicted. The sex offender would have a defense to liability because the state's unwillingness to register sex offenders like him is a circumstance beyond his control. However, if the sex offender failed to register after becoming aware of a change in state policy or practice allowing his registration, the 18 U.S.C. 2250(c) defense would no longer apply, because in such a case the circumstance preventing compliance with the registration requirement would no longer exist.

Example 3 to paragraph (a)(2). A sex offender needs to travel to a foreign country on short notice—less than 21 days—because of an unforeseeable family or work emergency. The sex offender would have a defense to liability for failing to report the intended travel 21 days in advance, as required by § 72.7(f), because it is impossible to report an intention to travel outside the United States before the intention exists. However, if the sex offender failed to inform the registration jurisdiction (albeit on short notice) once he intended to travel, 18 U.S.C. 2250(c) would not excuse that failure, because the preventing circumstance—absence of an intent to travel abroad—would no longer exist.

(b) Supervision condition. For a sex offender convicted of a Federal offense, compliance with SORNA is a mandatory condition of probation, supervised release, and parole. The release of such an offender who does not comply with SORNA may be revoked.

APPENDIX B

QUESTIONS FOR ASSESSING CLIENT OBLIGATIONS UNDER FEDERAL SORNA 2022

- **Has your client been convicted of a “sex offense” as defined by Federal SORNA?**
 - *[See Sex Offense definition at 34 U.S.C. § 20911(5) and (7).]*
 - *[SORNA can apply to those convicted of “sex offenses” whether they were convicted in federal or state court.]*
- **Was your client’s conviction under Federal law or State law?**
 - *[SORNA can apply under either, but jurisdiction will only apply to state law convictions where individual engages in interstate or international travel or federal jurisdiction is otherwise created].*
- **Was your client’s offense committed prior to the enactment of SORNA, July 27, 2006?**
 - *[Even if your state does not permit the retroactive application of its state registry regime on individuals convicted pre-SORNA, the Federal government has asserted that SORNA applies to all “sex offenders” even those convicted prior to SORNA’s enactment. As a result, some individuals not previously registered under state law, may find themselves individually liable (facing threat of federal prosecution) if they do not attempt to register in compliance with SORNA.]*
- **What state does your client live in? What state does your client work in [and/or go to school in]?**
 - *[Check whether each relevant state is compliant with SORNA via the SMART website at <https://smart.ojp.gov/sorna/sorna-implementation-status>.]*
 - *[Where states are compliant with SORNA, registrants will be fulfilling their state and federal registration obligations by following state law].*
 - *[Where states are not compliant with SORNA, registrants may need to actively offer information requested by the federal government to state and local authorities even if it is not requested.]*
 - *[Any state or local refusal to accept federally required registration information should be carefully documented so that individual can use that refusal as an affirmative defense in the event of a prosecution for failure to comply with SORNA.]*
- **Since your client’s conviction for a sex offense, have they ever traveled outside their state of residence?**
 - *[Any interstate or international travel post – July 27, 2006, and after the individual is subject to SORNA, may provide federal jurisdiction for the federal government to prosecute an individual for failure to comply with SORNA.]*

- **Is your client aware that he or she [may] need to comply with both state and federal registration laws?**
 - *[For individuals living or working in noncompliant jurisdictions a separate assessment of the individual's registration obligations under SORNA should be conducted – note that individual may fall under a different Tier designation and be subject to different obligations under state and federal law.]*
- **What has your client done to register under SORNA?**
 - *[Some states may not register the client because the client is not required to register under state law. If so, has the client nonetheless attempted to register.]*
 - *[Some states may not collect all of the information required under SORNA or the DOJ's SORNA regulations. If so, has the client nonetheless attempted to provide the necessary information to an appropriate official.]*